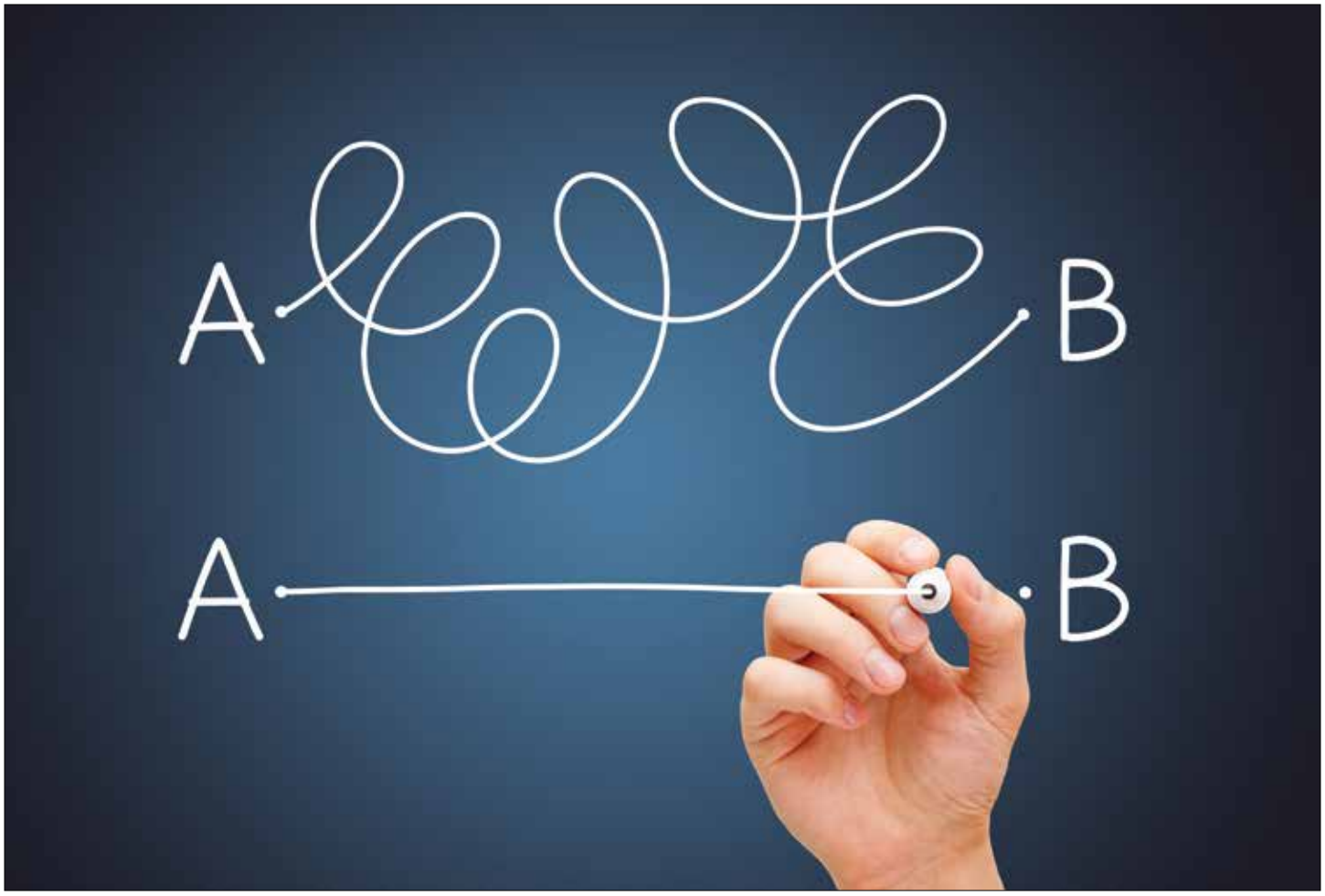

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Practice Notes

A View from the Bench

How to Uncomplicate the Easy—One Judge's Rules and Guidelines for Plea Agreements and Stipulations of Fact

By Colonel Charles L. Pritchard Jr.

There's no such thing as an easy guilty plea.[1]

At its core, a plea agreement contains two ingredients: the accused's anticipated pleas and the convening authority's promise to do something beneficial for the accused in return. A stipulation of fact supports the agreement by explaining, factually, what actions the accused took and what mental state the accused harbored for each offense to which he will plead guilty. It sounds pretty simple. Yet, trial practitioners routinely make the simple complicated by trying to do too much with the plea agreement and stipulation of fact. The quote at the beginning of this article is the result, when the opposite should be true. This article attempts to reverse that trend by providing trial practitioners rules and guidelines for crafting plea agreements and stipulations of fact. The "rules" should

be followed in every case; the "guidelines" should be considered in every case. The former are central to avoiding legal pitfalls; the latter are helpful to the same.

Plea Agreements

Judge Thomas Berg summed up the rules and guidelines for drafting plea agreements with the central concept of simplicity.

> Mindful that the accused is generally untrained in the law, writing the terms of the [plea agreement] . . . briefly and in plain English rather than "legalese" will go a long way toward insuring [sic] that the accused actually understands these documents and their purposes. Keeping things simple and unambiguous makes it much more likely that the plea will survive appellate scrutiny.[2]

Rules

Practitioners should heed the following rules when drafting plea agreements:

1. Plead correctly.
2. Define important terms and use precise language.
3. Identify and explain waivers and legal consequences.
4. Do not include illegal or impossible terms.
5. Do not leave it unsaid.

Plead Correctly

Entering the plea matters. It is axiomatic that entering the plea is a legally significant event and guides the rest of the court-martial. Rule for Courts-Martial (RCM) 910[3] lists the permissible forms of pleas, and the accused's plea to each specification and charge must be clear. Consider the following example plea agreement excerpts.[4]

1. The accused pleads as follows: to Specification 1 of Charge I, Guilty; to Specification 2 of Charge I, Guilty; to Specification 1 of Charge II, Guilty; to Specification 2 of Charge II, Not Guilty.
2. The accused pleads as follows: to Specification 1 of Charge I, Guilty except the words "and shoes" and the figure "$1,400.00" substituting therefore the figure "$1,200.00"; to the excepted words, Not Guilty; to the Charge and its Specification with the substituted figure, Guilty; to Specification 2 of Charge I, Not Guilty; to Charge II and its Specification, Guilty.
3. The accused pleads as follows: to the Specification of Charge I, Guilty except the words "on or about 27 December 2014," "thighs and knees," "drop-kicking her hip with his foot, kicking her back with his foot, punching her head with his fist," substituting therefore the words, "pushing her down on the stairs," except the words, "pushing her head down in a sink full of dishes, squeezing her neck with his hands," except the words, "which resulted in mental harm, to wit: watching her father assault her mother"; to the excepted words, Not Guilty, to the substituted words, Guilty.

The first example is deficient because it only pleads to the specifications and fails to plead to the charges. This is a common deficiency.

The second example is deficient for several reasons. First, it is unclear which of the two excepted phrases the substituted language is intended to replace. Second, a plea is not entered to the excepted figure, only to the excepted words. Third, it jumbles together a plea to language in a specification with a plea to a charge. Fourth, the language "to the Charge and its Specification with the substituted figure," references one charge and one specification when there are clearly multiple charges with multiple specifications.

The third example is a technically correct plea, but it is overly complicated because it virtually rewrites the entire specification. For a much easier and cleaner plea to this specification, the parties could agree that the government will move to amend the specification to reflect the accused's plea. The defense counsel should then write a specification that reflects the result of the exceptions and substitutions, ask the military judge to mark it as an appellate exhibit, and then announce the following: To the Specification of Charge I as charged, not guilty, but guilty to the amended specification reflected on Appellate Exhibit III. In addition to clarity, this has the benefit of simplifying announcement of the plea—and the military judge's later announcement of the finding—as well as not disturbing the charge sheet.

The plea agreement typically forms the basis of the defense counsel's announcement of the accused's pleas in trial. Counsel should take care, therefore, when listing the accused's pleas in the agreement. Although the defense counsel necessarily provides the accused's anticipated plea, the government counsel must serve as quality control; the plea agreement is a joint document, and both parties share responsibility for its contents.[5]

Define Important Terms and Use Precise Language

Words have meaning, and some words have legal significance. To the former, use the right ones and mean to say them. To the latter, define them so the parties have a common understanding of the provisions. Consider the following example plea agreement excerpts.

1. This agreement will be null and void if I fail to fulfill any material promise or violate any of the material terms of this agreement.
2. This agreement may become null and avoid upon occurrence of any of the following events.
3. The convening authority will not be bound by this agreement if I commit any additional misconduct between the date the agreement is signed and the close of trial.

For the first example, the phrases "material promise" and "material terms" clearly have import. Yet, they are not defined. How can a military judge or appellate court determine which provisions the parties agreed would permit withdrawal from the agreement? Even more troubling, many times the parties themselves (and the accused) do not know, or offer differing answers regarding, which provisions of the agreement are "material."

The second example includes the imprecise and almost useless term "may." If the agreement "may" become null and void, who is authorized to make that determina-

tion? Is the withdrawal subject to negotiation between the parties, or is it unilateral? Which party may withdraw? Usually, the parties do not know the answer to these questions at trial or agree that they did not really mean to use the word "may."

In the last example, the date range for the misconduct is uncertain. The word "close" has a legal meaning in a court-martial. The court is "closed" for deliberations or "closed" to the public (e.g., for discussion of classified evidence), but the trial is not over until the military judge "adjourns" it. What the parties likely meant was to end the period of probation at adjournment; what they wrote ends the probation when the military judge begins deliberations on the sentence.

A plea agreement is, or should be, a meeting of the minds between the accused and the convening authority. Every ambiguity in the wording of the agreement raises the specter that a meeting of the minds did not occur.[6] If there is no agreement on a provision, what do the parties intend for the rest of the document—particularly, where the lack of agreement is on an important term? Clarity is the foundation of agreement[7] and is attained through the use of precise language and the definition of terms.

Identify and Explain Waivers and Legal Consequences

Many times, the accused agrees to waive legal rights or agrees to events with legal consequences. The accused and the counsel need to understand and be able to articulate the scope of those. Consider the following example plea agreement excerpts.

1. The accused agrees to waive any motion his counsel would otherwise have filed in the case, but he understands his counsel did not intend to file any motions.
2. The accused agrees to waive an administrative separation board if the judge does not adjudge a punitive discharge.
3. The accused agrees the convening authority may withdraw from the agreement if the accused engages in any other misconduct punishable by a year or more of confinement after the convening authority signs the agreement.

The waiver in the first example is vague and too broad. If the defense counsel did not intend to file motions, is the accused really not waiving motions at all? If that is true, the provision actually says the accused intends to waive motions and simultaneously intends to waive no motions. Additionally, the waiver purports to include all motions the defense counsel would have filed. If the defense counsel had intended to file a motion challenging jurisdiction or asserting a speedy trial violation, the accused could not legally waive it.[8]

The second waiver, without more, does not indicate the accused understood the rights he would be waiving in the administrative separation board process. If the accused does not understand that he would be waiving the right to appear with counsel, to make a statement and call witnesses, etc.,[9] it is not self-evident that the waiver is a knowing one.

The third example imposes a condition of probation pursuant to RCM 705(c)(2)(D)—the accused agrees to "conform his conduct" to avoid committing additional felonies.[10] However, the accused and the convening authority did not identify the provision as a probationary condition and did not identify that the procedure in RCM 1108 will be used to adjudicate an alleged violation of the probation.[11] It is not apparent that the convening authority and the accused understood (or agreed) that a separate hearing would be required where the accused would have many of the rights associated with a court-martial. Sometimes this provision is bounded in time—for example, where the accused commits the misconduct between the date the convening authority signs the agreement and the announcement of the sentence. But, because it fails to address whether the convening authority may withdraw from the agreement if the convening authority discovers the misconduct after the sentence is announced—or whether the discovery must also occur during the bounded time frame, even that is usually ambiguous.

The accused and counsel should not discover the meaning of a waiver or legally significant provision of the agreement when the military judge asks about it at trial.[12] Waivers should be specific and explicit. Legally significant events should be explored and explained in the agreement.[13]

Do Not Include Illegal or Impossible Terms

Rulemaking tends to be a reactive process. Humans behave in certain ways, and, having observed that behavior, rule makers craft rules to govern that behavior. The rule stated here, which appears obvious, results from observed behavior. Consider the following example plea agreement excerpts.

1. The accused agrees to direct his defense counsel not to argue for confinement in lieu of a punitive discharge.
2. The convening authority agrees to approve the accused's medical retirement.
3. The accused agrees to plead by exceptions and substitutions to the following specification: In that the accused did, at or near Fort Bradley, North Carolina, between on or about 14 January 2020 and on or about 17 January 2020, wrongfully use cocaine. The plea excepts the words and figures, "17 January 2020" substituting therefore the words and figures "1 February 2020" and excepts the word "cocaine" substituting therefore the word "methamphetamine." The convening authority agrees to direct the trial counsel, after the military judge accepts the plea, to dismiss with prejudice the language to which the accused pleaded not guilty.

The first example unlawfully interferes with the accused's right to counsel and to due process.[14] It interposes the convening authority between the accused and defense counsel, limits the accused's sentencing strategy, and undermines the accused's opportunity to be heard.

The second and third examples are not legally possible. In the second example, a court-martial convening authority does not have the ability to approve a medical retirement. That authority is reserved to the Secretary of the Army, delegated to the Commanding General, U.S. Army Physical Disability Agency.[15] The convening authority can recommend a medical evaluation board over an adverse administrative separation and can refer the accused to a physical evaluation board for processing in the disability evaluation system; but, the

convening authority cannot do what the parties agreed he would.[16]

The third example leaves a defective specification for which the military judge cannot enter a finding. The government's motion to dismiss will occur after the military judge accepts the accused's plea but before entering findings. The military judge can grant the government's motion to dismiss language, but the military judge has no power to inject new language into a specification. Hence, the resulting specification would read as follows: "In that the accused, did, at or near Fort Bradley, North Carolina, between on or about 14 January 2019 and on or about, wrongfully use." The specification then alleges neither a specific date range nor any controlled substance—it fails to state an offense. The parties could have agreed the government would move to amend the specification in conformity with the accused's plea after acceptance of the plea, but they did not; instead, they drafted a legal nullity.

Once counsel have drafted the agreement's terms, they should walk each term through the procedure of fulfilling the term to its conclusion. This will highlight whether the term is legally possible. Also, it should go without saying that counsel must eye every term to ensure it does not run afoul of RCM 705(c).[17] If counsel think that RCM 705(c) might be implicated, they should turn to case law and be prepared to tell the military judge why the term is permissible.[18] But, if counsel find themselves researching case law for this purpose, they should think twice about the term's importance to the deal. Is the term important enough to risk having a sentence rehearing after the case is overturned on appeal?

Do Not Leave It Unsaid

RCM 705(e)(2) says,"[a]ll terms, conditions, and promises between the parties *shall* be written."[19] Further, Article 53a(b)(5), Uniform Code of Military Justice, requires the military judge to reject an agreement that is contrary to RCM 705.[20] So if the parties *mean* it, they must *say* it in the agreement. Consider the following example plea agreement omissions.

1. The accused pleads guilty to some, but not all of the specifications. The agreement is silent regarding the specifications to which the accused is pleading not guilty.
2. The convening authority agrees to waive automatic forfeitures for the benefit of the accused's dependents. The agreement is silent on the accused's responsibilities in this respect.
3. The accused pleads guilty to multiple specifications, and the sentence limitation says, "Confinement: a minimum of 60 days total and a maximum of 120 days total may be adjudged for all charges to be served concurrently." The agreement is silent as to other forms of punishment.

Usually when a plea agreement allows an accused to enter mixed pleas, the parties also agree that the end result will be that the accused is convicted only of the offenses to which he pleads guilty. The first example does not address this. Is the government permitted to attempt to prove the offenses to which the accused pleaded not guilty? Will the government move to dismiss those specifications or offer no evidence on them? Surely, the parties agreed one way or the other on this subject, but the plea agreement does not contain that understanding; therefore, it risks rejection by the military judge.

Waiver of automatic forfeitures is done for the benefit of an accused's dependents.[21] This involves identifying those dependents and the bank routing information for direct deposits from the accused's pay to them. Additionally, automatic forfeitures take effect fourteen days after the sentence is announced.[22] The agreement does not address the accused's responsibility to provide this information to the convening authority or the suspense for doing so. In order to effect the waiver, the parties must have agreed to these things. Again, the absence of this from the plea agreement risks its rejection.

Rule for Court-Martial 705(d)(2)(A)(i) states that a sentence limitation in a plea agreement that includes a term of confinement "shall include separate limitations [on confinement] for each . . . specification."[23] The third example does not do this. It states a cumulative total rather than limitations on confinement for each specification. The confusing injection of the phrase "to be served concurrently" hints that the intent of the parties is to authorize 60 to 120 days of confinement for each specification and that confinement for all specifications would be served concurrently. Rather than saying this, the confusing drafting appears to be contrary to RCM 705(d)(2)(A)(i) and risks being rejected.[24]

Before signing the agreement, counsel for both parties should analyze each provision and ask themselves whether any provision requires the reader to make assumptions or guess at intent. If a party believes a provision means something or requires additional action for implementation that is not written, the party should write the additional information into the agreement.

The Guideline

One guideline supplements the above rules: keep it simple. For every term that counsel draft, they should first pretend to be the accused and then pretend to be the judge. Considering the accused's age, rank, education, and experience, counsel should ask whether the accused will understand the provision. Envisioning the role of the judge who must explain the provisions of the agreement to the accused,[25] counsel should ask how they would explain it in layman's terms. If it seems overly complicated, it probably is and may turn into an appellate troublemaker. Counsel should also ask whether each term serves a useful purpose. Many plea agreements contain long recitations of rights that appear to be copied directly out of the *Military Judges' Benchbook*.[26] The military judge will advise the accused of his rights, including the ones the accused is waiving by pleading guilty. Further, the defense counsel should have done the same prior to allowing the accused to enter a plea agreement.[27] No additional purpose is served by also including those rights advisements (phrased as acknowledgements) in the plea agreement.

The plea agreement is a contract, and trial practitioners should approach it in that manner. They should only include important terms, draft the terms carefully, record pleas correctly, explain and define terms that are important, identify waivers and events with legal consequences, stay expressly within the bounds of the law and possibility, express everything the parties intend, and, throughout, keep it simple.

Because the stipulation of fact which supports the plea agreement is another legal document that needs careful crafting, the rules and guideline for plea agreements should presage those applicable to stipulations.

Stipulations of Fact

One judge advocate has commented, "The stipulation of fact should be the most extensive and elaborate document introduced by either party at trial because a thorough stipulation will bolster the providence inquiry and foreclose later appellate challenges to the legal sufficiency of the plea."[28] Whether the stipulation is elaborate, it should be useful, factual, and legal. The following rules and guidelines are designed to meet those criteria.

Rules

Trial practitioners should heed the following rules when drafting stipulations of fact.

1. Help the military judge with the providence inquiry.
2. Help the accused with the providence inquiry.
3. Tell the real story, not the story you want to tell.
4. Include facts, not legal conclusions.
5. Do not circumvent the law.

Help the Military Judge with the Providence Inquiry

The stipulation of fact can serve several purposes, but first and foremost it is evidentiary support for the accused's guilty plea. The military judge relies on the stipulation to prepare for the extensive inquiry of the accused into the facts surrounding the offenses. The military judge will determine whether all essential facts are elicited for each element of each offense and whether potential defenses are raised and disclaimed. The military judge will use the *Military Judges' Benchbook* to prepare, so the parties should use it to draft the stipulation. Consider the following examples.

1. The accused is charged with cocaine distribution. The stipulation says the following: "The accused collected money from Private First Class (PFC) A and Specialist (SPC) B for the purpose of purchasing cocaine. The accused took PFC A and SPC B to PFC X's room and handed PFC X the money. PFC X cut three lines of cocaine on his coffee table, and the accused, PFC A, and SPC B each snorted a line of cocaine.
2. The accused is charged with willfully disobeying a superior commissioned officer. The stipulation says the following: "On 1 March 2020, Captain (CPT) Jones ordered the accused to have no contact with his daughter by any means, because the accused was suspected of having physically and verbally abused her. On 1 April 2020, on the accused's birthday, at around 0500 hours, the accused received a call from his daughter on his personal cell phone. He recognized his daughter's number before answering, and then talked to her for 30 minutes after she wished him a happy birthday."
3. The accused is charged with stealing cash from his friend's wallet. The stipulation says the following: "Although the accused was drinking on the night of 24 March 2020 and was intoxicated at the time he stole the money, he was not so intoxicated that he could not form the specific intent to permanently deprive PFC A of the money."

The first example fails to elicit all the relevant facts. It is not clear how the accused distributed anything. A distribution can be an actual, attempted, or constructive transfer of possession.[29] Was this a constructive transfer? What facts support that? Was PFC X serving as the accused's agent when he laid out the lines of cocaine?[30] Was the accused serving as the agent of PFC A and SPC B when he handed over the money? These are questions the military judge will ask the accused, so they should be factually addressed in the stipulation.

The second example demonstrates the importance of the definitions provided by the *Military Judges' Benchbook* (borrowed from the *Manual for Courts-Martial* and case law). Willful disobedience is defined as an "intentional defiance of authority."[31] Moreover, the failure to comply with an order "through heedlessness, remissness, or forgetfulness" is not a violation of Article 90.[32] What facts support the former versus the latter? There is no indication that, when the accused answered his daughter's call on his birthday—a month after receiving the order, he was thinking about CPT Jones's prohibition and intentionally defying him. When drafting the stipulation, counsel must analyze the elements as well as the definitions; they must address both.

For every term that counsel draft, they should first pretend to be the accused and then pretend to be the judge. Considering the accused's age, rank, education, and experience, counsel should ask whether the accused will understand the provision.

The third example attempts to address a defense, but it is so hollow that it is unhelpful. It is conclusory rather than explaining why the accused's level of intoxication did not prevent him from forming the required specific intent. What was the accused drinking? How much? How often had he imbibed before? In what quantities? Were there other times where he believes his state of intoxication would have prevented the formation of specific intent? How was that different than during his commission of the charged offense?

A stipulation that fails to elicit the facts required by the elements, definitions, and potential defenses not only fails to prepare the military judge and the accused for the providence inquiry, it also hides potential problems with the guilty plea. What if the accused really did not think about his commander's order during the birthday call from his daughter? That potential incon-

sistency will then be discovered for the first time after the accused pleads guilty to the offense. The military judge may have to reject the plea, and the plea agreement could be in jeopardy. There are remedies for each, but the failure of the parties to carefully draft the stipulation will have worked contrary to judicial economy and speedy justice.

Help the Accused with the Providence Inquiry

Some accused Soldiers are highly articulate. Most are not. When you add the natural stress a court-martial presents to an accused with the certainty of a federal conviction, the uncertainty of life beyond the conviction, the prospect of having a discussion with a senior officer, and airing embarrassing facts to anyone who wishes to listen, you get an accused whose nervousness will—most likely—decrease his ability to articulate his guilt. The stipulation of fact can be a haven to which the accused returns both to help him articulate his guilt and to supplement his memories. Consider the following examples.

1. The accused is charged with obstruction of justice, alleged as an Article 134, Clause 1 and Clause 2, offense. The stipulation includes the following: "The act of the accused, a Soldier, in requesting another Soldier to wrongfully dispose of evidence, knowing that an investigation by military authorities was ongoing, caused a reasonably direct and obvious injury to good order and discipline. It encouraged another Soldier to violate military law, and it impeded the ability of military authorities to determine whether a crime occurred and to take action to correct it. Further, the accused's action tends to harm the reputation of the Army and lower it in public esteem. Members of society would think less of the Army if they knew Soldiers were asking other Soldiers to violate the law and impede official investigations. The civilian victims themselves were disappointed and hurt that an Army Soldier would commit these crimes and then act so brazenly to cover them up when confronted with an investigation into his wrongdoing."
2. The accused is charged with assault consummated by a battery on a police officer and drunken operation of a motor vehicle. The stipulation says the following: "The accused does not specifically recall the incident in question, although he does have flashes of memory of portions of the incidents. Having reviewed the report of investigation and the interview of Officer A, the accused is convinced that the facts are as set forth in this stipulation and he did commit the offenses."

It seems that the hardest thing for an accused to articulate is why his conduct was prejudicial to good order and discipline or service discrediting. Usually, the accused simply repeats the legal standard. But the legal standard must be supported by facts,[33] and the first example does that. More, it helps the accused tell the military judge why his conduct was prejudicial and service discrediting.

An accused need not personally know all the facts surrounding his offenses in order to plead guilty.[34] The second example appropriately alerts the military judge that the accused has no memory of the facts, and it provides the accused a reference from which he can discuss the source of his knowledge with the judge.

A guilty plea belongs to the accused, and the accused has the responsibility to convince the military judge that he is actually guilty. The stipulation should support that effort and help the accused accomplish this goal.

Tell the Real Story, Not the Story You Want to Tell

Many times, trial practitioners approach drafting the stipulation of fact with a zeal for presenting their presentencing cases. To this end, one judge advocate wrote the government-oriented view that,

> [a]n effective stipulation is, quite simply, the Government's perfected theory of the case. It represents the trial that would have occurred if all witnesses testified in the most persuasive fashion to all pertinent facts; all documents contained only incriminating facts without distracting complications or exculpatory information; all evidentiary questions were resolved in favor of the Government; and the whole sum of the tale left no opportunity for the accused to assert a defense or provide plausible extenuation or mitigation.[35]

A countervailing defense-oriented view follows:

> Counsel must not allow the successful negotiation of a highly favorable sentence limitation to become an excuse for rubberstamping whatever the government wishes to place in a stipulation of fact. Instead, counsel should aggressively pursue a fair stipulation of fact in the case. . . . [C]ounsel must strongly oppose inclusion of matters that are highly speculative, inflammatory, and not directly related to the offense.[36]

Yet, this focus on the adversarial aspect of the document has led trial practitioners to present a story that is not the one the accused experienced or is willing to tell. Consider the following example.

1. *The Specification.* The accused pleads guilty to child endangerment in violation of Article 134. The specification alleges the accused battered his wife by strangling her, pushing her over a couch, beating her with a chair, kicking her, punching her in the head, and pushing her head in a sink while the children were watching which caused them mental distress.
2. *The Stipulation.* The stipulation of fact reads as follows: "The accused grabbed Mrs. AV's neck with his hands and pushed against her throat. Throughout the duration of the argument, 2-year-old A, 3-year-old B, and 4-year-old C were present and witnesses to the altercation. All three children were crying and pleading for it to stop."
3. *The Providence Inquiry.* During the providence inquiry, the accused tells the military judge the following: "The girls didn't know we were arguing most of the time. The girls started crying after I pushed my wife over the couch. My wife told the girls to go upstairs, and my oldest daughter asked why. My wife insisted they go upstairs, and the three

girls went upstairs crying because they saw me push their mom over the couch. They were upstairs long before I ever pushed my wife into the wall or any of the other stuff."

What accounts for this discrepancy? It could be that the defense counsel did not understand the facts and did not properly advise the accused before permitting him to plead guilty. It could be that the accused was willing to agree to anything just to get the process over with. Or, it could be that the prosecutor was so strongly advocating the case he had built that the stipulation reflected the story he wanted to tell. To paraphrase the government-oriented viewpoint quoted above, it became the best version of facts the prosecutor could have hoped for. Or, perhaps a combination of the above factors played a role. The danger in treating the stipulation of fact as primarily an adversarial document is that it may result in rejection of the stipulation and an improvident plea. That is not a result either party or the accused wants, and it is not in the interests of justice. To avoid this, trial practitioners should treat the stipulation primarily as the foundation for the pleas and secondarily as pre-sentencing evidence. They should present the real facts that the accused is willing to admit, rather than the facts which support their strongest sentencing case.

Include Facts, Not Legal Conclusions

A stipulation of fact is an agreement about *facts.* Yet, many stipulations contain legal conclusions that do not belong in a document about facts. Consider the following examples of stipulation excerpts.

1. The accused specifically disclaims any defense of "reasonable mistake of fact" as to consent.
2. The accused agrees and admits that the search of his residence was lawful in all respects and that all evidence seized during the search or derived therefrom was legally obtained.
3. This court-martial has jurisdiction over the accused and the charged offenses.

In the first example, a disclaimer of a defense is a legal action; it is not a fact. In the second and third examples, the parties stipulate to a legal conclusion: the lawfulness of the search and seizure and the existence of jurisdiction. For the latter, the accused could not waive a motion pertaining to jurisdiction; similarly, a stipulation that jurisdiction exists is a nullity. For each of the examples, the parties should have simply related the facts that supported the legal conclusions or actions. With respect to the second example, the accused could alternatively have waived a motion to suppress the search and seizure in the plea agreement.

Trial practitioners must remember the scope and purpose of the stipulation of fact. It is a factual document and should not purport to be anything else. The parties should identify the factual predicate for any legal issues the military judge should discuss with the accused. However, the parties must leave the legal conclusions to the military judge.[37] Even if the parties agree that the facts support a legal conclusion that will uphold the plea, the military judge may conclude that the legal result is inconsistent with the plea. For example, the parties might "stipulate" that the accused is mentally competent to stand trial (a legal conclusion that does not belong in a stipulation of fact). But the military judge, after hearing evidence of the accused's mental conditions and interacting with the accused during the guilty plea, could ultimately determine the accused is not competent notwithstanding the "stipulation."[38]

Do Not Circumvent the Law

As in Rule #4, many trial practitioners try to make the stipulation into more than it can be. Because it warns against attempts to escape the confines of the law, this rule is qualitatively different than the previous. Consider the following examples of stipulation excerpts.

1. The following stipulated facts are admissible into evidence without regard to any Military Rule of Evidence or Rule for Courts-Martial 1001.
2. Any objection to or modification of this stipulation without consent of the Trial Counsel amounts to a breach of the plea agreement from which the Convening Authority may withdraw.
3. Private First Class A and the accused were acquaintances through SPC B. Specialist B was in a sexual relationship with the victim of the charged sexual assault, Ms. V, prior to 22 August 2020.

The first example is simply not true and attempts to rob the military judge of his evidentiary gatekeeping responsibility.[39] At the very least, all evidence in a case must be relevant.[40] During the providence inquiry, relevance is related to the determination of the accused's guilt. Many times, trial practitioners include facts in the stipulation that they believe are relevant to aggravation, extenuation, or mitigation—but not to the charged offenses. During the pre-sentencing proceedings, relevance is related to the categories listed in RCM 1001.[41] The parties cannot do away with these evidentiary rules. Nor can they usurp the military judge's responsibility to determine whether evidence is admissible.

The second example represents a plea agreement term that has been injected into the stipulation of fact. If that agreement to a legal consequence is not written into the plea agreement itself, the plea agreement violates Article 53a, UCMJ, and RCM 705, and may be rejected by the military judge.[42]

The third example introduces evidence of the victim's prior sexual conduct in violation of MRE 412.[43] That evidentiary rule applies equally during the merits and the pre-sentencing proceedings,[44] and it requires a closed hearing to determine admissibility of the evidence.[45] It also requires notice to the victim and an opportunity for the victim to be heard on the issue.[46] By injecting the evidence into the stipulation of fact, the parties circumvent the law and prevent the military judge from determining its admissibility.

To be clear, the parties cannot agree to the admissibility of evidence. They can agree not to object to the introduction of evidence. The military judge is the ultimate arbiter. If the parties find themselves straying from the facts in a stipulation, much less attempting to skirt the law, they need to go back to the drawing board.

The Guideline

In addition to conforming stipulations to the above rules, trial practitioners should

consider the following guideline in drafting: have a good reason for everything you include in the stipulation. Sometimes trial counsel insist on putting extraneous information in a stipulation of fact. Trial counsel may have spent significant time building the case for a contested trial and then want to showcase that work in the stipulation of fact. Consider the following example.

In a child pornography case, the stipulation says the following:

> Detective A used the law enforcement version of the peer-to-peer software "Roundup Ares" during his investigation. This software is used by civilian law enforcement to download files from a single source during a computer crime investigation. A single source download occurs when a user requests to download a file from another user rather than pieces of the file from several different users. Detective A conducted a single source download of a file from IP address 123.456.789.

None of this detail is important either to the military judge's determination on the accused's guilt or to the sentencing decision. If the defense challenged the investigatory procedure, it is administrative trivia that might have been important in a contested case. It shows a lack of understanding as to the role of the stipulation and possibly an inability to shift mindset from a contested trial to a guilty plea. Trial practitioners should be alert to and eliminate superfluous and unimportant details from stipulations.

Conclusion

A successful guilty plea ensures speedy justice is achieved and saves judicial resources. It generally benefits an accused, the Army, and crime victims. The parties to a guilty plea have a vested interest in ensuring the plea is provident and the parties' agreements are valid. Each of the examples used in this article were drawn from actual documents submitted in courts-martial. The rules and guidelines were crafted based not on single occurrences but on recurring issues. Each of the issues presents an opportunity to undermine the parties' goal of achieving a successful guilty plea. Trial practitioners should understand the purpose of the plea agreement and stipulation of fact, use that as their guiding star in drafting, and avoid trying to do too much with those documents. Trial practitioners should heed these rules and guidelines to avoid legal obstacles and achieve their goal. Perhaps then there will someday be such a thing as an easy guilty plea. **TAL**

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Notes

1. Every military judge ever.

2. Colonel Thomas S. Berg, *A View from the Bench: A Military Judge's Perspective on Court-Martial Providency*, Army Law., Feb. 2007, at 35, 36.

3. Manual for Courts-Martial, United States, R.C.M. 910 (2019) [hereinafter MCM].

4. All examples used in this article are closely (if not exactly) based on real language in documents encountered by the author when presiding over courts-martial.

5. *See, e.g.*, Major Stefan R. Wolfe, *Pretrial Agreements: Going Beyond the Guilty Plea*, Army Law., Oct. 2010, at 27, 32 (the plea agreement "is a tripartite effort, requiring the attention of government and defense counsel, as well as the military judge").

6. *See id.* ("Generally, the less specific the term, the more scrutinized the case will be on appeal. Additionally, if the parties have a material misunderstanding over what the terms of the pretrial agreement were, a guilty plea entered based on the plea agreement may be found improvident.").

7. *See, e.g.*, Major Bruce A. Haddenhorst & Captain Maryalice David, *Guilty Pleas: A Primer for Trial Advocates*, A.F. L. Rev., vol. 39, 1996, at 87, 102.

8. *See* MCM, *supra* note 3, R.C.M. 705(c)(1)(B).

9. *See* U.S. Dep't of Army, Reg. 635-200, Active Duty Enlisted Administrative Separations sec. II (19 Dec. 2016) [hereinafter AR 635-200].

10. MCM, *supra* note 3, R.C.M. 705(c)(2)(D).

11. *Id.* R.C.M. 1108.

12. *See, e.g.*, Colonel John Siemietkowski, *A View from the Bench: Preparing Your Client for Providency*, Army Law., Apr. 2008, at 42, 46.

13. There are some standard waivers, such as a waiver of trial by members and a waiver of rights when pleading guilty, which need not be explained in the agreement. The military judge explains these rights to the accused as a matter of course in every guilty plea. Explaining them again in a plea agreement is an unnecessary repetition. These waivers should be simply stated.

14. *See* MCM, *supra* note 3, R.C.M. 705(c)(1)(B).

15. U.S. Dep't of Army, Reg. 635-40, Disability Evaluation for Retention, Retirement, or Separation para. 2-2f (19 Jan. 2017).

16. *See* AR 635-200, *supra* note 9, para. 1-33.

17. MCM, *supra* note 3, R.C.M. 705(c) (listing permissible and prohibited terms for plea agreements).

18. *Id.*

19. *Id.* R.C.M. 705(e)(2) (emphasis added).

20. UCMJ art. 53a(b)(5) (2017); MCM, *supra* note 3, R.C.M. 705.

21. UCMJ art. 58b(b) (2017); MCM, *supra* note 3, R.C.M. 1103(h).

22. UCMJ art. 58(a)(1) (2006); UCMJ art. 57(a)(1)(A) (2016).

23. MCM, *supra* note 3, R.C.M. 705(d)(2)(A)(i).

24. *Id.*

25. *Id.* R.C.M. 910(f)(4).

26. *See* U.S. Dep't of Army, Pam. 27-9, Military Judges' Benchbook (29 Feb. 2020).

27. *See* Siemietkowski, *supra* note 12, at 46.

28. Major Alexander N. Pickands, *Writing with Conviction: Drafting Effective Stipulations of Fact*, Army Law., Oct. 2009, at 1, 3.

29. MCM *supra* note 3, pt. IV, para. 50.c.(4).

30. Note that agency is not required for a constructive transfer of possession, but it could be a helpful fact. *Id.*

31. *Id.* pt. IV, para. 16.c.(2)(f).

32. *Id.*; UCMJ art. 90 (2016).

33. United States v. Jordan, 57 M.J. 236, 239 (C.A.A.F. 2002) (finding that the accused's "yes" response to legally conclusive question whether his conduct was prejudicial or service discrediting failed to establish factual predicate).

34. *See* United States v. Axelson, 65 M.J. 501, 510–11 (A. Ct. Crim. App. 2007) (citing United States v. Moglia, 3 M.J. 216, 218 (C.M.A. 1977)).

35. *See* Pickands, *supra* note 28, at 1.

36. Lieutenant Colonel Dayton M. Cramer, *Trial Defense Service Note: Attacking Stipulations of Fact Required by Pretrial Agreements*, Army Law., Feb. 1987, at 43, 46.

37. *See, e.g.*, United States v. Simpson, 80 M.J. 33, 36 n. 3 (C.A.A.F. 2021) (carving out legal conclusions from the facts in a stipulation).

38. The military judge who suspects there may be an issue with competency will likely order a sanity board under RCM 706 and then, if necessary, hold a competency hearing under RCM 909 before ultimately concluding the accused lacks the mental competence to stand trial. *See* MCM, *supra* note 3, R.C.M. 706, 909.

39. *Id.* Mil. R. Evid. 104(a).

40. *Id.* Mil. R. Evid. 401. *See* Cramer, *supra* note 36, at 46. *See also* Pickands, *supra* note 28, at 9.

41. MCM, *supra* note 3, R.C.M. 1001.

42. UCMJ art. 53a (2017); MCM, *supra* note 3, R.C.M. 705.

43. MCM, *supra* note 3, Mil. R. Evid. 412.

44. United States v. Fox, 24 M.J. 110, 112 (C.M.A. 1987).

45. MCM, *supra* note 3, Mil. R. Evid. 412(c)(2).

46. *Id.* Mil. R. Evid. 412(c)(1)(B), (c)(2).