

Trial Preparation and Tactics for New Counsel

In July 2000 just before my retirement, I decided to collect what I thought might be of benefit to new trial and defense counsel based upon the many judges, counsel, superiors, and subordinates that had taught me. This is the result of the effort. Feel free to distribute it freely, adapt it for your own purposes, and consider it for your own “retirement CLE.” An PDF version is available at www.khodges.com/jag.

No document like this can address all the exceptions or apply to all cases. Every trial and client is unique, and this document contains only general observations. If your sense and experience tells you the pointers here will not work in your case, don't hesitate to try something else.

I hope this helps. Keith H. Hodges, Colonel (Retired), US Army, Judge Advocate General's Corps (Keith.Hodges@dhs.gov)

1. When the TC “knows” that a case is going to trial, what are some things that should be done right away?

- a. Order an NCIC check on the accused and then order all copies of all CID and MP reports and all records of convictions in which the accused has been titled. Run NCIC on all important witnesses.
- b. Order the accused's OMPF and SMIF.
- c. Obtain the accused's 201 file and read every document in it. Pay special attention to the enlistment/reenlistment contract and all the background information in it.

2. When the TC needs to know other information in order to proceed or prosecute, what do they do?

Call the CID and have them find out. What happens if the CID blows you off? Everybody works for somebody. Call the agent's boss and go up the chain of command.

Be sure to involve your chief of justice if you are having problems working issues with CID. CID supports you but does not work for you. This situation may require some finesse and a field grader.

CID is the right person to do criminal investigations because they have the training and authority to do so. Investigating requires training and experience and can be dangerous. Also, if you collect the evidence or you take the statement then you might be called as the witness.

3. What does the DC do when they need to develop information beyond making a phone call or speaking to a witness?

- a. Ask the CID if you are not afraid of the answer.
- b. Ask the government for investigatory assistance. Appeal to the judge if turned down.

4. What is a topic that a DC does not press with a client when they first meet? What is the last thing a DC tells a client when they have finished meeting? What do you tell the accused at every meeting?

Don't talk to an accused about a guilty plea the first time you meet unless the client raises the subject. Then only discuss as a possibility and not something you are pushing for. Make the client believe you are on their team and there to help. If you talk about a deal too early, they think all you are trying to do is clear your docket.

The last thing you talk about when your meeting is done is to set the appointment for the next meeting. Tell the accused the things you want done before the next meeting.

At every meeting, remind the accused to keep his nose clean and to perform his duties as best he can. Also remind the accused not to do any of his own investigating and to avoid all witnesses. If there is something that needs checking into, he should tell you.

5. What does a DC do when an accused who "should" plead guilty doesn't want to?

Pick a date when you will go from possible GP mode to contested trial - and then don't look back. There is nothing to be gained from continuing to press a client to plead G. It diverts energy from preparing for a contest and makes the client believe you don't have your heart in the game.

6. What is the best defense against a later claim of ineffective assistance of counsel?

Be effective. You should be as zealous with one client that you are with another. You should take progress notes indicating what the accused has told you, what you told the accused, and things you have done in the case. This should be done in every case and you should take a few minutes to make these notes right after speaking to the accused in person or over the phone. Resist the temptation to have the accused sign documents that say, "My lawyer told me that if I did this then X would happen." It makes it look like you are keeping book. Many of your clients have touches of paranoia.

7. If you are going to interview a critical witness who sometimes flip flops or might change their story, what special precautions should you take?

- a. Have a witness there who takes notes that can testify about a prior inconsistent statement at trial.
- b. You might want to type out some simple questions in advance and ask the witness to write out a brief answer. Tell the witness you are doing this so "no one tries to trick you."
- c. Ask the witness if you can record the conversation (and do not record without consent.) This is for their protection. Be wary - this technique often chills a witness' desire to speak with you.
- d. If you can't have a witness present, you take notes and at the end, ask the witness to initial the notes so he "can recognize them later" and to ensure you record what he said accurately. If the witness testifies inconsistently at trial, the notes can be used to refresh memory and perhaps be admitted as a statement the witness adopted. Caution - if the witness initials or adopts your notes, is that a "statement?" Is it discoverable? Probably so.

8. If the TC isn't sure whether to charge an offense, what should she do? If inconsistent offenses appear (larceny vs. receiving stolen property), how does the TC decide which to charge?

- a. Charge it. Why not? You can drop a charge anytime you want to.
- b. Charge them both.

9. How does the TC cut off any motion in limine as to uncharged misconduct?

Charge the "uncharged misconduct."

10. How are specifications written?

- a. Follow the form spec.
- b. Fill in the blanks on the form spec. Pay attention to what is supposed to be in the blanks.
- c. If the form spec doesn't make sense, maybe you have the wrong offense. Ask another TC or your Chief of Justice. Read the MCM discussion.
- d. Bounce the draft off the form spec.

DC, you too should compare the spec to the form spec. If there is a discrepancy, be prepared to make a motion to dismiss. This motion is best made after arraignment when major amendments cannot be made over objection. Timing is critical for a motion to dismiss for failure to state an offense can be made at any time even at the close of the evidence.

11. How much detail should be in the specification?

- a. As little as possible to satisfy pleading requirements. The goal is to write a spec that will withstand a motion for failure to state an offense and 99% of the time, satisfying the form spec will do that.
- b. You should just say "stole stereo equipment the property of PFC Jones of a value in excess of \$100.00" instead of setting out the precise value and each individual item stolen (and also, I have seen even the serial numbers and brand names plead.) The defense is always able to present a motion for a bill of particulars.

12. What does the DC do when he notices that the wrong offense has been charged?

- a. Pray hard and say nothing. There is no need to make the TC's job any easier.
- b. When you realize that the TC has got it all wrong (and be sure you are right about this), consider waiving the 32 and demanding speedy trial. Be sure you are ready to go and have everything (like witnesses) lined up.
- c. Exception, the accused can't plead G to what he didn't do.

13. What are factors that might indicate the defense should waive an Article 32?

- a. To sweeten the pot for a pretrial agreement. Be sure you know the government is giving you real credit for the waiver. If there are not a lot of loose ends or flaky witnesses, what you get for a 32 waiver might not be as much as you would get with a weak government case.

b. When the game is truly over (good confession and corroborating physical evidence) and you get credit for the waiver. But, when the case is really strong, often the government won't give you credit for a 32 waiver so why bother? You might get lucky.

c. You have good reason to believe that an adverse witness might be unavailable at trial. If the witness testifies at the article 32, it is former testimony overcoming a hearsay objection. If you know the witness is about to go to prison, is very ill, or a civilian about to move overseas, or otherwise can't or won't answer a subpoena, going to a 32 preserves that witness' testimony. Consider also whether their prior statements might be admissible under MRE 807. Be careful not to assist a witness in being unavailable or suggest they not appear. This includes being cautious about what you say to the accused. If you or the defense (to include the accused) are a party to the witness' unavailability, there could be dire consequences.

d. You know that the government is not aware of a significant piece of information but if you go to the 32, the government will probably discover it. Balance this factor carefully.

e. TCs are essentially lazy folk, procrastinators, and secretly praying that the usual case will go away or plead out. If you can lull them into complacency by waiving a 32, consider doing that. Going to a 32 means they will have to read the file in depth and actually talk to witnesses.

f. Don't think that errors at Article 32's get you much relief at the trial or appellate level. In my experience, they don't though judges will reopen a 32 when it is fair to do so. If the only reason you are going to a 32 is to hope for some error, reevaluate.

g. Don't even think about a 32 waiver in a death penalty case. Even if a good idea, you will get slammed for doing it. A DP case is not the time to experiment with a new strategy. 32 waivers in non-capital premed murder cases is also often a bad idea.

Note: If you recommend a 32 waiver to the client, be sure you explain the reasons why you recommend this course. Annotate your client log with what you told the client.

14. When should the government not take a waiver?

When there is a decent chance (err of the side of caution) a government witness will be unavailable for trial, or a defense witness will be unavailable and there might be a hearsay exception that allows the witness' testimony. There are also those cases that simply need a neutral and detached eye or you have uncooperative witnesses and want to see what they will do and if necessary, lock down their testimony.

15. A trial, what do the parties call themselves?

Look at the charge sheet. It is *United States v. Private Michael Jones*.

The TC should always refer to her side as "The United States." Wrap yourself in the flag. The Army is a green machine. The government or God-forbid, the US Government, is a large amorphous bureaucracy. The "United States" sounds like "We the people."

The defense should never refer to the accused as "the accused;" "My client" is too civilian for most tastes. Your client is "this soldier" or "Private Michael Jones." On sentencing and sometimes on the merits, you might wish to refer to the accused as "this young man/lady" or "this young soldier."

Of course, the TC always refers to the accused as “the accused.” (Don’t say this disdainfully, members and judges don’t like it.) The DC always refers to the prosecution as the Army, the Government, or the US government choosing the term that best fits the situation.

Reminds me of a murder case I tried long ago where the defense was that the victim committed suicide. The first time I said “crime scene,” the defense moved that the crime scene forever be referred to as “the suicide scene.” You would be surprised of the effect labels can have. The judge instructed the witnesses to refer to “the scene.”

16. What is the real purpose of voir dire? What are some secondary purposes?

The primary (and legal) purpose of voir dire is to learn about the members so you know whether you have a basis for a challenge. Voir dire also lets you learn about the members so even if you do not have a basis for a challenge, you may learn that you want (or don’t want) a particular member. Other purposes of voir dire are:

- + See how the members as a group respond to evidence that may come in. You might want to fine tune your case accordingly.

- + Excuse members to get a balance that is more favorable (you think) to your position. This not only includes the numbers game (6 is a bad defense number - all other numbers don’t make much of a difference in my opinion) or to change the officer-enlisted balance.

- + Introduce your case. Unfortunately, too many counsel see this as the primary purpose or the only purpose of voir dire. A judge who is strict on voir dire should not let you ask a question that only introduces your case and is not probative as to the basis for a challenge. A few examples of ways to introduce your case AND to see how members might think about your or your opponent’s case:

What do you feel about whether a soldier’s who consumes alcohol should legally be excused for certain criminal offenses?

What do you think of the idea that some of us do things that have unintended consequences?

17. A good voir dire question is designed to _____?

Find out how the members think about things. What are their likes and dislikes? Are they law and order people? Are they flexible? Do they understand that young kids who commit offenses are not necessarily hardened criminals?

You will not learn a thing about the members if you ask questions that call for simple answers. Most members see voir dire like getting a shot. They want it to go quickly with as little pain as possible. They will usually answer a question in the fewest possible words.

So, don’t ask, “Do you think that people do things when drunk they wouldn’t do while sober?” They will all answer yes and you learn nothing. How about, “What do you think about what people do when they have had a little too much to drink?” Now, they will give you the same, bottom-line information - but maybe not. But listen to how they answer. They might even say, “Well, if they hadn’t been drinking

Look at the below questions and see how really worthless they are if what you are trying to do is get into the member's head:

Will you follow the military judges instructions?

Do you believe that you should adjudge a fair and just sentence?

Should you consider the whole soldier concept in deciding a sentence?

Will you hold the government to its burden to prove the case beyond reasonable doubt?

18. What is one thing you must be careful to avoid during voir dire?

Offending the members !!!

Please stop saying to the members, "Do you understand." That question is reserved for children, trainees, and prisoners. If you need to make a point on something, ask "Do you promise to _____."

Military judges have broad discretion on how much voir dire to permit. If the judge wants to restrict questioning to the bare essentials, he/she legally could. Do a good voir dire but do not exceed the judge's patience.

19. What are the factors to decide the best forum? (See enclosure 1)

20. How much credit/pressure should the TC apply for a JA forum in a pretrial agreement?

Little. Most often in a GP, the accused is going to go JA anyway. Why give credit for something the accused wants? Besides, what do you really save? It costs nothing to have members come in and it is good experience. It is also a good way to see what soldiers think an offense is worth.

21. What is the TCs true goal in an opening statement?

Present a very broad overview of what the case is about. As the saying goes, it is a roadmap to the evidence. (It is not a turn-by-turn strip map.) It is not all the details. Details are necessary only to place the testimony of witnesses in rough context. The more you say, the more you have to prove and the more the defense will point out your opening statement was incorrect and you did not prove your case.

22. What is the DCs true goal in their opening statement?

Make the following points:

- + Listen to both sides.
- + The trial ain't over until the defense counsel sings.
- + Keep an open mind.
- + Entice them - give them a sniff that all is not as it appears.
- + If you have an affirmative defense, tell them to look for it (unless the TC doesn't see it coming.)

23. When should the DC make or reserve opening statement?

+ If the TC makes a powerful opening and the members are fashioning a noose, you need to open now. You should have prepared an opening for this contingency.

+ If you have a dicey defense - such as you are unsure if you can raise self-defense - reserve. It might even be best *not* to open and leave out the self-defense because later the members might wonder, "Why didn't he tell us about self-defense?" Exception - TC makes a powerful opening.

+ In serious offenses (murder, child molestation, rape, forcible sodomy), there might be a heightened expectation that you should open. If so, open.

+ If you are absolutely, positively and without any doubt 100% sure the accused will testify, open. That may make the members look forward to the accused's testimony and be less attentive to the government witnesses. "Members, I advise you now this soldier will take the stand and answer any and all questions. He will address these groundless charges. After you hear this soldier tell you the truth about what really happened - because he knows what really happened - you will acquit this soldier. Wait for his testimony."

24. The first questions of a witness on direct should be designed to _____?

Put the witness at ease and orient them to the events so they can comfortably testify.

25. On the TC's direct and after the "comfort" questions, a victim or a witness to the actual offense should be allowed to _____?

Tell the whole story from beginning to end without interruption unless the witness has a serious misspeak. The testimony of a victim or one who actually witnesses an event can be extremely powerful. It loses all of its impact when you break a chain of thought with dumb questions like, "What kind of shirt was he wearing?" or even "Did you consent to this?" Let the victim or actual witness relive the whole event in front of the members. Then take the witness back through, step by step, and fill in the details and reemphasize the important parts.

26. On cross of a witness, the defense should address what issues in what order?

Those defense-favorable matters in which you are sure the witness agrees, then those points where there is some or slight disagreement, and then those matters where the witness is mistaken or lying.

Get out that which is favorable to you up front and before the witness forms an impression you are going to dispute them. If they are treated politely, they will be more agreeable. Also, by having the witness agree with you so much at the beginning, the members get the impression you are right because even the big bad CID agent agrees. If the CID agent then begins to quibble, the agent might look like the bad guy.

27. On cross of an accused, the TC should first question the accused on what facts?

Have the accused admit to all the elements that he will admit to. For example, in a rape case, step up and ask the accused if he admits that there was sexual intercourse. In an adultery, ask the accused if he admits that he has never been married to the correspondent. You can even ask that IF the accused DID have intercourse with the correspondent, wouldn't it be conduct prejudicial or service discrediting. In larceny, ask the accused if he ever owned whatever it is that was allegedly stolen. If he tries to quibble on undisputed points, he can hurt his chances on the rest of his story.

Thereafter, have the accused admit to facts from your case that you presented evidence on earlier. The date. The time. The place. The clothing. Words spoken. Don't leave out any details. Have the accused agree to as many itsy bitsy facts you can think of.

When it is all over, it will be shown that the accused agrees totally with you except that, for example, "the act was by force and without consent."

28. What are the first two rules of cross-examination?

Don't ask a question to which you do not know the answer is the **2d rule** of cross-examination.

The first rule of cross examination is don't cross at all unless your cross will help you more than hurt you. Cross permits a witness to state their testimony again. It permits them to highlight that which you aren't asking about. It permits them to explain their answers and alerts the opponent to where you are going on the rest of the case. It cuts off re-direct. You must weigh the points you can win against the points the witness will score on cross and then decide what to do.

29. Generally, what are the kinds of questions that should not be asked on cross?

Do not ask a witness to explain their testimony. You are free to elicit facts that makes their testimony unbelievable, but don't ask them to explain it. They have thought about their answer more than you have. It might even be a set up.

There are exceptions to the "non-explanation" rule:

1. If the witness has given prior inconsistent explanations before,
2. You are certain you have boxed the witness into a ridiculous explanation.

Do not ask the witness the ultimate question. They will only disagree with you and broaden the scope of re-direct. You should ask the ultimate question, rhetorically, in your closing argument when no one is on the stand to disagree with you. So, don't ask the witness, "So, you forced her didn't you?" They will say no. They might even add, "As I told the CID three months ago" or "As the Ms Jones told her Mother."

30. When you stumble on the foundation for an exhibit, what 3 questions will usually get your through?

I show you (Prosecution) (Defense) exhibit ____ and ask do you recognize it?
What do you recognize it to be?
How do you recognize it to be (the) (a) _____?

31. In most cases, what objections and in what order should you consider making them?

401, relevance. If it isn't relevant, it doesn't come in. Nothing else matters.

901, lack of foundation. Even if relevant, if the members can't conclude what the proponent claims it to be, the exhibit or the testimony should not be accepted. In the case of testimony, you should add, "**Lack of personal knowledge.**"

Hearsay when applicable. This applies to not only verbal statements but documents as well. A proper 901 foundation does not resolve hearsay issues. If the proponent claims the evidence is not being offered for the truth of the matter asserted, force the judge to ask for what purpose it is being offered and

then be prepared to object on relevance again. Please also remember that hearsay exceptions are not a basis of admissibility - they are only responses to hearsay objections. The evidence still must be relevant and have a proper foundation.

403. This objection should almost always be made when not specious, and it should be the last objection made. If the evidence squeaks by on the other objections, then there is a good chance the relevance or trustworthiness has been diminished making the 403 balance more favorable to you.

These “rules” apply equally to the defense and prosecution.

32. What questions can both sides expect when there is a hearsay objection?

Is it offered for the truth of the matter asserted?

If not offered for the truth, for what purpose is it offered and how then is it relevant?

What hearsay exception do you rely upon?

Counsel should be prepared, in advance, to respond intelligently.

33. How do you object? What exactly should you say?

This is subject to judicial preference, but you will never go wrong, get the judges gratitude, and look professional if you stand and clearly state, “Objection (or I object) followed by the *legal* basis of your objection. Examples:

Objection, relevance.

I object. Hearsay.

Objection, MRE 901, lack of foundation.

I object. Lack of personal knowledge.

Trying to smuggle evidence, make a mini-argument, or communicate with witnesses while making an objection is unprofessional, the members know it, and the judge will call you down for doing it.

34. In the course of litigating an objection, how do you tell the judge you wish to make an offer of proof or have something further to state on an objection?

If you need to make an offer of proof or explain further, add to the end of an objection, “I would request to (be heard further on the basis of my objection) (make a brief offer of proof.)”

35. What do you do when you sense that the judge wishes or wants you to withdraw an objection?

Don’t give in unless you come to believe the objection is baseless. If you have had your say and made your offer, simply state, “Your honor I have presented my objection and respectfully request your ruling.” You are looking for the magic words “sustained” or “overruled.” Nothing else will do to preserve your point or to know what you can do next.

36. As the proponent of evidence, what do you do if the judge’s ruling on an objection is not clear?

Ask for clarification without sniveling. Tell the judge you don’t understand. Don’t say, “Are you saying” That sounds like a trap in the making.

37. What should you do if you think the judge is “outside his lane?”

Respectfully and preferably in a side bar or an Article 39a, tell the MJ that you object on the basis that the MJ is departing from his proper role by asking the question or whatever the judge is doing. If the damage is already done, ask for an Article 39a and request a mistrial. If the mistrial is denied, move to have the judge recuse herself.

Remember that a court-martial is not a civilian trial. The court has the authority to receive and request all relevant evidence. It is almost impossible for a military judge to exceed her/his authority in this matter. Recognizing that, your real objection is that the military judge is helping the other side. In other words, what the judge does can help one side though the judge cannot have as a purpose to help either side.

38. If the TC sees that the DC is setting up the factual basis for error but the judge might miss it, what should the TC do?

Call it to the attention of the MJ. For example, if the DC is leading a witness to the point where the witness will be forced to suggest that the accused invoked his Article 31 rights, request an immediate Article 39a. The judge can then cut off the examination or warn the DC that he proceeds at his peril.

39. What should the TC be doing during the providence inquiry?

Paying attention and following the providence inquiry word for word to ensure the judge gets the elements right and conducts a thorough inquiry. Think like an appellate defense counsel - where are the holes? Be especially attentive to defenses the accused might have raised intentionally or unintentionally.

40. What is the most critical portion of the cross and the redirect? (when you should be the most attentive?)

In the first barrage of cross questions, some counsel try to inflict the most damage to undo the witness’s impact. Big points may be scored here. I know your are patting yourself on the back for getting through direct, but you need to listen to what the opponent is doing so you can rehabilitate your witness.

Similarly on redirect, the counsel is trying to score big points to rehabilitate the witness or trying to clean up or reemphasize some points. Often they try this by leading questions, beyond the scope of cross, or with questions that have already been asked or answered.

41. If at all possible, counsel should use _____ evidence to prove their case?

Physical evidence.

Physical evidence does not lie, it is not biased, it has no motive to misrepresent, and it speaks for itself. Members also like physical evidence, and it lets them play detective.

You must also be careful when selecting physical evidence going over it carefully because the members (all of them) might notice something that damages your case. So, if the accused presents his driver’s license and it has been altered so he could buy beer underage, think of something else.

War story. In a larceny case, the defense presented a pawn ticket to show that someone other than the accused pawned the very item the accused was charged with stealing. On the back, the shop owner wrote down the customer’s driver’s license number. Turns out it was the accused’s driver’s license. The DC had not noticed that.

42. What is the worst way for the defense to present evidence?

The uncorroborated testimony of the accused.

The TC will always say there is a motive for the accused to lie (the effect of the verdict on the accused.) You must assume that everything that the accused says is suspect in the eyes of the members.

If the accused testifies, the DC must painstakingly present physical evidence that corroborates everything the accused says. If he says his car is green, offer a photo. If she says that she already owns a cell phone (defending against such a larceny), present a receipt. If there is no physical evidence that corroborates the accused's testimony, present a neutral witness or better yet, get it out of government witnesses.

This technique also has another advantage. When the accused's testimony is corroborated in this way, it makes the accused's entire testimony look more believable.

Another war story (I am entitled.) When assisting a new defense counsel in a larceny case, the accused said that his bank statement was partially eaten by mice in his room so he threw the statement away and he didn't have it available for the judge. First I heard of that and it sounded weird to me. At lunch, the DC went back to his room - with his escort - and had his escort go into his wall locker and retrieve papers that had been chewed on by mice. They were received into evidence. The accused was acquitted. It did make a difference.

43. What is the TC rebuttal argument to a claim their case is "just circumstantial?"

Don't cringe when the DC makes this argument. Circumstantial evidence can be lawfully considered and in many cases is more reliable than direct or eyewitness evidence. Read instruction 7-3 again. Use the Prosser example (paraphrasing), "Would you believe 100 witnesses that said no dog passed by or dog footprints in the snow."

44. What is the best possible position for the government to take with respect to discovery?

Article 46, UCMJ. "The trial counsel, the defense counsel, and the court-martial shall have equal opportunity to obtain witnesses and other evidence "

This Article is universally recognized as one of the aspects of military jurisprudence that makes our system superior to that of other jurisdictions. The provision has also been consistently interpreted as quite broad, continuing, and placing upon the government a duty to locate and provide information to the defense even if not within the four corners of a discovery request (though the defense should still ask) and not necessarily exculpatory.

Delayed or denied discovery is a major cause for delays in trials, the subject of unnecessary motions because of failure to abide by the spirit of A. 46, and delays and wasted time during trials. Not abiding with Article 46 is also unfair and contrary to law.

TCs are best advised simply to give the defense whatever the TC has less that which is privileged (informants) or truly attorney work product such as interview notes and the lawyer's thoughts. Make enough copies of all documents that are received to immediately have your clerk serve a copy upon the DC or the TDS clerk. (Make up a simple cover document listing what is being provided, the date provided, and a place for the TDS lawyer or a clerk to receive the document.) This is the only guaranteed method of keeping the trial on track and avoiding needless litigation. The TC doesn't have to do the DCs work, but providing everything is the best way to avoid discovery pitfalls later. If there is an Article 32, mark everything you got as exhibits and have the IO consider them.

What should the TC do when they get a discovery request for something that does not exist, or which would cause the TC to look for needles in haystacks and which is not relevant? Deny the request and make a “motion for appropriate relief” stating that the TC was requested to do produce something, the TC thinks it is not relevant, and you want a ruling you don’t have to do it. (I have never seen this motion made, but it seems like a good idea.) This avoids a last minute or a delayed defense request for this information.

TCs are also reminded that they have a duty to disclose not only those statements of the accused they intend to offer, but ALL statements of the accused.

Enclosure 1, Forum Choice Factors

I. The forum decision.

a. The forum decision is the accused's personal choice made with the aid of counsel. The below are very general observations based on my trial experience and having sat as a member in many courts-martial when I was younger. These comments do not suggest that either members or judges fail to follow the law, but to point out how they may see the same situation within the legal range of their discretion. These factors might be explored during voir dire.

b. A forum choice that is best for merits might not be the best for sentencing. The opposite can also be true. This must be explained to the accused. The defense must decide which is the most critical phase of the trial. If there is a decent opportunity for acquittal on a significant charge, and especially a charge that would make any confinement or a punitive discharge unlikely, then the forum choice should be one that best addresses merits concerns. If the chance of an acquittal on a significant charge is not high, then the best forum choice for sentencing should be considered. In all other cases, the defense must balance the forum choice on those factors that best meets the facts of the case.

II. On the Merits. As a general rule,....

1. **Beyond reasonable doubt and jury nullification.** Judges do understand the concept of beyond reasonable doubt and will acquit when they believe the accused committed the offense but the government has failed to prove beyond reasonable doubt. It is said - especially if the offense is very serious - members will not make such fine distinctions. On the other end of this spectrum, members more so than judges, will acquit on factors that judges would not such as jury nullification, "smells bad," distasteful witnesses, or that the "government screwed up."

2. **Dirty witnesses.** Judges understand that sometimes witnesses are "dirty" (accomplices or generally those with bad reputations for truthfulness) but will evaluate the testimony and not wholesale reject the testimony of any witness. Members more than judges may mentally shut out a witness' testimony if they don't like the witness.

3. **Legal niceties.** Judges will apply the law more strictly than members. To the extent that a jury understands the law, they might not apply it as strictly as a judge. This concept may cut both ways. If the members are unsure on how to apply the law, they can give that doubt to the accused or give it to the government.

4. **Personal impact.** Members have lived the common soldier's life more frequently than judges. Accordingly, they take a more personal interest in those matters that affect a soldier's lot such as barracks larceny, failure to make a deployment, and even offenses like drugs in the workplace. Judges understand the impact of these offenses, but the impact has rarely affected them personally.

5. **Offenses as to status .** Members are more sensitive to affronts to military status and authority (violations of orders.) Judges may be more sensitive to assaults upon the integrity of the judicial process such as bribery, false swearing, and obstruction.

6. **Egregious offenses or gruesome evidence.** Judges have seen a lot of ugly exhibits (autopsy photos, dead people, photos of rape kits on abused children.) They have heard and seen a lot of serious offenses and understand this isn't the only murder, abuse, or theft there is. These offenses and this type of evidence have less impact on them than on members whose experience is more sheltered.

7. **Tooth fairies.** Members are more likely to accept a defense that many would consider outlandish. While judges “have seen it all” and know that truth can be stranger than fiction, they are better trained to sorting out competing positions and resolving them. They are less afraid to ask questions. They also know they can call or recall witnesses.

8. **Accused who does not testify.** If you asked me ten years ago if I thought that the members paid any attention to the fact the accused did not testify, I would have said they might (even if improperly.) Today I am not convinced. I have seen too many member acquittals with non-testifying accused that I think that the military jury (who is far smarter and better educated than their civilian counterparts) will honestly follow the instruction not to consider the accused’s silence. Judges also pay no attention to the fact that an accused does not testify. It is probably to the point to say that in any trial it is best not to call the accused unless he is needed to say something someone else can’t say. More importantly, carefully diagram the points you can score and the TC can score and decide who will come out ahead.

9. **Technical branch officers and other geeks.** Judges and most soldiers of most branches have a good grasp on “knowledge of human nature and the ways of the world.” They accept that the truth is something that must emerge from bodies of conflicting information and the truth usually lies somewhere in the middle. Those in technical branches or with technical backgrounds (chemical corps, engineers, math folks, computer geeks, regulation writers and many finance and AG types) often believe, however, 2 plus 2 is always 4 and if something doesn’t add up, it is to be disregarded. They have trouble evaluating and comparing conflicting evidence. They do not understand it is their duty to decide who is telling the truth because in their world, everything is black or white. These members are often defense favorable because if the evidence conflicts and there is nothing concrete to resolve it (like physical evidence), they disregard everything that the parties don’t agree on. Since the defense rarely agrees the accused is guilty, there is a greater chance of acquittal.

III. On Sentencing. As a general rule,....

1. **General deterrence and social defense.** Members place more weight on these sentencing factors.

2. **Wild sentences.** Members are capable on sentencing anywhere on the spectrum. In a child molestation case, for example, they are able to sentence anywhere from extremely low to extremely high. The sentences of judges are reasonably predictable not only because they have track records that can be checked, but because of their experience. Also, in judge alone trials, counsel address only one personality. Member sentencing has the dynamic of different personalities influencing each other.

3. **Personal impact.** While it is improper argument for counsel to ask members to place themselves in the position of a victim, they could silently do so. They may also see their own children, spouses and loved ones when thinking of the victim. Judges don’t do this.

4. **Good soldier information.** Judges do listen and give credit to good soldier evidence. Members probably give less weight to general good soldier evidence but more weight to great soldier evidence. Judges are less impressed by “poor soldier” evidence. Members tend to be more affected by bad soldier evidence provided it isn’t just the run of the mill failure to repair or the like.

5. **Parole possibilities.** Judges ignore the possibility of parole and presumes the accused will serve every day to which sentenced. Members are not permitted to adjudge a higher sentence based upon possible mitigating evidence later but, you can never be sure it doesn’t cross their minds. This is one of the most frequent, post-trial questions members ask.

6. **Mendacious accused.** When an accused must have lied on the merits to be convicted, it may be seen as “an affront to the justice system” for which the judge might be more concerned. However, judges know that the trial is combat and an accused is likely to try anything. The testimony might even have been suggested by the defense counsel or the accused lied initially and didn't have the presence of mind to correct that oversight. Members seem to be more affected when they are lied to. Ask any commander or senior NCO what they think of a soldier who doesn't tell the truth or doesn't sign up for what they did when they had the chance. Members generally believe a mendacious accused has significantly diminished rehabilitative potential.