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The Procedural Guide: The First Path to Truth^[1]

BY LIEUTENANT COLONEL BRYON T. GLEISNER

Courts-martial aren't scripted, as experienced trial practitioners know, but the procedural guide navigates trial counsel and the accused through legally significant gateways and milestones that must be traversed during every court-martial proceeding.

“Adversity is the first path to truth.”

–Lord Byron^[2]

New assistant trial counsel may relate to this Lord Byron quote as a military judge interrupts his or her reading of the procedural guide to correct what counsel may perceive as ‘minor’ errors. A wrong date here, an incorrect name there. Some trial counsel may think, “What’s the big deal...it’s just a meaningless ‘scripted’ portion of the trial, right? In fact, didn’t we used to call this thing the ‘script’?” Putting aside that trial counsel has just made a poor first impression with the military judge by demonstrating a lack of understanding and attention to detail, the procedural guide’s structure is rooted in the Uniform Code of Military Justice (U.C.M.J.) and the Rules for Courts-Martial (R.C.M.). In fact, the procedural guide mirrors the requirements set forth in R.C.M. 901. While it was previously called “the script,” that name was retired for several reasons, chief among them was that it inaccurately described what was actually occurring during these early

portions of the trial. Courts-martial aren't scripted, as experienced trial practitioners know, but the procedural guide navigates trial counsel and the accused through legally significant gateways and milestones that must be traversed during every court-martial proceeding.

“THE PROCEDURAL GUIDE IS THE FIRST PATH TO TRUTH.”–JUDGE BRYON

The adversarial process of courts-martial, with its many rules, is designed to seek the truth. By understanding the procedural guide and being conscientious in both completing and reading it, new assistant trial counsel can ensure this truth finding process begins smoothly. This journey begins by properly stating the convening order number, headquarters and date, as well as any amending convening orders. Be sure to note any minor corrections to the convening order(s). This information publicly announces the R.C.M. 201(b) requisites of court-martial jurisdiction: (1) that is convened by an official empowered to convene it and (2) that the court is composed of the proper number of personnel.

Judge Bryon Says: The detailed military judge will receive the initial convening order counsel send to the central docketing office; however, if later amendments occur, be sure to send those amended convening orders to the detailed military judge and upload them to the e-filing site. Also, include hard copies of all convening orders in the judge's folder.

GOT 30A'S?

Next, if there were any requests for investigative subpoenas, warrants or orders under Article 30a, counsel may announce the dates on which those proceedings were held. A proceeding occurs whether or not there was a hearing and includes all the email communications and documents considered or issued by the detailed judge in acting upon the Article 30a request. Consistent with R.C.M. 309(e) all this documentation must be included in the record of trial as an allied paper.[3]

YOU'VE BEEN SERVED!

A common error by new assistant trial counsel is that he or she will often state the incorrect date of service of the charges. In these instances, it is usually because counsel has confused prefferal, where the accused is informed of the charges, with formal service of referred charges. Counsel can find the date the accused was served the referred charges by going to page two, block 15 of the charge sheet (DD Form 458). Article 35 and R.C.M 602(a) require physical service upon the accused, substitute service upon the defense counsel is insufficient. The date of service of the charges carries legal significance because an accused cannot be brought to trial over objection until after expiration of the three day, for special courts-martial, and five day, for general courts-martial, statutory waiting period. When computing the days, the day of service of the referred charges and the day of trial are not counted. Sundays and Holidays are included. If the statutory waiting period has not expired, make sure the judge conducts the appropriate inquiry with the accused before continuing on with the procedural guide.

Judge Bryon Says: The judge will appreciate the attention to detail if counsel properly drop the (s) on charge(s) when there is only one charge. Be sure to drop the (s) even if the charge has multiple specifications.

WHO'S PRESENT, WHO'S ABSENT, & WHO'S ON TELEVISION?

Trial counsel will announce the rank and full name of the accused and properly identify whether they are ready to proceed only with arraignment or with the entire trial by including or excluding the "(with the arraignment)" parenthetical as necessary. Next, properly stating who is present and who is absent is important because the U.C.M.J. and R.C.M. require the presence of certain trial participants. Article 39(b) and R.C.M. 804 require the presence of the accused at trial proceedings. R.C.M. 805 requires the presence of the military judge, at least one qualified counsel from each party, and the members; with the exception that members are not required for Article 39(a) sessions, during individual voir dire, or after excusal.[4] The presence requirements of R.C.M. 804 and 805 also apply to post-trial 39(a) proceedings held in accordance with R.C.M. 1104.

Presence of the parties should be interpreted to mean physical presence unless otherwise authorized by service regulation[5] and the R.C.M. R.C.M. 804(b) specifically states that defense counsel must either be physically present at the accused's location or "when the accused consents to presence by remote means with the opportunity for confidential consultation with defense counsel during the proceeding." [6] Where the Manual for Courts-Martial authorizes a party's presence by "remote means" the Manual always does so in terms of "audiovisual technology, such as video conferencing technology" (VTC).[7] For example, R.C.M. 804(b) specifically states, "Such technology may include two or more remote sites as long as all parties can see and hear each other." [8] Similar language appears in R.C.M. 805. This means that the Article 39(a) session should not continue if there are technical difficulties which prevent all parties from both hearing and seeing the proceedings.

The Manual does not specifically allow, and case law prohibits, any of the parties from appearing via telephone. In *U.S. v. Reynolds*,^[9] the Court doubted that by presiding over an arraignment via the telephone that the military judge could properly supervise the proceedings, ensure appropriate decorum, participate in a full and meaningful way, and perform his duties under Article 26. Specifically, the judge was unable to observe the most elemental aspects of the court-martial process, including the accused's presence in court, the accused's capability, by reason of intelligence and sobriety, to participate in the proceedings, the accused's body language, and whether the responses the accused gave were his own. The court highlighted the importance of an accused's "body language," which could indicate to the military judge whether the accused really understands his or her rights or requires additional instruction.

Judge Bryon Says: When any party appears via VTC, it is best practice to specifically state who is physically present and who is appearing via VTC along with their location. Counsel should also state that all parties can both hear and see the proceedings. For example,

The accused and the following persons detailed to this court are physically present at the Moody Air Force Base courtroom: Capt Sally Newbee, assistant trial counsel, and Capt Lance Longbow, defense counsel. The military judge, Lt Col Bryon Gleisner is present and appearing, connected via video conferencing technology from Joint Base Langley-Eustis, Virginia. Capt Tommy Twoguns, circuit trial counsel, is present and appearing, connected via video conferencing technology from Cannon Air Force Base, New Mexico. Prior to coming onto the record, all parties have confirmed they are receiving both the audio feed and the video feed of this proceeding.

IT'S ALL IN THE DETAILING...AND CERTIFICATION.

As is likely evident by now, the old saying, "the devil is in the details" is certainly true when it comes to the procedural guide. But the devil also lurks in the detailing and qualifications of counsel. R.C.M. 503(c) requires all counsel to be detailed by their detailing authority as established by AFI

51-201, para 10.3. To properly announce this, counsel should understand and appropriately state who detailed each of the counsel appearing in the court-martial, to include who detailed circuit trial counsel (hint: local counsel and circuit counsel are not detailed by the same person).^[10]

Next, counsel must accurately state whether all members of the prosecution are qualified and certified. Even if counsel are not certified it is proper to say all counsel are qualified, assuming all counsel are designated judge advocates.^[11] Counsel are not qualified if they lack this designation or have served in any of the disqualifying roles listed in Article 27(a)(2). If any counsel is disqualified, the judge is required to conduct an inquiry and "take appropriate action."^[12] At a minimum, the detailing authority should be informed of the disqualification of detailed counsel. If the disqualification is one the accused may waive, the military judge will inform the accused so he or she can decide whether to waive it. Failing to have the requisite number of qualified counsel can bring the case to a screeching halt.

For example, a fellow judge was conducting an arraignment at a general court-martial and the new assistant trial counsel, standing alone at the prosecution table, stated confidently on the record that he was qualified but not certified or sworn. Much to the new counsel's surprise, the judge immediately stopped the arraignment and refused to proceed until certified counsel was detailed to sit with the uncertified counsel. What this legal office failed to appreciate was that Article 27(b) and R.C.M. 805 require the presence of a certified trial counsel for all stages of a general court-martial.

One may be thinking, "What's the big deal? It's just an arraignment." Of course, to say it's "just" an arraignment is folly because every arraignment has significant legal consequences for both the government and the accused. For example, it stops the R.C.M. 707 speedy trial clock, prevents additional charges from being referred to the court-martial without waiver by the accused,^[13] and marks the point in time after which the trial may proceed even if the accused voluntarily absences himself or herself. If done improperly, these important legal consequences of an arraignment may be imperiled. Had this new trial counsel been sitting

alone at a special court-martial that would have been fine because Article 27(c)(2) does not require certification, but only requires trial counsel at a special court-martial to be designated as a judge advocate.[14] In contrast, Article 27 requires defense counsel and assistant defense counsel at both general and special courts-martial to be certified. These certification rules apply to reservists with equal force; therefore, if a Staff Judge Advocate (SJA) has an experienced, but not yet certified reservist on a general court-martial, the reservist must be detailed as assistant trial counsel even if detailed trial counsel is a certified but less experienced litigator.

Judge Bryon Says: During the initial 802 with the judge on the first day of trial, uncertified counsel should inform the judge of his or her status, advise the judge whether the counsel prefers to swear or affirm,[15] and let the judge know if the SJA is likely to ask the military judge for a memorandum in support of certification at the conclusion of the trial. Providing this information in advance allows the judge to pay particular attention to the uncertified counsel's trial performance, in addition to the trial itself. Furthermore, the judge may ask the uncertified counsel and the SJA about cases to which the counsel has been previously detailed. It is also not unusual for the judge to request the certification package the SJA will be submitting prior to writing an indorsement memorandum because it provides the judge with a good history of the counsel's overall experience. If the judge declines to provide a certification memorandum he or she will normally provide the SJA with areas where counsel's performance fell below that of minimal competence. In the event this occurs, counsel should talk to the SJA about these areas, engage in self-study, and request additional training to elevate his or her litigation skills.

VICTIMS, DEFENSE COUNSEL, AND PERSONS OF LIMITED STANDING, OH MY!

Prior to arraignment, trial counsel has certain obligations to inform Article 6b victims of the time and date of any court-martial proceeding and the victim's right to attend.[16] If the victim is not represented, this communication is made directly to the victim. If a Special Victim's Counsel (SVC) is detailed then trial counsel is responsible for ensuring the SVC is aware of the date and time of the proceeding. Counsel

must ensure that, at a minimum, someone on the trial team has informed the victim directly or through counsel of his or her rights, so counsel can affirmatively state that the victim has received timely notice of the proceeding and has been made aware of his or her right to attend. Next, the military judge may prompt any SVCs to place their qualifications on the record. SVCs are not parties to the litigation, but are considered "persons of limited standing." [17]

R.C.M. 506 provides that an accused has the right to be represented by detailed military counsel, civilian counsel, or military counsel of the accused's own choosing, if reasonably available. R.C.M. 901(d)(4) requires the military judge to inform the accused of his or her rights to counsel, ascertain whether the accused understands those rights, and have the accused affirmatively select representation. The judge must swear any civilian defense counsel.[18]

Judge Bryon Says: While counsel may not have a speaking role when the military judge informs an accused of his or her rights to counsel, counsel can still assist the court in ensuring the record is complete by bringing to the judge's attention, during an 802, the following: (1) Will the accused be waiving the presence of one or more defense counsel for arraignment? (2) Was the accused previously represented by another defense counsel on the charges before the court? By alerting the judge to these issues ahead of time, the judge will be properly prepared and will be less likely to inadvertently fail to inquire with the accused on these matters. If the accused has released a defense counsel or if a defense counsel has requested and was granted permission to withdraw by the court,[19] these documents should be printed and counsel should be prepared to mark them as appellate exhibits for the record.

OFF THE RECORD DISCUSSIONS, FORUM CHOICE, AND THE GENERAL NATURE OF THE CHARGES.

After the judge states his or her detailing and qualifications, he or she may wish to summarize or have assistant trial counsel summarize any prior 802 conferences for the record. If the judge summarizes the 802 conferences, but misses something significant, counsel should not be hesitant about adding to the judge's summary. Additionally, if a previous judge held 802 conferences, counsel will need to summarize

those. The primary purpose of summarizing the 802 conferences is to ensure a complete record, but an interaction with the judge at an 802 could also provide grounds to question or challenge the military judge.

If neither party wishes to question or challenge the military judge, the judge will inform the accused of his or her forum rights as set forth in R.C.M. 903. Oftentimes, during arraignment only proceedings, the defense may request to defer forum choice.[20] However, if there are straddling offenses, meaning some offenses occurred prior to 1 January 2019 and some occurred on or after 1 January 2019, the military judge must inform the accused of the different sentencing rules and the accused must select either the pre- or post-1 January 2019 sentencing rules.[21] The accused must make this election before arraignment and the election is irrevocable absent good cause. Counsel should be aware of the ramifications of this choice not only upon the accused but also upon the convening authority's ability to take certain actions regarding plea deals.[22]

Sometimes when assistant trial counsel is prompted to announce "the general nature of the charge(s)," judges get quizzical looks and sense apprehension. Occasionally new counsel will incorrectly state "charges" even though there is just one charge. Moreover, newer counsel sometimes misstate the general nature of the charge or charges. The general nature is simply the article number and title of the specification. So, for example, if the accused was charged with two specifications of sexual assault and two specifications of abusive sexual contact, counsel would state, "The general nature of the charge in this case is two specifications of sexual assault and two specifications of abusive sexual contact in violation of Article 120, Uniform Code of Military Justice." Counsel must also state who preferred the charges, and forwarded them with recommendations as to disposition, as indicated in block III of the charge sheet. For general courts-martial, the special court-martial convening authority will also be involved in forwarding the charges to the general court-martial convening authority with recommendations as to disposition. For general courts-martial, the date of the Article 32 preliminary hearing or waiver of the preliminary hearing must also be stated.

Judge Bryon Says: Ask the judge at an 802 conference if he or she requires trial counsel to mark the scheduling order as an appellate exhibit. Some judges have it marked as a matter of course and others only mark it when there was a violation of the order that may impact the proceedings. An 802 conference is also a good time to inform the judge if the accused waived the Article 32 preliminary hearing so that the judge can be prepared to enter into a colloquy with the accused regarding that decision.

ARRAIGN ON MY PARADE.

Arraignment is the reading of the charges and specifications to the accused and calling on the accused to plead.[23] The entry of the pleas is not part of the arraignment and, therefore, the accused can ask to defer entry of pleas. Arraignment is complete when the military judge utters the words, "how do you plead?" If a judge does not call for the entry of pleas, an arraignment has not occurred. As stated earlier in this article, an arraignment has certain legal consequences, but a legally insufficient arraignment may not trigger these consequences. In addition to stopping the R.C.M. 707 speedy trial clock, prohibiting additional charges from being referred to the court-martial without waiver by the accused, and allowing the court to proceed in the absence of the accused, the arraignment also prevents the government from making minor changes to the specifications without first making a motion to the military judge. [24] If arraignment and trial are bifurcated, defense counsel will often request to defer motions because failure to defer or make certain motions prior to arraignment will result in waiver.[25]

R.C.M. 910 lists the legally permissible pleas that may be entered by the accused. A military judge cannot accept an irregular plea (*e.g.*, guilty without criminality or guilty to a charge but not guilty to all specifications). In addition to ensuring the accused's plea is legally permissible, counsel should also ensure that it is in proper form. This can sometimes trip up counsel, particularly when an accused is pleading by exceptions and substitutions.

Judge Bryon Says: To find the proper form for announcing pleas and findings, look at Appendix 10 in the 2016 Manual for Courts-Martial. Counsel should take note that for some inexplicable reason, this handy reference was taken out of the 2019 Manual. Also, particularly when arraignment and trial are bifurcated, trial counsel may want to request that the judge inform the accused of the consequences of an arraignment if the judge does not do so *sua sponte*.

ASSEMBLY AND IMPANELMENT REQUIRED.

Article 29 and R.C.M. 911 require the military judge to announce assembly of the court-martial, and as vanguard of the procedural guide, counsel should make sure the judge says these words at the correct time.[26] Assembly of the court is significant because it “marks the point after which: substitution of the members and military judge may no longer take place without good cause; the accused may no longer, as a matter of right, request trial by military judge alone or withdraw such a request previously approved; and the accused may no longer request, even with the permission of the military judge, or withdraw from a request for members.”[27]

R.C.M. 505(c) states that prior to assembly the convening authority or the SJA, if delegated the authority, may excuse members without showing cause; although the SJA may dismiss no more than one-third of the members detailed by the convening authority.[28] Prior to assembly the military judge has no authority to excuse members. After assembly the SJA no longer has authority to excuse members. The convening authority and the military judge have the power to excuse members after assembly, but only if good cause is shown.[29] The military judge may also dismiss members as a result of challenges or when the number of members is in excess of the number required for impanelment.[30] Finally, after assembly, new members may be detailed only when the venire falls below quorum or, in the case of an enlisted accused who has requested enlisted members, the number of enlisted members is reduced below one-third of the total membership.[31]

Article 29 and R.C.M. 912A(f) also require, in members trials, for the judge to impanel the court-martial after the exercise of challenges and announce that “The members are impaneled.” A special court-martial requires four members for impanelment and a general court-martial requires eight members; additionally, if requested by an enlisted accused, at least one-third of the members must be enlisted.[32] Counsel should be familiar with the rules for randomizing and impaneling members that are found in R.C.M. 912A to ensure a proper impaneling of members has occurred.

Judge Bryon Says: The procedural guide is an important step in the triggering of legal ramifications for both the accused and the government. Incorrect completion and reading of the procedural guide could have drastic consequences and result in needless litigation. Consequently, in addition to reading through the procedural guide and becoming familiar with it, this judge encourages counsel to also read the corresponding U.C.M.J. Articles and R.C.M. referenced in this article to gain a better understanding of what counsel are saying, why counsel are saying it, and why it matters in the long run. Additionally, take the time to practice the oath for members and witnesses.[33] Completing the procedural guide correctly and reading it in a confident and controlled manner, rather than a rushed and uncertain way, will not only build confidence, but it will ensure a legally sufficient arraignment, and minimize the need for the military judge to intervene. After all, despite the wisdom of Lord Byron, adversity does not have to be the first path to truth, but as so eloquently professed by Judge Bryon, such path to the truth begins with a correctly completed procedural guide.

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ENDNOTES

- [1] An update of the 2009 article “The Trial Script: Everything You Didn’t Know You Didn’t Know” written by Lt Col Le T. Zimmerman, USAF.
- [2] Lord Gordon Byron, simply known as Lord Byron...was an English poet – who became a revolutionary. <https://www.britannica.com/biography/Lord-Byron-poet>.
- [3] *See also*, Uniform Rules of Practice Before Air Force Courts-Martial, rule 2.3.
- [4] R.C.M. 901(e) states, “The procedures described in R.C.M. 901 through 910 shall be conducted without members present in accordance with the procedures set forth in R.C.M. 803.”
- [5] U.S. DEP’T OF AIR FORCE, INSTR. 51-201, ADMINISTRATION OF MILITARY JUSTICE, section 12H (18 July 2019) [hereinafter AFI 51-201]: “[t]he use of audiovisual and teleconferencing technology is authorized by Secretary of the Air Force to the extent and under the conditions allowed for in R.C.M. 804(b), 805(a), 805(c), 914A, and 914B.” The Uniform Rules of Practice Before Air Force Courts-Martial, rule 3.8 authorizes VTC for all preliminary matters.
- [6] R.C.M. 804(b).
- [7] *See e.g.*, Article 39(b), R.C.M. 804(b), 805(a), and 805(c).
- [8] R.C.M. 804(b).
- [9] 44 M.J. 726 (A.C.C.A. 1996), *affirmed*, 49 M.J. 260 (1998).
- [10] In addition to announcing orders detailing counsel orally, the written detaining is included in the record of trial. R.C.M. 503(c) and AFI 51-201, para 10.3.
- [11] *See* 10 U.S.C. § 8067(g) and U.S. DEP’T OF AIR FORCE, INSTR. 51-101, AIR FORCE JUDGE ADVOCATE GENERAL’S CORPS (AFJAGC) OPERATIONS, ACCESSIONS, AND PROFESSIONAL DEVELOPMENT, [hereinafter AFI 51-101].
- [12] R.C.M. 901(d)(3).
- [13] *See* R.C.M. 904.
- [14] *See* 10 U.S.C. § 8067(g) and AFI 51-101, Ch. 6.
- [15] *See* Article 42(a), R.C.M. 901(d)(5), and AFI 51-201, para 10.5.2 regarding oath requirements for uncertified counsel and defense counsel.
- [16] *See* R.C.M. 806(b)(3).
- [17] *See* Uniform Rules of Practice Before Air Force Courts-Martial.
- [18] *See* R.C.M. 901(d)(5).
- [19] *See* Uniform Rules of Practice Before Air Force Courts-Martial, para 2.5(C).
- [20] Although if an accused makes a forum choice, he or she can withdraw it any time before assembly. R.C.M. 903(d)(1).
- [21] R.C.M. 902A.
- [22] AFI 51-201, para 3.3.3.
- [23] R.C.M. 904.
- [24] R.C.M. 603(e).
- [25] *See* R.C.M. 905 for a list of motions that must be raised before a plea is entered to avoid waiver. Motions to dismiss for lack of jurisdiction and failure to allege an offense are not waived.
- [26] In trial by members, the court is assembled after the court members are sworn by trial counsel. In military judge alone cases, the court is assembled after the military judge approves the accused’s request for trial before military judge alone.
- [27] R.C.M. 911, discussion.
- [28] R.C.M. 505(c)(1)(B)(ii).
- [29] R.C.M. 505(c)(2).
- [30] *Id.*
- [31] R.C.M. 505(c)(2)(B).
- [32] R.C.M. 912A(a)-(b).
- [33] *See* R.C.M. 807; Uniform Rules of Practice Before Air Force Courts-Martial, rule 4.4(f).