

Civilian Attorneys and the Defense of U.S. Service Members

by Victor Kelley

The *Civil Litigator* column addresses issues of importance and interest to litigators and trial lawyers practicing in Colorado courts. The *Civil Litigator* is published six times a year.

This article presents an introduction to practice in military proceedings. It provides civilian attorneys with an overview of the types of situations in which they may provide legal counsel to members of the U.S. armed services.

It is not uncommon for an attorney to hear a client mention in passing that a son in the Army is facing a court-martial. Or perhaps a daughter in the Air Force is suffering an administrative injustice or a spouse needs to petition for a correction of his or her military record. More than 1.4 million men and women presently serve in the U.S. armed forces, in addition to the many veterans who served previously. Accordingly, numerous opportunities exist for lawyers to provide assistance to hundreds of thousands of citizens affiliated with the armed services. Military justice is a legal practice that needs competent civilian counsel.

U.S. service members enjoy excellent statutory and administrative rights. In some instances, they have the right to military counsel, such as for a court-martial referral, advice concerning a commander's punishment, and a military court-martial appeal. However, in most proceedings, service members have the right to retain their own qualified civilian attorneys as long as such civilian representation is at no cost to the U.S. government. Unlimited opportunity exists for civilian attorneys to help service members exercise their rights.

Military criminal justice and its related administrative actions are multifaceted. This article provides an overview of the general types of military proceedings, including court-martial processes, appellate review, nonjudicial (commander's) punishment, clemency and parole proceedings, discharge review board proceedings, and petitions for correction of military records. The article addresses

the qualifications for counsel's representation at those proceedings and provides some guidance as to when civilian attorneys may represent members of the armed services. It also covers resources that may help guide attorneys representing U.S. service members in the U.S. Air Force, Army, Coast Guard, Marines, and Navy.

Attorneys Practicing Military Justice

There are numerous misconceptions about who may practice military law and what the practice entails. In many instances, the entertainment media have dramatically misguided the public about the military justice system.¹ This section addresses the roles of civilian and military lawyers, as well as the requirements for practicing before a military court.

Civilian Lawyers

A military service member generally may retain the service of a civilian lawyer in substantially all of the circumstances in which military counsel may be provided. Additionally, the service member may be represented by civilian counsel in certain military proceedings when there is no concomitant right to representation by a military lawyer. Although relatively few civilian attorneys have military justice as their primary practice, a number actively practice in this field.²

Military Lawyers

Progression to becoming a military attorney varies, with several programs

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available for officers and officer candidates. However, to be qualified to practice before a court-martial, military counsel must be certified by the Judge Advocate General of the armed force of which that attorney is a member, under Article 27(b) of the Uniform Code of Military Justice.³ To be certified, the attorney must

... be a member of the bar of a [f]ederal court or the highest court of a state. The Judge Advocate General concerned may establish additional requirements for certification.⁴

When working with civilian counsel, military defense counsel are unusually well-placed to assist civilian counsel in the preparation and presentation of the case.⁵ Military advocates are "school trained" and have the advantage of being at the post as well as in a position to keep a finger on the pulse of a case. For civilian attorneys to be effective in the military courts, they must have some knowledge and understanding of military rules.

Overview of Military Rules

The formality of courts-martial and other military proceedings can be intimidating to the uninitiated. However, they certainly are no more formal than practice in civilian U.S. courts. Further, the military rules of procedure are such that all of the resources available to the United States are available to the defense.

Military courts use the Military Rules of Evidence ("MRE"),⁶ which are patterned on the federal evidentiary rules. Thus, those who practice in U.S. District Court should be at ease working within the military evidentiary system. The punitive articles are the military criminal code, which are set out in the *Manual for Courts-Martial*,⁷ which contains descriptions of offenses, a listing of the elements of each offense, a list of any lesser-included offenses, and a set of definitions for any legal terms of art used in that article. In addition, the *Manual for Courts-Martial* contains the MRE and the Uniform Code of Military Justice ("UCMJ"), which is the statutory body of law governing the conduct of military personnel.⁸

Civilian qualification to represent military accused at courts-martial is stated in the MRE. Succinctly, for a civilian to practice before a court-martial, that person must be a "member of the bar of a [f]ederal court or of the bar of the highest court of a State."⁹ At the outset of courts-martial proceedings, the military judge will ask civilian counsel to state his or her qualifi-

cations. Having done so, the judge will administer an oath to civilian counsel to well and faithfully represent the accused. Without other formalities, the proceedings commence. The most common types of proceedings for which service members may require legal representation are discussed below.

Courts-Martial

A court-martial is a legislative criminal court convened under the authority of the UCMJ. It exists to try and punish those persons—principally service members—who are subject to the UCMJ. Following is an overview of the three types of courts-martial, from most to least severe: (1) general court-martial; (2) special court-martial; and (3) summary court-martial. This section briefly addresses court-martial appeals as well.

General Courts-Martial

General courts-martial exist to try only the most serious offenses. In addition to common-law offenses, such as murder, rape, and robbery, certain military-specific offenses also may be tried by general courts-martial. These include assaulting a superior commissioned officer, misbehavior before the enemy, aiding the enemy, and conduct unbecoming an officer. Capital cases in military courts are heard by general courts-martial.¹⁰

A general court-martial is empowered to adjudge any punishment authorized by the UCMJ. Authorized punishments may include a reprimand, forfeiture of pay and allowances, fine, reduction in pay grade, confinement, and a dishonorable discharge. In the case of officers, a court-martial may result in dismissal from the service.¹¹

If requested by an accused, the military court-martial must be comprised of at least five members.¹² These members are military personnel who serve as the counterpart to a civilian jury. The accused has the right to military counsel. Moreover, the accused has the right to retain qualified civilian counsel at his or her own expense.¹³

Special Courts-Martial

Special courts-martial are used to try offenses that commonly are thought of as misdemeanor offenses in the civilian community. Military-distinctive offenses such as Absent Without Leave ("AWOL"), disrespecting a senior, and certain orders violations are properly punishable at special courts-martial. Although a serious proceeding, a special court-martial's punishment

authority is inferior to that of a general court-martial.

A special court-martial is empowered to adjudge punishments authorized by the UCMJ, subject to the maximum jurisdiction of the court. Punishments may include one year of confinement, a bad conduct discharge, hard labor without confinement for three months, and forfeiture of two-thirds pay per month for up to one year.¹⁴ If an accused makes a request, a special court-martial must be comprised of at least three members.¹⁵ Similar to a general court-martial, the accused has the right to military counsel and may retain his or her own civilian counsel.¹⁶

Summary Courts-Martial

A summary court-martial is composed of one commissioned officer. This officer's function is to "promptly adjudicate minor offenses under a simple procedure."¹⁷ Minor offenses include going from place of duty, damaging property through neglect, drunken driving, drunkenness aboard ship, and gambling with subordinates. Further, the summary court officer ensures that the interests of both the government and the accused are safeguarded. Lawful punishments include confinement for one month, restriction to limits of quarters for two months, and forfeiture of two-thirds pay for up to one month. The accused does not have the right to military counsel at a summary court-martial, but he or she has the right to retain civilian counsel.

Court-Martial Appeals

The military rules for appellate review vary according to the court from which the appeal is taken and the offense for which the accused was convicted. Generally, the first *de facto* "appeal" is to the convening authority, who may only mitigate findings or sentence.¹⁸ Unless an accused waives appellate review, the Court of Criminal Appeals may review court-martial convictions.¹⁹ In certain circumstances, the Court of Appeals for the Armed Forces²⁰ and the U.S. Supreme Court²¹ also may review court-martial convictions. In each of these courts, the accused may be represented by military counsel. He or she may retain civilian counsel in addition to, or instead of, military counsel.

Adverse Actions

Adverse action could result from repeated minor infractions or from conduct that, although not severe enough to warrant court-martial referral, is considered of a

sufficiently serious nature for administrative sanction. The term "adverse action" refers to a number of quasi-judicial or administrative proceedings that may subject military service members to potentially career-ending sanctions short of judicial proceedings. Those adverse actions are generally governed by relevant service regulations.²² During most adverse action proceedings, service members have the right to assistance of military counsel and may retain civilian counsel if they choose.

Administrative Separation Boards

The most serious adverse action is the Administrative Separation Board. Service separation boards are administrative in nature; however, the service member is entitled to administrative due process of law. These boards generally have the authority to retain the respondent or to discharge him or her with: (1) an honorable discharge; (2) a general discharge under honorable conditions; or (3) an other-than-honorable discharge. With the second or third type of discharge, the service member will lose many rights under the service department and the Department of Veterans Affairs. Military personnel have the right to military counsel and may retain civilian representation before an Administrative Separation Board.

Nonjudicial Punishment

Article 15 of the UCMJ,²³ otherwise known as Nonjudicial Punishment ("NJP"), also is referred to as "captain's mast" in the Navy or "office hours" in the Marines. NJP is a disciplinary measure, but it is not as severe as a court-martial. Unless a service member is attached to or embarked on a vessel, he or she may refuse Article 15 and demand the right to a court-martial. NJP exists as a commander's corrective tool for punishment of the least serious military offenses. For example, minimal periods of unauthorized absences, disrespect to a non-commissioned or petty officer, and disrespect to a sentinel are properly punished by NJP.

If the service member accepts Article 15, he or she may be punished with restriction to limits, arrest in quarters, forfeiture of pay, correctional custody, and reduction in pay grade. If embarked on a vessel, the service member may be ordered to confinement on bread and water or diminished rations for three days.

Any service member who believes that the punishment imposed is unjust or disproportionate to the offense may appeal to

the next senior commander within five days of imposition of punishment. An accused has the right to consult military counsel before accepting Article 15 or demanding trial by court-martial. The accused also may speak with retained civilian counsel; with permission of the commander, counsel may represent the service member at the Article 15 proceeding and on appeal to the next senior commander. There is no right to representation by military counsel at Article 15 proceedings.

Boards of Officers

Not unlike Administrative Separation Boards, Boards of Officers exist to administratively hear allegations of officer misconduct and neglect, such as conduct unbecoming an officer, but not serious enough for referral to a court-martial. Their jurisdiction is non-punitive in nature. However, a hearing may result in administrative and career-ending sanctions. Military counsel is made available for service members who are referred to a Board of Officers. Respondents also may retain civilian counsel for their representation.

Military Boards

Each service has a Board for Correction of Military Records, Physical Evaluation Board, Clemency and Parole Board, and Discharge Review Board. For each board, service members may choose to retain their own civilian counsel.

Boards for Correction of Military Records

Boards for Correction of Military Records ("BCMR") are established by federal law with authorization to "correct any military record . . . to correct an error or remove an injustice."²⁴ The board is comprised of civilian members of the executive part of that military department. With the exception of a favorable decision by the board based on fraud, a correction of the record is final and conclusive.

Ordinarily, the claimant must file a petition to the BCMR within three years after the service member or his or her legal representative discovers the error or injustice.²⁵ "Errors" that may be corrected are usually administrative decisions in the service member's file that are not in compliance with existing regulations.

It is important to note that the BCMR sits in equity. Although the service may have complied with all its regulations, the BCMR still may correct a record if it feels an injustice has occurred. The board has the authority to excuse an out-of-time filing if it finds the filing to be in the interest of justice. A service member does not have the right to assistance of military counsel; however, he or she may retain civilian counsel for redress to the BCMR.

Physical Evaluation Boards

Each service provides boards for evaluating the degree and extent of a service member's physical and mental fitness for continued duty. Although the language and reference to the service boards may vary, the process generally is comparable.

Usually, an initial finding of disability may be appealed through a tiered system, with the goal of either continuing on duty (usually until the service member is eligible for retirement) or with the view of having a reasonable disability designation awarded. On the designation of 30 percent disability, the service member is medically retired to the "Temporary Disability Retired List," with some limitations. Military counsel is available for assistance or, if the service member prefers, he or she may retain civilian counsel for representation before the Physical Evaluation Board.

Clemency and Parole Boards

All of the services have clemency and parole boards that exist to consider each petition to determine whether clemency and restoration of certain civil rights is appropriate. The boards also may determine that a military prisoner has earned the right to be paroled into the civilian community and complete his or her debt to society as a free individual on parole. In certain circumstances, a service member convicted by court-martial may petition the U.S. Justice Department pardon attorney for an executive pardon. Civilian counsel may represent military personnel for all clemency, parole, and pardon applications. There is no right to military representation.

Discharge Review Boards

The Secretary of each armed force is statutorily required to establish a Dis-

charge Review Board.²⁶ A service member must move this board to review a discharge within fifteen years after the date of the discharge or dismissal. The review is based on the records of the armed force concerned, as well as other evidence that the petitioner may present to the board. The petitioner may present his or her case personally, via affidavit, or by civilian counsel advocating his or her interests before the board.

Conclusion

Military jurisdiction attaches worldwide as a result of service members' status in the armed forces.²⁷ Whether from courts-martial or any number of administrative proceedings, at some time in his or her service, a service member is likely to benefit from the sound advice of counsel. If an attorney is a member in good standing of the federal bar or any U.S. state bar, he or she is qualified to represent service members.

The area of military justice is virtually untapped and is one in which, with some application, civilian lawyers can practice competently. The *Manual for Courts-Martial* enables civilian counsel to have access to the basic information needed for court-martial representation. With some study, application, and work with detailed military defense counsel, civilian counsel can develop an expertise in a fairly underutilized legal specialty area and provide a singular benefit for the men and women who serve in the U.S. armed forces.

NOTES

1. See, e.g., the 1992 blockbuster film, *A Few Good Men*. Although based on a true incident in which a member of the armed forces was killed by fellow Marines, much of the film is both fictitious and legally inaccurate. The accused in *A Few Good Men* are convicted of a crime that does not exist (and supposedly conduct unbecoming an officer). The defense attorney boldly submits a defense of misconduct of a senior officer that—incorrectly—could subject him to court-martial charges. However, there is no such offense recognized by the Uniform Code of Military Justice ("UCMJ"). An attorney who zealously and ethically defends a client will never subject himself or herself to charges.

2. Some attorneys post their services in the *Air Force, Army, Marine, and Navy Times* weekly newspapers (Media Group, 6883 Commercial Drive, Springfield, VA 22159). See <http://www.airforcetimes.com>; <http://www.armytimes.com>; <http://www.marinecorpstimes.com>; and <http://www.navytimes.com>. Information about and referrals to military justice practitioners are available through Internet searches, as well as some local bar associations.

3. Rules for Court-Martial (*hereafter*, "RCM") 502(d).

4. See *Discussion* at RCM 502(d).

5. In a military justice proceeding involving a service member, the service member's appointed military attorney can assist the civilian attorney in areas such as the preparation of legal documents and attendance at hearings.

6. See *Manual for Courts-Martial* (*hereafter* "MCM") (2002), Part III. Copies of the MCM are available through the U.S. Government Printing Office. See <http://www.access.gpo.gov>. See also <http://www.jag.navy.mil/documents/mcm2000.pdf>.

7. *Generally* Articles 77-134, UCMJ. Part IV, MCM.

8. 10 U.S.C. §§ 801 to 940.

9. RCM 502(d)(3).

10. "A capital offense for which there is a prescribed mandatory punishment beyond the punitive power of a special court-martial shall not be referred to such a court-martial." RCM 201(f)(2)(c)(i).

11. RCM 1003.

12. RCM 501(a)(1).

13. RCM 506(a).

14. RCM 501(a)(2).

15. RCM 501(a)(2).

16. RCM 1301(e).

17. RCM 1301(a).

18. RCM 1107(d).

19. RCM 1203.

20. RCM 1204.

21. RCM 1205.

22. "The head of an executive department or military department may prescribe regulations for the government or his department, the conduct of his employees, the distribution and performance of its business, and the custody, use, and preservation of its records, papers, and property." 5 U.S.C. § 301; see also 10 U.S.C. §§ 801 to 940.

23. Part V, MCM.

24. 10 U.S.C. § 1552(a)(1).

25. 10 U.S.C. § 1552(b).

26. 10 U.S.C. § 1553.

27. *Solorio v. U.S.*, 483 U.S. 435 (1987).