

## **Trial Procedures in the Military**

*The rules and procedures in courts-martial are very similar to those in civilian courts. The following discusses some of those similarities and points out some of the differences.*

**Pretrial Conferences (“Meeting in Chambers”)**. As in many civilian courts, a legally trained judge presides over most courts-martial. The "military judge" may hold informal conferences to coordinate aspects of the trial. These are similar to conferences a civilian judge might have "in chambers." Under the military rules, "RCM 802 conferences" may be in person, or by phone, but may not be used to resolve contested issues. Contested procedural or legal issues must be resolved in court, on the record.

**Pretrial Hearings**. The military judge usually settles contested legal or procedural issues under Article 39(a), of the Uniform Code of Military Justice, which allows him to conduct hearings for that purpose. Called "Article 39(a) sessions," the military judge may hear witnesses, take other evidence, and hear arguments, just as a civilian judge would during "motion hearings" in a civilian case. These sessions and most other proceedings of courts-martial are open to the public. As in civilian cases, Article 39(a) sessions take place outside the presence of the "court-martial members" who serve as the jury in military cases.

**Arraignment**. One of the first "Article 39(a) sessions" in a military case is typically "arraignment." Just as in civilian cases, the accused servicemember is informed of the charges against him and offered an opportunity to make a plea (i.e., "guilty" or "not guilty"). If the servicemember intends to plead guilty, before a formal plea may be accepted the military judge must ensure that the servicemember understands what he is doing and is acting voluntarily. This is called a "providency inquiry." Civilian judges have the same requirement, although the military inquiry is typically more extensive and fact-specific regarding the offenses.

**The Court-Member Panel**. Similar to civilian juries, court-martial members are officers or enlisted persons from the same community or command (“jury of peers”) as the servicemember on trial. In civilian communities, serving on a jury is a duty of citizenship, and local court officials will "summon" citizens to serve as jurors. In the military, the commander assigns members to serve as jurors, and that becomes their primary military duty.

**Voir Dire and Challenges**. Just as with civilian jurors, court-martial members must be impartial and may make no decisions about a case until the military judge directs them to begin deliberations. Each side -- prosecution and defense -- gets a chance to ask the court-martial members questions to ensure that members are impartial. If a court-martial member's impartiality is brought into question, or if it is otherwise inappropriate for that member to serve on the court-martial, the military judge will dismiss him or her, as would a civilian judge. As is done in civilian courts, the prosecution or defense may also remove a court-martial member "peremptorily," meaning without a stated reason. In military practice, both the prosecution and defense are afforded one peremptory challenge. Also, like a civilian defendant, except in a capital case, a servicemember on trial may decide to have the judge decide his guilt or innocence, rather than court-martial members.

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**Trial on the Merits.** Once the court-martial members are selected, the case is ready to proceed "on the merits," that is, evidence will be presented about the guilt or innocence of the servicemember. As with any civilian case, the military prosecutor (called a "trial counsel") presents evidence on the charges. The servicemember on trial (called "the accused") may confront this evidence and cross-examine any witnesses. The servicemember may also present evidence and, through the court-martial, compel witnesses to appear.

**Rules Of Evidence.** What evidence is admissible in a court-martial is spelled out in the Military Rules of Evidence (MRE). As required by the UCMJ, these rules are closely patterned after the Federal Rules of Evidence used in United States District Courts for civilian cases.

**Defense Counsel.** In all special and general court-martial cases, a military attorney, called a "defense counsel," represents the servicemember on trial. [Military attorneys are also known as "judge advocates."] This attorney is assigned free of charge to the servicemember. The servicemember may also request a specific military attorney to join his defense team and, if available, that attorney will also be assigned free of charge to the defense team. Finally, at his own expense, the servicemember may hire a civilian attorney (even so, the military attorneys remain assigned to the case).

**Closing Arguments and Burden Of Proof.** Mirroring the practice in civilian courts, once both prosecution and defense counsel have presented their evidence, they get to make "closing arguments." Following closing arguments, the military judge will instruct the court-martial members about the law and direct them to begin deliberations. Because all servicemembers are presumed to be innocent, the court-martial members must be satisfied that the evidence established the servicemember's guilt "beyond a reasonable doubt."

**Deliberations and Voting.** One departure from civilian cases arises in the way the court-martial members vote. Most civilian court systems require the jurors to vote unanimously to convict. Because of the need for expeditious resolution of cases, Congress directed that a vote of "two-thirds" of the court-martial members is needed before the accused may be found guilty of any offense charged. If the vote is less than a two-thirds to convict, a verdict of "not guilty" is required. As such, the military does not experience "hung juries," as do civilian jurisdictions. However, death penalty cases require a unanimous verdict. Voting is done by secret, written ballot. Although court-martial members are usually of different ranks, they are not permitted to use superiority of rank to influence or pressure another member.

**Sentencing Proceeding.** If the servicemember is convicted of any offense, the case proceeds immediately to the issue of sentencing. This is different from most civilian courts, where sentencing is delayed several weeks pending the completion of a presentencing report. In military cases, there is no presentencing report. Rather the prosecution and defense are expected to be prepared for this possibility and be ready to present evidence about the convicted servicemember and the offense.

Sentencing evidence includes the impact of the crime (both on a victim, and on a unit's discipline and morale), the servicemember's duty performance history, and extenuating or mitigating circumstances. Both the prosecution and defense may call witnesses. The accused may also testify, give an unsworn statement for consideration. At the conclusion of the presentation of evidence, the prosecution and defense meet with the military judge regarding sentencing instructions to be given in court-member cases and then counsel present arguments about what the appropriate sentence should be.

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If a servicemember elected to waive his right to have court-martial members participate in his case, then the military judge will impose the sentence. However, if court-martial members found the servicemember guilty, they will also decide the sentence. This is another difference from the typical practice in civilian courts where a judge imposes the sentence in almost all cases. The only exceptions in both civilian and military courts are death penalty cases that require the participation of a jury.

Once the prosecution and defense finish presenting all their evidence and arguments on sentencing, the military judge or court-martial members will deliberate on the appropriate penalty. The types of sentences that can be imposed differ significantly from those imposed in civilian cases. In civilian courts, typical sentences may include death, confinement, or fines. A civilian judge may also impose probation, and he may require the completion of community service and mandatory treatment or education programs as a condition of probation. Although probation is not possible in military cases because a court-martial is a temporary entity created to resolve a particular case and adjourned when the sentence is imposed, sentences may subsequently be suspended by the court-martial convening authority.

Military sentences can include many different punishments such as death, confinement, separation from the service, reduction in pay grade, forfeiture of pay and allowances, fine, and reprimand. The maximum limits on punishments for each offense are set by Congress in the Uniform Code of Military Justice and defined in more detail by the President in the Manual for Courts-Martial. Unlike civilian courts, where an individual will receive a sentence on each count for which he is convicted (for example, if convicted of two counts of burglary, a civilian judge might sentence an individual to three years in prison for each count to run consecutively -- or a total of six years in prison). In the military, a court-martial imposes one overall sentence, no matter how many "counts" (termed "specifications") there are.

The overall sentence limits are the sum of the limits on each "count" charged. For example, a servicemember charged with burglary before a general court-martial would face a maximum possible sentence of 5 years of confinement, forfeiture of all pay and allowances and dishonorable discharge. If charged and convicted of two counts of burglary, the servicemember could be sentenced to up to 10 years of confinement. [It is not legally permissible in a single case to adjudge forfeitures all pay and allowances twice, or to receive two dishonorable discharges. Only the potential confinement for each convicted offense is accumulated.] Also, there are no "sentencing guidelines" or minimum sentence requirements for military courts.

When deliberating about a sentence, any court-martial member may propose a certain sentence. The court-martial members will then vote secretly on each proposal. Notably, a sentence of death must be unanimous; a sentence for life imprisonment or confinement for more than ten years jail requires agreement by three-fourths vote; and a sentence for anything less requires a two-thirds agreement by the court-martial members. Once the sentence is announced, the court-martial is adjourned and the post-trial review processes begin.