

# **ANNEX A:**

# **MILITARY JUSTICE**



## ANNEX A

### SUBJ: MILITARY JUSTICE ANNEX

**1. Purpose.** To provide an overview on the practice of military justice in the Marine Corps as part of the Marine Corps Legal Services Strategic Action Plan, 2010-2015.

**2. Background.** The practice of military justice is the historical reason for the profession of judge advocates in the armed services, and, in the Marine Corps, it has traditionally been a primary focus of our legal community. The military justice system is driven by the commander and based on a complete set of criminal laws for service members in the Uniform Code of Military Justice (UCMJ). The UCMJ includes many crimes punished under civilian law, such as murder, rape, drug use, larceny and drunk driving. In addition, the UCMJ allows a commander to punish strictly military crimes, such as desertion, absence without leave, disrespect towards superiors, failure to obey orders, dereliction of duty, drunk on duty, and malingering. It includes a general article applicable to officers (conduct unbecoming) and a general article for offenses (both enumerated and unenumerated) prejudicial to good order and discipline or service discrediting, respectively. The UCMJ includes provisions punishing misbehavior before the enemy, improper use of countersign, misbehavior of a sentinel, misconduct as a prisoner, aiding the enemy, spying, and espionage.

### **3. Discussion**

#### **a. History**

(1) Modern military justice practice began with the enactment of the UCMJ in 1950 (effective 1951), which modernized the practice of criminal law in all Services. The Military Justice Act of 1968 and the Manual for Courts-Martial (MCM) of 1969 further modernized the practice of criminal law in the military by, among other things, establishing an independent trial judiciary and ensuring a defense counsel was appointed to all members of the armed forces facing trial by special or general court-martial. Since that time, the MCM has been continuously updated to keep pace with the federal practice of criminal law.<sup>1</sup>

(2) Historically, the Marine Corps has tried more courts-martial than the other Services. In addition, due to the general preference to ensure all Marine judge advocates are grounded in military justice, judge advocates in their first tours typically litigated a significant number of courts-martial cases. This provided our

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<sup>1</sup> The Joint Service Committee on Military Justice has the responsibility of reviewing and proposing changes to the Manual for Courts-Martial per Article 146, UCMJ and DOD Directive 5500.17 (May 3, 2003). In addition, Military Rule of Evidence (MRE) 1102 ensures that amendments to the Federal Rules of Evidence (FRE) apply to the MRE within 18 months of the effective date of the FRE amendments "unless the President takes action to the contrary." Manual for Courts-Martial, United States, Mil. R. Evid. 1102 (2008) [hereinafter MCM].

judge advocates basic competence in the practice of military justice and placed them in good stead for follow-on tours as supervisors of military justice offices.<sup>2</sup>

## **b. Current Practice**

(1) In the Marine Corps, military justice services are provided by Legal Service Support Sections (LSSS), Staff Judge Advocate (SJA) offices, and law centers and include both prosecution and defense services. The LSSSs and law centers are responsible for the handling of all aspects of a military justice case from the time a request for legal services is submitted by the command through post-trial processing and forwarding, if necessary, to Navy Marine Corps Appellate Review Activity (NAMARA) for appellate review. The officer-in-charge, LSSS or the Director of the law center is the senior supervisory attorney for the trial counsel in their respective offices. Each LSSS or law center serves multiple commanders (courts-martial convening authorities) and SJAs aboard their respective installations or regions.<sup>3</sup>

(2) Commanders seeking to have charges preferred against individual Marines or Sailors send a request for legal services (RLS) to the LSSS or law center,<sup>4</sup> initiating the military justice process. The military justice section is responsible for the prosecution of the case. In addition, trial counsel (prosecutors) assess the evidence and advise their supervisors (the senior trial counsel or military justice officer) of the prosecutorial merits of the case. The commanding officer is advised by the trial counsel or military justice officer, often in conjunction with the SJA.

(3) Upon preferral of charges or placement in pretrial confinement, an accused Marine or Sailor at a special or general court-martial case will be assigned a detailed defense counsel.<sup>5</sup> Marine defense offices<sup>6</sup> also provide nonjudicial punishment (NJP) counseling, Article 138 complaint advice and representation for servicemembers at adversarial proceedings such as administrative discharge board hearings.

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<sup>2</sup> Prior to the current conflicts, it was common for Marine judge advocates to have several years of military justice experience and extensive courts-martial experience before being placed in a military justice supervisory billet.

<sup>3</sup> Typically, the Director of a law center also acts as a staff judge advocate for an installation commander. However, the OICs of the three LSSSs do not act as SJAs.

<sup>4</sup> There are three LSSSs in the Marine Corps, one attached to each Marine Logistics Group. Law centers are at all major installations where there is no LSSS.

<sup>5</sup> Per Military Rule of Evidence 305(d), an accused or person suspected of an offense is entitled to consult with defense counsel and to have them present at the interrogation if evidence of a testimonial nature is sought during questioning.

<sup>6</sup> The Marine defense community is managed by a separate supervisory chain for fitness reports and attorney oversight. All defense counsel in the Marine Corps fall under the professional supervisory authority of the Chief Defense Counsel of the Marine Corps (CDC). In turn, each region in the Marine Corps (E. Coast, W. Coast and Pacific) has a regional defense counsel (RDC), who acts as the supervisory attorney and fitness report reviewing officer, for the defense counsel in their region. The senior defense counsel at an LSSS or law center provides professional supervisory oversight of junior defense counsel. See U.S. MARINE CORPS, ORDER P5800.16A, MARINE CORPS MANUAL FOR LEGAL ADMINISTRATION (31 Aug 1999) [hereinafter LEGADMINMAN].

(4) The commander has several options to dispose of the case after the prefferal of charges.<sup>7</sup> If a case is referred to a special court-martial or an article 32 followed by a general court-martial, the LSSS, SJA office or law center responsible for the case, will handle the case through the pre-trial, trial, and post-trial process. If the case is handled at a lower forum, such as summary court-martial, NJP or adverse administrative action, the LSSS, SJA office or law center responsible also continues to provide administrative support and legal advice until the completion of the process.

(5) The post-trial review process before forwarding to NAMARA requires a substantial amount of work in a relatively short period of time (120 days from date of trial to the convening authority's initial action).<sup>8</sup> After trial, a transcript of the trial proceedings, the ROT (ROT) is prepared by a court reporter in the court-reporter section. It is provided to both the trial counsel and the defense counsel for correction, and is then authenticated (certified as accurate) by the military judge. The severity of the adjudged sentence determines whether a verbatim or summarized ROT is required. After a general or special court-martial, a verbatim transcript is required when any part of the sentence adjudged exceeds six months confinement, forfeiture of pay greater than two-thirds pay per month or any forfeiture of pay for more than six months or other punishments that may be adjudged by a special court-martial or when a punitive discharge has been adjudged.<sup>9</sup> Other sentences require only a summarized record.<sup>10</sup> Once the ROT is authenticated, the review officer at the LSSS, SJA office or law center takes the record through the post-trial review process, preparing the SJA recommendation for the SJA and the convening authority's action for the convening authority. Upon completion, the record is forwarded to the appropriate authority for appellate review.

(6) The convening authority performs the initial review of the case and takes action on the sentence.<sup>11</sup> Prior to taking action, the convening authority must consider the results of trial, the recommendation of the Staff Judge Advocate, and any matters submitted by the defense counsel and the accused. If there is a finding of guilt and the adjudged sentence falls outside the purview of automatic review by

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<sup>7</sup> These include taking no action, initiating administrative action, taking nonjudicial punishment per Article 15, UCMJ, or sending the case to a court-martial. If the commander decides that the offense is sufficiently serious to warrant trial by court-martial, the commander requests that charges be preferred and referred to a summary or special court-martial or sent to an Article 32 investigation.

<sup>8</sup> U.S. v. Moreno, 63 M.J. 129 (2006).

<sup>9</sup> See UCMJ Art. 19 (2008); MCM, *supra* note 1, R.C.M. 1103(b)(2)(B).

<sup>10</sup> See MCM, *supra* note 1, R.C.M. 1103 (b)(2)(C).

<sup>11</sup> In taking action, the convening authority either approves the findings and sentence or may change either or both of them. He or she may dismiss any offense or change the finding of guilty of any offense to one of a lesser-included offense. The convening authority may disapprove the findings of guilty or all or any part of a sentence. However, court-martial findings of "not guilty" are final when adjudged and may not be later changed by the convening authority. He or she may reduce or suspend a sentence or change the punishment to one of a different nature so long as the severity of the punishment is not increased. The convening authority may approve a sentence only if he or she determines that it is warranted by the offense(s) and appropriate for the accused servicemember. For example, the convening authority may reduce or eliminate any confinement, may change a dishonorable discharge to a bad-conduct discharge, and may reduce a sentence of death to imprisonment. See MCM, *supra* note 1, R.C.M. 1101-1114.

the appellate court or Judge Advocate General, the review officer shall provide a review to determine whether the court-martial met the jurisdictional and sentencing requirements of the UCMJ.<sup>12</sup> Following the convening authority's action, the case will be forwarded by the review officer to NAMARA for the appropriate level of review. If there is an approved sentence that includes a sentence of death, a punitive discharge (dishonorable discharge or bad conduct discharge for enlisted personnel; dismissal for officers), or confinement for one year or more, the Navy-Marine Corps Court of Criminal Appeals (NMCCA) will automatically review the case.<sup>13</sup> In any general court-martial which does not trigger review by the NMCCA under Article 66, UCMJ and in which there is a finding of guilt and the accused does not waive his right to appellate review, the Navy Judge Advocate General is required to examine the ROT for legal errors and possible referral to the appellate courts.<sup>14</sup> Additionally, upon timely application<sup>15</sup> of an accused whose case does not trigger automatic review by the Judge Advocate General or by the NMCCA, the Judge Advocate General may modify or set aside the findings or sentence on the ground of newly discovered evidence, lack of jurisdiction, fraud on the court, error prejudicial to the substantial rights of the accused or the appropriateness of the sentence.

### **c. Current Training, Education, and Resources**

(1) All Marine judge advocates attend the Naval Justice School's (NJS) Basic Lawyer Course (BLC) after completion of The Basic School. Upon successful completion of the BLC at NJS, Marine judge advocates are certified to practice law as a judge advocate, including specifically, as trial and defense counsel. The BLC is designed to meet the requirements for basic judge advocate qualification and certification as set forth in the UCMJ. Marine judge advocates are provided with continuing training and access to resources for the practice of military justice from the time they leave NJS throughout their trial careers. These include providing mentoring and training at local military justice offices, providing opportunities for continuing legal education courses, and providing advice and support at local and higher echelons of command.

(2) For enlisted Marines in the legal community, during Recruit Training, potential legal service specialists (MOS 4421) are screened based on test scores, general aptitude, and disciplinary history. Upon completion of Recruit Training and Marine Corps Combat Training, 4421s attend NJS for their formal legal training (Legal Service Specialist Course). This course of instruction lasts 11 weeks and trains Legal Marines in military justice, post-trial review, legal administration, and legal assistance issues and procedures. Upon graduation, new 4421s are assigned to fulfill a 36-month tour of duty. Additionally, each fiscal year, two speech recognition courses are held at NJS to train new Marine court reporters. Each

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<sup>12</sup> See UCMJ Art. 64 (2008).

<sup>13</sup> See UCMJ Art. 66 (2008).

<sup>14</sup> See UCMJ Art. 69(a) (2008).

<sup>15</sup> The application must be filed on or before the last day of the two-year period beginning on the date the sentence is approved, unless the accused establishes good cause for failing to file within this period. See UCMJ Art. 69(b) (2008).

course has 10 allocations and provides training over 11 weeks. The instruction for the course covers exhibit handling and preparation, grammar, operation of computer aided transcription systems, courts-martial proceedings, closed mask capture of proceedings and the preparation of verbatim and summarized ROTs. Upon completion of this course the Marine is sworn as a court reporter and an officer of the court. As with Marine judge advocates, legal service specialists and court reporters are provided with local training and mentoring, opportunities for follow-on training, and resources and support throughout their careers.

**d. Current Initiatives.** In recent years, the practice of military justice has become more complex, necessitating greater proficiency on the part of judge advocates and legal service specialists. The historical focus by our legal community on military justice has served the Marine Corps well; however, operational requirements since 2002 have created a demand on legal services that compete with military justice requirements. Simultaneously, from within the practice of military justice the pressures of increasingly complex courts-martial, an increasing number of high profile cases, and events highlighting post-trial processing delays have demonstrated a need for a reassessment of the delivery of military justice services. The initiatives described below are, in part, a result of that reassessment, which is in progress now in our legal community and the Military Justice Branch (JAM), Judge Advocate Division (JAD).

(1) Case Management System (CMS). The Staff Judge Advocate to the Commandant of the Marine Corps (SJA to CMC) mandated use of the CMS per MARADMIN 062/10 of 1 February 2010. The implementation of a common database, the CMS, is an initiative to improve the administrative efficiency and procedural regularity of military justice services. The CMS is a Lotus Notes based, web-enabled database. The CMS tracks court-martial cases from receipt of a RLS through to the promulgating order and submission of the ROT to NAMARA. CMS will eventually provide a standardized database for administrative separations and investigations. The new CMS enhances the ability of local supervisors to oversee their case loads for improved day to day management, provides a common operating picture for all military justice practitioners, provides a data mining tool, decreasing manpower dedicated to responding to requests for information (RFI), improves military justice data capture, increases the visibility of a case across its life from the local LSSS or law center to the cognizant SJA and HQMC, allows NAMARA to track Marine military justice cases from date of trial to mailing of the ROT to ensure visibility of post-trial cases, provides up to date trends for commanders and legal leadership to identify issues and improves ease of data entry and report creation for military justice clerks.

(2) Share Point and Public Websites. A new JAM website was launched in December 2009 to provide a single location for military justice supervisors and prosecutors for military law updates, forms, pleadings, motions, advice, links to various military law websites and a legal news and blog forum. The new website is a restricted Share Point site requiring judge advocates to register and use a common access card (CAC) to access. This allows JAM to provide forms, sample pleadings and motions directly to military justice practitioners and allows judge advocates in

the field to upload documents and comments. The Chief Defense Counsel launched a similar Share Point website in 2008, which has been successful in providing standardized resources, assistance and advice for the Marine defense bar. In addition, JAM continues to host a publicly available webpage on the SJA to CMC website that includes information regarding the military justice mission, the history of military justice, the Marine Corps Victim Witness Assistance Program (VWAP) and Sexual Assault Prevention and Response Program (SAPR), officer discipline and promotion matters, and points of contact at JAM.

(3) Standardization, SOP's and forms. The practice of military justice across the Marine Corps should be consistent from one duty station to the next. Military justice standard operating procedures (SOP), which will cover the details for the administration of military justice, review, and defense offices, are currently being collected and maintained centrally by JAM. Likewise, commonly used forms should be standard throughout the community. In that regard, a standardized post-trial SJA review letter and other forms have been posted on the SJA to CMC website and other documents are under review for standardization: 1) Military justice office SOPs; 2) SJA military justice forms, such as Article 34, UCMJ review letters and convening authority's actions; 3) motions and other trial pleadings, and 4) prosecution correspondence, such as discovery and witness requests/responses, letters accompanying subpoenas and travel orders.

(4) Inspections. To ensure standardization and guarantee the health of the military justice system, a standardized Article 6 inspection process and a commander driven, Inspector General Legal Service inspection process have been initiated. The IG inspections will rely upon the Marine Corps IG Automated Inspection Reporting System (AIRS) checklist, developed by JAD for military justice litigation, court reporter sections, and post-trial review, among other practice areas. The IG inspection process will provide local commanders with a means of measuring their military justice support, while annual Article 6 inspections provide an opportunity to reinforce the IG inspection process.

(5) Coded military justice billets. JAD requested in June of 2009 that Deputy Commandant, Manpower and Reserve Affairs (DC M&RA) code 37 billets for military justice specialization. These billets are supervisory and must be filled by military justice experts with an LL.M in criminal law or a proven history of military justice experience and expertise.

(6) Increase structure at LSSSs. JAD also requested in March of 2010 that DC M&RA increase the number of judge advocates at the LSSSs aboard Camp Lejeune and Camp Pendleton by six.<sup>16</sup> If granted, the request for additional manpower at the LSSSs would relieve some of the strain upon the military justice mission that has historically occurred when the LSSSs have deployed by ensuring enough personnel are present to handle the rear echelon case load.

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<sup>16</sup> These two LSSSs have borne the majority of the deployment quotas for lawyers and are generally the busiest military justice offices in the Marine Corps.

(7) Increased availability of military justice LL.Ms. JAD also has an initiative underway to increase the number of military justice LL.Ms obtained by Marine judge advocates at The (Army) Judge Advocate General's Legal Center and School (TJAGLCS) each year, which will increase the number of military justice experts in the judge advocate community. JAD has historically sent 8-10 Marines to the TJAGLCS LL.M program<sup>17</sup> each year. SJA to CMC has asked TJAGLCS to increase that number to 15 Marine students per year.

(8) Trial Counsel Assistance Program (TCAP). JAD has also initiated a Marine Corps TCAP<sup>18</sup> headed by a field grade military justice expert, modeled after the Army JAG Corps TCAP. This initiative also contemplates augmentation by three regional trial counsel<sup>19</sup> field grade military justice litigation experts and a civilian sexual assault litigation expert. The TCAP personnel at JAM will develop and provide training, litigation resources and on-call advice and mentoring for prosecutors across the Marine Corps. The regional trial counsel will provide local training, mentoring, advice and be available to try complex or serious, high profile cases upon demand.

(9) Civilian complex litigation and sexual assault expert. Based in part on the need to prevent and respond to sexual assault, JAD has proposed the hiring of a civilian complex litigation and sexual assault expert. The billet would provide another resource for counsel during complex litigation, including sexual assault cases, and serve as a force multiplier to the TCAP.

(10) Revitalize the USMC Victim Witness Assistance Program. After a review of VWAP around the Marine Corps in 2009, SJA to CMC determined it was necessary to renew our commitment to providing a professional, accessible and visible framework for the delivery of services and support to victims and witnesses of crime. In that regard, JAM embarked upon a mission to revitalize our base VWAPs through training, resources and leadership. As announced in MARADMIN 063/10, the SJA to CMC sponsored the first ever USMC VWAP Training Conference, hosted by JAM and attended by VWAP representatives from every Marine Installation in June 2010. Upon conclusion of the conference, the base Victim Witness Liaison Officers agreed to an ambitious plan to improve their programs within the immediate future. Additionally, JAM secured funding from the Department of Justice (DOJ) to provide training for Marine VWAP personnel around the Marine Corps to attend training provided by the DOJ's Office for Victims of Crime.

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<sup>17</sup> The Army Judge Advocate General's Legal Center and School (TJAGLCS) houses the only military law LL.M program. Students are typically 0-4s and, for the Marine Corps, are selected by a competitive board process.

<sup>18</sup> JAM stood up the TCAP, run by the current Deputy Branch Head, JAM and a Captain. The program includes a secure website (SharePoint) for government counsel in the Marine Corps, which features: Real-time (Blog format) military justice updates posted as issues arise, JAM Updates newsletters and Code 20 News-mailers, a Pleadings and Motions Bank for trial counsel, sample forms and correspondence, and updated directives and military justice regulations.

<sup>19</sup> The defense community is already supported by three regional defense counsel (RDC). The RDC litigate cases, provide leadership, training and mentoring for the local defense bar and write fitness reports for the defense counsel in their region in order to maintain an independent defense bar.

(11) Electronic Records of Trial. Another initiative that may provide substantial improvements to the post-trial mission, in particular, is the use of electronic Records of Trial (e-ROT) along with the CMS or a follow-on common database. The use of e-ROT has the potential to revolutionize the speed of post-trial processing. JAD envisions implementing e-ROT as soon as possible, but must have a database that can support the data and must obtain the permission of the NMCCA to submit electronically certified records of trial.<sup>20</sup>

(12) Consolidation and Regionalization of Post-Trial Processes. In order to improve the administrative processes, work flow and management of our LSSS and law centers, JAD is studying the post-trial processing mission. One possible improvement to our work flow in the area of post-trial processing is the realignment of the structure of the review offices in each region of the Marine Corps. By regionalizing review services, the Marine Corps may gain significant efficiencies by consolidating resources and know-how into one regional review shop on the East and West Coasts and in the Pacific. This proposal would also free manpower to devote to other missions such as trial litigation.

#### **e. Goals and Strategic Vision**

In the near term, the Marine legal community will standardize to the extent practicable the practice of military justice, provide improved resources for the increasingly challenging litigation mission and focus efforts on the improvement of the post-trial review process to ensure a fair and expeditious appeals process for criminal cases in the Marine Corps. During the next five years, the Marine legal community will continue to improve and standardize the practice of military justice and explore how to best harness technology and train, resource and equip the military justice mission.

**4. Conclusion.** The mission of providing military justice services is a core, statutory requirement for Marine judge advocates. The Marine legal community is committed to professional excellence in the practice of law, whether representing the government or zealously defending the rights of the accused. From the preferral of charges to the appellate courts, it is essential that our efforts sustain the impartial, timely and superior execution of military justice. Accordingly, we must elevate our practice to ensure that justice remains the cornerstone of good order and discipline in the Marine Corps.

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<sup>20</sup> e-ROT are authorized by Executive Order (EO) 13468 of 24 July 2008, which became effective 23 August 2008 and amended R.C.M. 1104 (a)(1) to allow an electronic signature to authenticate “an electronic record of trial” and service of an authenticated electronic record of trial with a means to view it as satisfying the service requirements upon the accused and defense. Although the regulation on point, paragraph 0153(b) of JAGINST 5800.7E, Manual of the Judge Advocate General (JAGMAN), does not seem to contemplate electronic records of trial, it does not prohibit the use of e-ROT. Moreover, paragraph 0153(b) of the JAGMAN was drafted prior to EO 13468 and could be easily amended to allow for use of e-ROT. A pilot program using small e-ROT was made at the NMCCA and resulted in an average savings of “four days mailing time and approximately \$56.00 per record.” Considering that this involved only small ROTs and took into account the savings of only the last leg of the post-trial process from the field, the overall savings per record of trial, if used throughout the post-trial life of a case, could be considerably larger per record.

## **5. Resources**

- a. 10 U.S.C. §§ 801-941 (Uniform Code of Military Justice)
- b. U.S. Marine Corps, Order P5800.16A, Marine Corps Manual for Legal Administration (31 Aug. 1999) (LEGADMINMAN)
- c. Message, 012130Z Feb 10, Judge Advocate Division, Headquarters Marine Corps, subject: Implementation of Case Management System for Courts-Martial (MARADMIN 062/10)
- d. JAGINST 5800.7E, Manual of the Judge Advocate General (20 June 2007)