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Three types of court martial

To be accused of a crime is a terrifying ordeal. To be accused of a crime in the military, however, can be even more traumatic for people because it is such a unique criminal system. While most people have a general understanding of the civilian criminal justice system, the unique nature of the military’s approach can be very confusing. A criminal trial in the military is known as a Court-Martial. While many of the criminal allegations addressed in a Court-Martial have similar charges in the civilian system, the Court-Martial process is extremely unique and differs in many significant aspects from a civilian criminal trial. For that reason, any attorney representing a military member at a Court-Martial should have specific, military experience. At JAG Defense, our Military Attorneys have litigated hundreds of Courts-Martial: as prosecutors, defense counsel, and even as military judges. We have done so with outstanding success, and we encourage you to review our Representative Cases. Your future – to include your reputation, livelihood and freedom – will depend upon how effectively your lawyer can represent you. If you have been notified that you are pending a Court-Martial, please contact JAG Defense for a consultation about how one of our experienced Attorneys can help you with your case. Court-Martial Overview Courts-martial are governed by a variety of rules including, but not limited to: the Uniform Code of Military Justice (UCMJ); the Rules for Courts-Martial (RCM); the Military Rules of Evidence (MRE); and a number of service-specific regulations and other administrative guidance such as service/local Rules of Court. All services employ trial by Court-Martial to address criminal activity by service members. There are three types of Court-Martial: Summary (SCM), Special (SPCM), and General (GCM). Summary Court-Martial. The SCM is the lowest level Court-Martial in the military justice system. The SCM is ordinarily used to dispose of relatively minor offenses where nonjudicial punishment (Article 15/Captain’s Mast) is not considered severe enough. The SCM is composed of one officer who acts as judge, prosecutor, and defense counsel; he or she is charged with impartially inquiring into both sides of the matter and ensuring that the interests of both the Government and the member are safeguarded and that justice is done. A military defense counsel is typically not authorized to represent the service member in a summary Court-Martial, but service regulations differ on this point. A civilian defense counsel may represent the member at the member’s expense, if the appearance will not unreasonably delay the proceedings and if military exigencies do not preclude it. The service member does not have to accept trial by SCM. He or she may decline to be tried by SCM. However, the command does have the option to convene a SPCM or GCM, addressed below, if the SCM is declined. At the SCM, the member has the right to cross examine any witnesses, call witnesses and produce evidence, testify under oath in the findings (guilty/not guilty) phase, remain silent; and raise motions. If convicted, the member may testify under oath; make an unsworn statement; remain silent; and/or present matters in extenuation and mitigation. There are also a variety of post-trial procedures that apply to the SCM. The maximum punishment that may be imposed by SCM follows: For E-5 and above: Reduction of one pay grade Forfeiture of two-thirds pay for one month Restriction for sixty days For E-4 and below: Reduction to E-1 Forfeiture of two-thirds pay for one month Confinement for thirty days or hard labor without confinement for forty-five days or restriction for sixty days The prevalence of SCMs is also service-specific. Some services tend to move directly from the Article 15 disposition realm, immediately to the SPCM. Other services tend to employ the SCM more frequently as an efficient way to dispose of cases more serious than those calling for an Article 15, but not serious enough for a SPCM. Special Court-Martial. The SPCM is the intermediate level of Court-Martial in the military. The jurisdictional maximum imposable punishment for this court is reduction in grade to E-1; forfeiture of two-thirds pay per month for a period of twelve months; confinement for a period of twelve months; imposition of a bad conduct discharge; and a fine. The amount of the fine may not exceed the total forfeitures which could be imposed; nor can the combination of a fine and forfeiture exceed the total amount of permissible forfeitures. Unless the service member elects trial by military judge alone, the jurisdictional number of court members (jury) is four (4) officer members, to include, at the election of the enlisted accused, at least one-third enlisted members. This “forum selection” is discussed below. General Court-Martial. The GCM is the most serious type of Court-Martial. The jurisdictional maximum imposable punishment for this court is reduction to the grade of E-1 (officers cannot be reduced); forfeiture of all pay and allowances; confinement for life without eligibility for parole; imposition of a dishonorable discharge (dismissal for officers); death (if capital); and a fine in an unlimited amount. The maximum imposable punishment in any given trial for the GCM is determined by the charged offenses; most offenses do not include death as an option, and most offenses provide for a confinement cap well below life. Unless the service member elects trial by military judge alone, the jurisdictional number of court members is eight (8) officer members, to include, at the election of an enlisted accused, at least one-third enlisted members. The Court-Martial Process – Preliminary The Court-Martial process typically begins at the conclusion of a law enforcement investigation. The report of investigation is provided to the member’s chain of command. In consultation with the local JAG office, the commander determines the proper disposition level for the case. Of course, the commander will have a variety of options besides trial by Court-Martial, to include nonjudicial punishment action (Article 15, Captain’s Mast), administrative discharge action, or other lower-level adverse administrative action. (See other Practice Areas on this site). If the commander determines Court-Martial action is appropriate, he or she will “prefer” charges against the member. From this point on in the process, the member is known as “the accused.” The preferal is no more than the commander’s statement that he or she believes the charges to be true, and a formal notification to the accused that he or she is now under charges and the Court-Martial process has begun. If the commander has determined that the case should proceed to SPCM, the Court-Martial can quickly be convened and the case set for trial. A Court-Martial is “convened” in the military when a designated senior officer (often O-6 or above), the “Convening Authority” (CA) directs that a Court-Martial take place and appoints court members to the case from within his or her command. Members from outside the command may be appointed with the concurrence of the commander concerned. Service practices differ a bit here. Some services have their CA appoint new members each time a Court-Martial is convened. Other services have their CA appoint court members to serve on all courts convened within a certain period of time; for example, six months. When the CA convenes a Court-Martial, he or she “refers” the charges to trial by Court-Martial. Upon notice of this referral action, the accused can be tried after a statutory respite of three days, although there is typically a longer period before the trial begins. The assigned military judge, or a superior judge, will review the schedules of all counsel and set a trial date. The Article 32 Hearing Process If the commander determines that the case should proceed to GCM, the process differs significantly. The preferal process is the same, but no case can proceed to trial by GCM without first holding a preliminary investigation under Article 32, UCMJ. This investigation is designed to protect service members from baseless charges. When required, an Article 32 investigation is conducted by an impartial Preliminary Hearing Officer (PHO) appointed by the a CA. The PHO is charged with making three (3) recommendations to the CA, whether there are reasonable grounds to believe an offense occurred and the accused committed it, whether the charges are in proper form; and the appropriate level of disposition for the case. An accused has a variety of rights at an Article 32 hearing. They are: Be informed of the charges under investigation; Be informed of the identity of the accuser; With very limited exceptions, be present throughout the taking of evidence; Be represented by counsel; Be informed of the witnesses and other evidence known to the IO; Be informed of the purpose of the investigation; Be informed of the right against self-incrimination; Cross examine witnesses who testify; Have witnesses produced if their appearance meets the applicable requirements; Have evidence within military control produced if certain requirements are met; Present anything in defense, extenuation, and mitigation; Make a statement in any form. When the PHO concludes the Article 32 investigation, he or she makes recommendations to the CA. Although the CA is not bound by the recommendations of the IO, he or she may adopt them in whole or in part. After the Article 32 investigation, the CA may refer the case to trial by GCM. Although the CA may dismiss the case altogether, or determine a lower disposition level is appropriate, the large majority of cases that go through an Article 32 hearing are referred to GCM. Upon notice of this referral action, the accused can be tried after a statutory respite of five days, although there is typically a longer period before the trial begins. As with the SPCM, the assigned military judge, or a superior judge, will review the schedules of all counsel and set a trial date. The Trial Process The trial begins with a session out of the presence of the court members. At the beginning of this session, the military judge asks the accused about his or her choices regarding various rights. The military judge will ask the accused by whom he or she wants to be represented and whether he or she wants to be tried by court members or by military judge sitting alone. Also during this session, the lawyers for each side may ask the judge to rule on certain points of law. Typical motions at this phase may involve the suppression of evidence due to an improper search or seizure, suppression of statements made by the accused due to a rights violation, and attempts to introduce or exclude evidence under the Military Rules of Evidence. After the military judge rules on any motions brought before the court, the accused enters his or her pleas in the case. If the accused pleads guilty, the military judge will question him or her to determine if the pleas are knowing and voluntary. If the judge determines the pleas are provident, or acceptable, the case proceeds to sentencing. If the accused pleads not guilty, and has elected trial by court members, the “findings” (guilty/not guilty) phase of the trial begins. The trial starts with opening statements by each side. These statements are the lawyers’ views of what the evidence will show. The Government then begins their case. The prosecutors in the military are referred to as “Trial Counsel.” Trial Counsel present their evidence and witnesses and the Defense has an opportunity to question all witnesses called by the Government. At the conclusion of the Government’s case, the Defense may present a case, or may remain silent and present no evidence. If the Defense puts on a case, all witnesses called by the Defense are subject to cross examination by the Trial Counsel, to include the accused if he or she testifies. After both sides have an opportunity to present possible rebuttal evidence, the military judge will close the court and have a session with the lawyers and the accused to determine what instructions he will provide the members. The judge is obligated to instruct the members on the law applicable in the case; sometimes there are are disagreements as to the appropriate instructions, and the judge will rule on these issues out of the presence of the court members. The members are then called back into the courtroom and the judge provides the substantive instructions to the members. The lawyers then make closing arguments. Closing arguments are more than just the lawyers’ recitation of the facts; these arguments are the lawyers’ opportunity to convince the judge or members that their respective cases are the more believable. After the arguments of the lawyers, the military judge provides the instructions on the applicable procedures for closed session deliberations, voting by the members, and announcing the findings. In the military, unlike the civilian community, an accused can be convicted if three-fourths of the members vote for conviction on any given offense – a unanimous verdict is not required. If the accused is convicted of an offense before the court, the case proceeds immediately to the sentencing phase. If the accused is acquitted – or found “Not Guilty” – of all charged offenses, the trial is over and the accused returns to duty. In the civilian community, there is often a period of time between a conviction and the sentencing phase of the trial. This respite allows for completion of such items as a sentencing report for the judge; it is also often undertaken before a judge without a jury and governed by state or federal sentencing guidelines. In the military, however, the sentencing phase of the trial follows immediately after the findings phase. The sentence case procedure mirrors the findings case procedure in that the Trial Counsel goes first. The Trial Counsel presents a number of mandatory items from the accused’s military record, and any other evidence directly relating to or resulting from the offenses of which the accused has been convicted. The Trial Counsel’s evidence is known as “matters in aggravation.” The Defense goes next, and presents matters in “extenuation and mitigation.” At the conclusion of the evidence, the judge again instructs the jury, the lawyers argue, and the jury deliberates. If the accused is sentenced to confinement, the confinement takes place immediately, with very limited exceptions. If the accused is sentenced to a reduction in rank or forfeitures, the effective dates of those portions of the sentence depend upon the service of the accused. If the accused is sentenced to a punitive discharge, the effective date is driven by the completion of post-trial processing and any appeals in the case. Your Important Trial Rights When a case proceeds to trial, an accused has a variety of rights. They include: To be represented by military (no cost) and civilian defense counsel (member’s expense); To raise motions regarding points of law in dispute; To be tried by court members (jury) or a military judge alone; To invoke the Military Rules of Evidence regarding admissibility of evidence; To rely on the Government’s burden to establish the charged offenses by legal and competent evidence beyond a reasonable doubt; To remain silent; To testify; To request the production of relevant witnesses and evidence; To have access to information available to the Government counsel through the “Discovery” process; and If convicted, to present matters in extenuation and mitigation. While all these rights are important, and are exercised most effectively with the assistance of a seasoned trial practitioner, some bear further explanation. The Right to Counsel. The right to counsel is the foundation for effectively and persuasively exercising all other rights available to an accused in a Court-Martial. An accused is entitled to be represented by detailed military defense counsel, free of charge. Different services make defense counsel assignment decisions based upon different criteria. Some services tend to place second-assignment JAGs or above in defense counsel billets, while other services may assign JAGs fresh out of law school. You should be sure to ask your detailed counsel about his or her level as experience as a lawyer, a defense counsel, and counsel in the type of case you are facing. In addition to your detailed counsel, you may ask for another military counsel to represent you. If the requested counsel is reasonably available (different service rules apply), he or she will be appointed to represent you also free of charge. If this second military counsel is appointed, however, you would no longer have the right to keep your originally detailed military counsel. You may ask your original counsel’s superiors to allow him or her to remain on the case, but hat request would not have to be granted; that is because you are entitled to only one military lawyer. If you asked for a specific military lawyer, you should again be very careful to question that person about his or her level f experience, especially in a case like the one you face. These may be hard or awkward questions to ask, but you should get past that and do so – your future depends upon it. In addition to military counsel, you may also be represented by a civilian counsel of your choosing, but you must pay for the civilian. If you are represented by a civilian, you can keep your military lawyer on the case to assist the civilian, or you can be represented alone by the civilian. It is usually not a good idea to dismiss your military lawyer, so think very carefully about that issue if it comes up. If you decide to hire a civilian, question that person too, extensively, about his or her experience. Ask them about such areas as prior military service, prior JAG experience, familiarity with military law, representative samples of cases they have tried, how many cases have been litigated, and their ability to dedicate sufficient time to your case. Right to Confront Witnesses. The right to confront witnesses means the right to cross examine witnesses. However, it means much more than simply standing up and asking the witness any questions that come to mind. The cross examination right, properly exercised, requires significant preparation, and a great deal of thought as to how the cross examination of each witness plays into the overall case strategy. It certainly requires interviewing each opposing witness prior to trial; sometimes on more than one occasion. Simply, it requires experience to be conducted effectively. Right to Select Forum. In a Court-Martial, an accused may be tried by either court-members or by military judge alone. If tried by military judge alone, the judge first determines whether the accused is guilty or not guilty of the charged offenses. If the judge finds the accused guilty of any charged offense, the judge also determines the sentence in the case. The accused may also be tried by court members. If the accused is enlisted, and he or she elects enlisted membership on the court, the Court-Martial panels must include at least one-third enlisted membership; however, typically no enlisted member will come from the accused’s unit, and no enlisted member will be junior to the accused. If the accused elects trial by members, the members must vote by secret written ballot to determine the guilt or innocence of the accused. If there is a conviction, the members again vote, by secret written ballot, to determine the sentence of the accused. In the military, with one limited exception, court members are only excused if it can be demonstrated that they cannot hear the case fairly and impartially. However, the lawyers do get a chance, as noted above, to question the court members in order to determine whether they are fair and impartial. Additionally, each side is permitted one challenge against a court member, which results in the excusal of the court member, without demonstrating partiality. This exercise, too, requires significant study of the background of the court members as set forth in their background data sheets supplied before trial, and application of experience to determine which court members are better suited to sit. For example, one may think it would be a good idea from a Defense perspective, to try and remove any women from a Court-Martial panel in a sexual assault case. This is not always the case; in fact, in some sexual assault cases, it is a good idea to try and keep women on the Court-Martial panel. Only years of experience puts the Defense in a position to make such calls. The Right to Testify. The right to testify is much more than an accused’s right to sit before the jury and tell his or her side of the story. Whether or not to testify is a decision made by the accused with the advice of his or her lawyer. However, an accused will never be in a position to make such a decision until he or she is fully prepared for the prospect of testifying. The military defense attorney should prepare the accused for trial testimony by actually taking an accused into the courtroom and conducting a mock examination – to include cross examination – with an accused. Only then can an accused make an informed judgment about whether or not to testify. In fact, only then can a military defense lawyer make an informed recommendation to an accused about whether or not to testify. This part of trial preparation, like all others, requires significant experience. Only the seasoned advocate is in the best position to make such crucial recommendations to an accused as his or her future hangs in the balance.

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