

“Though this be madness, yet there is method in it”:¹ A Practitioner’s Guide to Mental Responsibility and Competency to Stand Trial

Lieutenant Colonel Donna M. Wright
Formerly Professor and Vice-Chair, Criminal Law Department
The Judge Advocate General’s School, United States Army
Charlottesville, Virginia

Introduction

You are a defense counsel at a large Army installation and are detailed to represent Staff Sergeant (SSG) Johnson, a senior noncommissioned officer with over fifteen years of outstanding service. Your client is charged with several offenses, including assault on a commissioned officer, larceny of three compact discs from the post exchange, and communicating a threat to his brigade command sergeant major. You have just concluded your third meeting with SSG Johnson and are baffled by his demeanor, as well as the conduct giving rise to the charges. During your meetings, SSG Johnson either prattles on excitedly or lapses into sullen moods during which you get no response from him. You have talked to the chain-of-command, and the only helpful information came from the company first sergeant, who said that about six months ago SSG Johnson suddenly began acting erratically and having problems dealing with people. The first sergeant explained that he tried to talk to SSG Johnson several times about the situation but was ignored. After some time, the first sergeant decided that if SSG Johnson did not want help, he was on his own.

You are unsure how to proceed at this point; your experience up to this point is limited to three guilty pleas and one contested drug distribution case. You seek the sage advice of your senior defense counsel, Major Sugna² and proceed to lay out the facts. Major Sugna listens thoughtfully and then says, “Have you thought about requesting a sanity board?” You blink several times. Nonplused by your apparent ignorance of this court-martial procedure Major Sugna settles into his chair and says,

“Let me explain a few things that you need to know when you become concerned about a client’s mental condition.”

Questions about an accused’s mental condition generally arise during the course of court-martial proceedings in one of two ways. First, a soldier may not even be competent to stand trial at all. Second, even if an accused is deemed competent, a defense can be based on a lack of mental responsibility. Because of the special procedures associated with the litigation of these issues, it can be a difficult area.

A lack of mental responsibility is a complete defense to criminal culpability.³ Mental responsibility must be distinguished from mental competency or competency to stand trial.⁴ Mental responsibility refers to a person’s mental condition at the time an offense was committed and criminal responsibility for that offense.⁵ Competency to stand trial, on the other hand, deals with a soldier’s mental condition at the time of trial and his ability to assist in his own defense.⁶ Counsel must understand the difference, as well as recognize that one or both may arise during court-martial proceedings.

Competency to Stand Trial

Sometimes referred to as mental capacity, mental competency refers to the present ability of the accused to stand trial and to participate in and to understand the trial process. Convicting an incompetent person violates due process.⁷ The *Manual for Courts-Martial* provides that no person should be brought to trial if that person is presently suffering from a men-

1. WILLIAM SHAKESPEARE, HAMLET act 2, sc. 2.

2. Your discussion with Major Sugna is based on Professor James W. McElhaney’s popular litigation column in the ABA Journal. In the feature, Angus, a seasoned and wily advocate, typically describes various aspects of trial practice to an appreciative audience of young attorneys. See, e.g., James W. McElhaney, *Don’t Take the Bait*, A.B.A. J., June 1997, at 80.

3. UCMJ art. 50a (1994); MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 916(k)(1) (1995) [hereinafter MCM] (providing that “it is an affirmative defense . . . that, at the time of the commission of the acts constituting the offense, the accused, as a result of a severe mental disease or defect, was unable to appreciate the nature and quality or the wrongfulness of [the] acts”).

4. United States v. Lopez-Malave, 15 C.M.R. 341 (C.M.A. 1954) (holding that each of the two areas focuses on a different relevant time and presents a completely separate analytical question).

5. See *infra* notes 24-37 and accompanying text.

6. See *infra* notes 7-23 and accompanying text.

7. See *Drope v. Missouri*, 420 U.S. 162, 181-82 (1975); *Pate v. Robinson*, 383 U.S. 375, 385-86 (1966).

tal disease or defect that renders him mentally incompetent to understand the nature of the proceedings or to cooperate intelligently in his defense.⁸ Like mental responsibility, this standard was changed after Congress passed the Insanity Defense Reform Act in 1984.⁹

The test for competency has been described as whether the accused “has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding—and whether he has a rational as well as factual understanding of the proceedings against him.”¹⁰ Factors suggesting problems with competency could include whether the accused understands that: he could be confined if convicted, he might not see his family for an extended period of time, his military career could be terminated, he could be reduced in rank, or he may carry the stigma of a federal conviction. To cooperate in one’s defense, an accused need not deal with legal matters but should be able to assist with recounting facts, identifying witnesses, and similar matters.¹¹

Counsel who question an accused’s competency to stand trial should request a sanity board.¹² Based on the board’s results, the General Court-Martial Convening Authority (GCMCA) may decide that the accused is not competent. If so,

the GCMCA can transfer the accused to the custody of the Attorney General.¹³ Alternatively, the government may proceed to trial, placing the burden on the defense to make a motion for appropriate relief with the military judge.¹⁴ When an issue of competency is raised, the judge decides the issue as an interlocutory question of fact.¹⁵ The accused is presumed to be competent unless he can show by a preponderance of evidence that he is not competent.¹⁶

If the accused is found not competent to stand trial, the proceedings are suspended and the GCMCA will transfer the accused to the custody of the Attorney General.¹⁷ The judge may authorize a delay, which would be excluded from the speedy trial clock.¹⁸ Alternatively, the convening authority may withdraw or dismiss the charges.¹⁹

Once the accused is under the control of the Attorney General, federal law governs his commitment.²⁰ The accused may be confined for a reasonable period of time, not to exceed four months, if there is a substantial probability that he will become competent during that time.²¹ If the accused has improved at the end of the hospitalization period, the military will regain control of the individual.²² If he is still incompetent to stand

8. MCM, *supra* note 3, R.C.M. 909.

9. See *infra* note 31 and accompanying text. The 1986 amendments to the MCM adopted the federal standard for competency, found at 18 U.S.C. § 4241(d). Exec. Order No. 12,550, 51 C.F.R. 6497 (1986), reprinted as R.C.M. 909. The effective date of the new rule was 1 March 1986. *Id.* § 6. The old standard provided: “No person may be brought to trial by court-martial unless that person possesses sufficient mental capacity to understand the nature of the proceedings against that person and to conduct or [to] cooperate intelligently in the defense of the case.” MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 909 (1984) [hereinafter 1984 MANUAL]. The biggest change is the addition of a requirement for a mental disease or defect.

10. *United States v. Lilly*, 34 M.J. 670, 675-76 (A.C.M.R. 1992) (citation omitted). It should be noted that amnesia is not equivalent to a lack of capacity. See *United States v. Lee*, 22 M.J. 767 (A.F.C.M.R. 1986) (holding that an accused might not remember an offense but could analyze his culpability in light of what he knows about his character and likelihood of committing such a crime).

11. *Lee*, 22 M.J. at 769. The accused must have the requisite mental power and understand his situation to the extent necessary to decide whether to testify and otherwise to participate in his defense. *Id.*

12. See *infra* notes 38-68 and accompanying text. Once a sanity board is requested, the military judge must consider the sanity board report before ruling on competency to stand trial. *United States v. Collins*, 41 M.J. 610 (Army Ct. Crim. App. 1994). In *Collins*, the judge denied a request for a sanity board and, at the same court session, found the accused competent to stand trial. The Army Court of Criminal Appeals concluded that the judge erred in failing to order the sanity board before ruling on competency. *Id.* at 612. Whenever competency is in issue, a sanity board should be conducted before a competency ruling is made.

13. UCMJ art. 76b(a)(1) (1996). See also Joint Service Committee on Military Justice Report, *Analysis of the National Defense Authorization Act Fiscal Year 1996 Amendments to the Uniform Code of Military Justice*, ARMY LAW., Mar. 1996, at 145.

14. See MCM, *supra* note 3, R.C.M. 906(b)(14).

15. *Id.* R.C.M. 909(c)(1) discussion; *Short v. Chambers*, 33 M.J. 49 (C.M.A. 1991). *Accord* *United States v. Proctor*, 37 M.J. 330 (C.M.A. 1993), *cert. denied*, 114 S. Ct. (1994).

16. MCM, *supra* note 3, R.C.M. 909(b), (c)(2).

17. UCMJ art. 76b(a)(1) (1996). See also Joint Service Committee, *supra* note 13, at 145-46. The article discusses the provisions of the new legislation and points out that several unanswered questions remain, including legal representation while the accused is in the hands of federal authorities and appellate review of a judge’s competency determination.

18. MCM, *supra* note 3, R.C.M. 707(c)(1) discussion. See also *infra* note 52 and accompanying text.

19. MCM, *supra* note 3, R.C.M. 909(c)(2) discussion.

20. UCMJ art. 76b(a)(2) (1996) (providing that action will be taken in accordance with title 18 of the United States Code).

trial, the director of the facility where the accused is hospitalized can request further hospitalization.²³

Mental Responsibility

Article 50a of the Uniform Code of Military Justice provides that a person is not mentally responsible if, at the time the offense was committed, the person, as a result of a severe mental disease or defect, was unable to appreciate the nature and quality or the wrongfulness of the acts.²⁴ This standard became law in 1986.²⁵ The standard matches that applicable in the federal courts and is similar to the *M’Naghten* test.²⁶ The test differs from the military’s old standard in several ways. First, the accused must suffer from a *severe* mental disease or defect.²⁷ Second, the individual must suffer *complete* impairment rather than *substantial* or *great* impairment.²⁸ Next, the focus is now on understanding one’s conduct rather than controlling it.²⁹ Finally, a person need only know that his conduct is *wrongful*, not necessarily that it is *criminal*.³⁰

The changes to the military’s standard followed congressional action that changed the way mental responsibility was tried in federal district court. Congress responded after public

outcry over the perceived ease with which a criminal accused could successfully mount an insanity defense.³¹ The new standard in the military became effective for all offenses committed on or after 1 November 1986.³²

Probably the most contentious aspect of litigating mental responsibility is the requirement for a severe mental disease or defect. The existence of a *severe* mental disease or defect is a threshold requirement before any finding of insanity can be made.³³ Counsel may wonder what makes a mental disease severe. Unfortunately, there is no clear answer to this question. Article 50a is silent, but the *Manual for Courts-Martial* does address the issue. The *Manual* states that “the term ‘severe mental disease or defect’ does not include an abnormality manifested only by repeated criminal or otherwise antisocial conduct, or minor disorders such as nonpsychotic behavior disorders and personality defects.”³⁴

Despite this language, the Court of Military Appeals³⁵ (CMA) has rejected this interpretation of the mental responsibility standard. The court has held that the term severe mental disease or defect does not require a psychosis.³⁶ Instead, the determination of whether a condition amounts to a severe mental disease or defect is made by considering the individual facts

21. 18 U.S.C. § 4241(d) (1994).

22. UCMJ art. 76b(a)(3) (1996).

23. 18 U.S.C. §§ 4241(d), 4246(a) (1994). The soldier can be hospitalized for an additional period of time until his mental condition improves or the charges against him are disposed of, whichever is earlier. *Id.*

24. UCMJ art. 50a (1988). It also provides that mental disease or defect does not otherwise constitute a defense. *Id.*

25. National Defense Authorization Act for Fiscal Year 1987, Pub. L. No. 99-661, § 802, 100 Stat. 3905 (1986).

26. MCM, *supra* note 3, R.C.M. 916(k) discussion (citing *M’Naghten’s Case*, 8 Eng. Rep. 718 (H.L. 1843)). The federal standard is found at 18 U.S.C. § 20 (1994). For an excellent and detailed history of the insanity defense in the military prior to the 1986 changes, see Captain Charles E. Trant, *The American Military Insanity Defense: A Moral, Philosophical, and Legal Dilemma*, 99 MIL. L. REV. 1 (1983).

27. Major Rita R. Carroll, *Insanity Defense Reform*, 114 MIL. L. REV. 183, 189 (1986). The old standard only referred to a mental disease or defect. 1984 MANUAL, *supra* note 9, R.C.M. 916(k)(1). See also *infra* notes 33-37 and accompanying text.

28. Carroll, *supra* note 27, at 189 (indicating that the language “substantial lack of capacity” was deleted in favor of “was unable”).

29. *Id.* at 188 (Congress eliminated the volitional prong.). The new standard emphasizes cognition rather than volition. See *United States v. Rosenheimer*, 807 F.2d 107 (7th Cir. 1986); *Insanity Defense in Federal Courts: Hearings on H.R. 6783 Before the Subcomm. on Criminal Justice of the H.R. Comm. On the Judiciary*, 97th Cong. 227-33 (1982) [hereinafter *Hearings*] (statement of Stephen J. Morse, Professor of Law and Professor of Psychiatry and Behavioral Sciences).

30. Carroll, *supra* note 27, at 212-13.

31. *Id.* at 183-87. The outcry peaked in 1982 after a jury found John Hinckley not guilty by reason of insanity of the attempted assassination of President Ronald Reagan. *Id.* at 184. As reflected by the words of the subcommittee chairman, “the Hinckley verdict accelerated our concern” with the insanity issue. *Hearings, supra* note 29, at 143 (statement of John Conyers, Jr., Chairman). The subcommittee considered many different proposals, including eliminating the insanity defense, creating a guilty but insane verdict, and limiting expert testimony. Even though there was strong disagreement about which proposal was the best, the consensus view was that the existing standard was “too vague and too broad and allows too many people to come under the umbrella of insanity.” *Id.* at 4 (statement of Arlen Specter, member of the Senate Judiciary Committee).

32. MCM, *supra* note 3, R.C.M. 916(k) discussion.

33. *United States v. Farmer*, 6 M.J. 897 (A.C.M.R. 1979) (analyzing the American Law Institute standard, which was in effect prior to the changes to Article 50a in 1986).

34. MCM, *supra* note 3, R.C.M. 706(c)(2)(A).

and circumstances in each case. Counsel cannot refer to a medical treatise and find a list of conditions which will be listed as severe mental diseases or defects, because it is a legal term and not a medical term. Having said that, however, an expert can opine that a certain condition is a severe mental disease or defect as long as the witness limits himself to a medical opinion. The CMA has acknowledged that any attempts to provide further clarification would only be confusing and prejudicial.³⁷

Sanity Boards

In confronting the issue of an accused's mental condition, the starting point for counsel is often the sanity board. Once counsel realize that mental responsibility will be an issue at trial,³⁸ they should request that an inquiry be made into the accused's mental condition. Although the defense counsel normally requests the sanity board, anyone involved in the administration of the case can do so.³⁹ The request can be made at any stage of the proceeding, including post-trial. Before referral of charges, a convening authority can order the sanity inquiry;

after referral, the military judge has that power.⁴⁰ The request for a sanity board should include those facts which reflect or suggest problems with the accused's mental status.⁴¹ Typically, this might include facts surrounding the commission of offenses with which the accused is charged, other odd behavior, statements made by the accused, background information, and any other information that might be relevant. The request should also mention those questions that the board will be expected to answer, as well as any other issues related to the accused's mental condition.⁴² Frequently, the request will also ask the board to conduct certain psychological or psychiatric tests. Counsel should be as specific as possible in identifying areas they want the board to explore.

The standard for ordering a sanity board is fairly low; any request that is made in good faith and is not frivolous should be granted.⁴³ Despite this low threshold, trial counsel will often oppose a defense request for a sanity board, assuming that the sanity board is intended as either a delay tactic or a fishing expedition. The problem is, absent some showing of bad faith, a judge applying the proper standard will almost always grant

35. On 5 October 1994, the National Defense Authorization Act for Fiscal Year 1995, Pub. L. No. 103-337, 108 Stat. 2663 (1994), changed the names of the United States Court of Military Appeals and the United States Courts of Military Review. The new names are the United States Court of Appeals for the Armed Forces, the United States Army Court of Criminal Appeals, the United States Navy-Marine Corps Court of Criminal Appeals, the United States Air Force Court of Criminal Appeals, and the United States Coast Guard Court of Criminal Appeals. For the purposes of this article, the name of the court at the time that a particular case was decided is the name that will be used in referring to that decision.

36. *United States v. Benedict*, 27 M.J. 253 (C.M.A. 1988). Major Benedict was charged with conduct unbecoming an officer by taking indecent liberties with a child under 16. In his defense, he called two psychiatrists who testified that the accused suffered from pedophilia, a mental disease or defect, and that, as a result, he was not responsible for his actions. On cross-examination, one psychiatrist admitted that pedophilia was a "non-psychotic disorder." In rebuttal, a government psychiatrist went even further and testified that any nonpsychotic disorder would not meet the legal definition of a "mental disease or defect." The CMA concluded that such testimony inaccurately stated the law and that an accused was not required to show a psychosis before prevailing on a defense of lack of mental responsibility. *Id.* at 259. A psychosis is a "fundamental mental derangement characterized by defective or lost contact with reality." WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 951 (1986). It is normally characterized by hallucinations and delusions. AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (4th ed. 1994). The *Benedict* court was also troubled by the government witness, a medical expert, testifying about legal conclusions. The court noted that the witness usurped her role in providing legal guidance to the fact-finder. *Benedict*, 27 M.J. at 259. See also *United States v. Proctor*, 37 M.J. 330 (C.M.A. 1993) (holding that "an accused need not be found to be suffering from a psychosis in order to assert an affirmative defense based on lack of mental responsibility"), *cert. denied*, 114 S. Ct. (1994). *Contra United States v. Lewis*, 34 M.J. 745 (N.M.C.M.R. 1991) (intermittent explosive disorder is a nonpsychotic disorder that does not amount to a "severe mental disease or defect" within the meaning of Article 50a, UCMJ), *pet. denied*, 36 M.J. 60 (C.M.A. 1992).

37. *United States v. Cortes-Crespo*, 13 M.J. 420 (C.M.A. 1982) (conceding that the court was unable to define a severe mental disease or defect "beyond the use of the terms themselves").

38. As indicated before, a sanity board may also be requested when competency is at issue. See *supra* text accompanying note 12.

39. MCM, *supra* note 3, R.C.M. 706(a) (listing who can request a sanity board: any commander who considers the disposition of the charges, an investigating officer, trial counsel, defense counsel, military judge, or court member.). Mention of court members contemplates those occasions when the issue of mental responsibility arises for the first time at trial. Cf. *United States v. Sims*, 33 M.J. 684 (A.C.M.R. 1991) (military judge should have directed sanity inquiry or inquired of defense counsel whether expert opinions had been obtained regarding the accused's mental condition when accused made several bizarre statements at trial regarding an invisible friend and described himself as the "incredible hulk").

40. MCM, *supra* note 3, R.C.M. 706(b). Any convening authority who has the charges for disposition may order a sanity inquiry. This would include a summary or special court-martial convening authority. This is useful to remember because sanity inquiries ordered by these convening authorities will obviously be completed sooner than those ordered by the general court-martial convening authority (GCMCA) or the judge. The GCMCA may still order a sanity inquiry after referral (up until the first session of the court-martial proceeding), if the judge is not reasonably available. *Id.* A judge is not bound by the convening authority's ruling. *Id.*

41. For a sample sanity board request, see CRIMINAL L. DEP'T, THE JUDGE ADVOCATE GENERAL'S SCHOOL, U.S. ARMY, JA 310, TRIAL COUNSEL AND DEFENSE COUNSEL HANDBOOK, fig. 3-31 (Mar. 1995) [hereinafter JA 310].

42. See *infra* notes 48-49 and accompanying text. Counsel may ask the board to look into other issues affecting the accused's thinking process, including the use of alcohol, post-traumatic stress syndrome, or abuse suffered as a child.

43. *United States v. Kish*, 20 M.J. 652 (A.C.M.R. 1985).

the request for a sanity board. The government's opposition will only result in even more delay. When a request is made before referral, trial counsel would be better off recommending that the convening authority approve the request so that the board may begin as soon as possible.

Trial counsel are not without recourse when opposing a request for a sanity board. If a mental evaluation has already been performed, then counsel may be able to argue that it is an "adequate substitute" for a sanity board. In *United States v. Jancarek*,⁴⁴ the Army Court of Military Review held that a mental evaluation was an "adequate substitute" for a sanity board, where the physician who evaluated the accused had completed her psychiatric residency and was serving as the Chief of Community Mental Health. The psychiatrist testified regarding the accused's competency to stand trial, provided a specific diagnosis of the accused, knew that the accused was pending court-martial at the time of the examination, and indicated that no purpose would be served by further inquiry during a sanity board.⁴⁵ However, completion of a Mental Status Evaluation Form⁴⁶ has been held not to be an adequate substitute for a sanity board, even if filled out by a psychiatrist.⁴⁷

Once the decision is made, the judge or convening authority should sign an order directing that the sanity board be conducted. The order should contain the reasons why the accused's mental status is in doubt and the questions the board should consider. Rule for Court-Martial (R.C.M.) 706 sets out four questions that must be addressed at a minimum. These questions basically address whether the accused is mentally responsible and competent to stand trial, using the legal definitions for those terms.⁴⁸ In addition, the order may direct the board to consider other issues relating to the accused's mental condition.⁴⁹

A sanity board is composed of one or more persons, each of whom must be either a physician or a clinical psychologist.⁵⁰ In addition, at least one member of the board should be a psychiatrist or a clinical psychologist.⁵¹ Typically, the commander of the medical treatment facility will appoint the sanity board. Frequently, three members sit as the sanity board, but three members are not required. While this offers the board the advantage of considering different viewpoints, it tends to slow things down. Government counsel interested in minimizing delays may want to remind the appointing authority that a sanity board may consist of only one person. Although the command generally abhors delays in the processing of a court-

44. 22 M.J. 600 (A.C.M.R. 1986), *pet. denied*, 24 M.J. 42 (C.M.A. 1987).

45. *Id.* at 604. See also *United States v. Nix*, 36 C.M.R. 76 (1965). Recently, the Navy-Marine Corps Court of Criminal Appeals concluded that a sanity board did not have to be conducted when earlier exams by a psychiatrist and clinical psychologist had already been performed. In *United States v. English*, a Marine referred himself to a Navy hospital for suicidal thoughts and depression. 44 M.J. 612 (N.M. Ct. Crim. App. 1996) (*pet. granted* by CAAF, Jan. 21, 1997). After evaluating him, a psychiatrist and clinical psychologist concluded that he was exaggerating his symptoms, and they reported this to the command. After the command preferred charges of malingering and attempted malingering, the defense requested a sanity board. After hearing the testimony of the two mental health professionals, the judge found the prior mental evaluations to be "adequate substitutes" for a sanity board. The judge relied on the testimony of the psychiatrist and psychologist that: (1) their exams complied with R.C.M. 706 requirements, including the questions to be addressed; (2) the accused was competent to stand trial and was mentally responsible for his actions; and (3) if ordered to conduct a sanity board, they would not need to interview the accused any further or change their opinions regarding his mental status. *Id.* at 613-14. The appellate court affirmed.

46. U.S. Dep't of Army, DA Form 3822-R, Report of Mental Status Evaluation (Oct. 1982). This form contains a series of blocks to be checked off which purport to describe the person's behavior, alertness, thinking process, etc. It is required for certain administrative separation actions under the provisions of *Army Regulation 635-200*. U.S. DEP'T OF ARMY, REG. 635-200, PERSONNEL SEPARATIONS: ENLISTED PERSONNEL, para. 1-34b (17 Sept. 1990) [hereinafter AR 635-200].

47. *United States v. Collins*, 41 M.J. 610 (Army Ct. Crim. App. 1994). In *Collins*, the trial counsel offered a mental status evaluation and represented that the individual who signed as the "Chief CMHS" was a psychiatrist. The judge held that the evaluation was not an adequate substitute for a sanity board but then went on to rule on the accused's competency to stand trial without directing a sanity board. The Army court agreed that the evaluation did not have the depth required for a sanity board and noted that the form reflects only a cursory review of the soldier and is limited to determining whether administrative proceedings could continue. *Id.* at 613.

48. MCM, *supra* note 3, R.C.M. 706(c)(2) provides that a sanity board will be instructed to make findings on the following questions:

- (A) At the time of the alleged criminal conduct, did the accused have a severe mental disease or defect? . . .
- (B) What is the clinical psychiatric diagnosis?
- (C) Was the accused, at the time of the alleged criminal conduct and as a result of such severe mental disease or defect, unable to appreciate the nature and quality or wrongfulness of his or her conduct?
- (D) Does the accused have sufficient mental capacity to understand the nature of the proceedings and to conduct or [to] cooperate intelligently in the defense?

Note that the language in question D differs slightly from R.C.M. 909, which is the competency standard. A proposed amendment to R.C.M. 706(c)(2)(D) will make the language identical. MCM, *supra* note 3, R.C.M. 706(c)(2)(D) (proposed Apr. 1996).

49. For example, the order may direct the administration of certain psychological tests. See *supra* note 42 and accompanying text. The order should also contain instructions to the board addressing release of the report. MCM, *supra* note 3, R.C.M. 706(c)(3); see also *infra* notes 64-65 and accompanying text.

50. MCM, *supra* note 3, R.C.M. 706(c)(1).

51. *Id.*

marital, a reasonable amount of time spent performing a mental evaluation is excluded from the speedy-trial clock.⁵²

Article 31⁵³ warnings do not apply at a sanity inquiry because Military Rule of Evidence (MRE) 302 protects anything the accused says from being used against him.⁵⁴ The privilege is designed to balance the accused's right to present an insanity defense with the privilege against self-incrimination.⁵⁵ Because his statements are protected, the accused can be compelled to cooperate with the examination. If he refuses to cooperate, the judge can prohibit the defense from presenting evidence on the issue of the accused's mental condition.⁵⁶ Military Rule of Evidence 302 is a compromise designed to encourage an accused to speak freely to the board.

It is important to note that the privilege only applies to a sanity board properly ordered pursuant to R.C.M. 706.⁵⁷ It will not attach to other mental evaluations performed on the accused. In *United States v. Toledo*,⁵⁸ the defense counsel sent his client to an Air Force psychologist to determine "whether or not there were any possible problems concerning sanity."⁵⁹ At trial, the government called the psychologist as a witness to testify about the accused's truthfulness and his sexual history. The CMA pointed out that MRE 302 only applies to mental examinations

ordered under R.C.M. 706 and found no error in the testimony. The court cautioned that a military member has no right to "commandeer" a government expert, bypassing the proper authorities.⁶⁰ Even where a mental examination has been considered an "adequate substitute,"⁶¹ at least one service court has ruled that MRE 302 does not protect the accused's statements.⁶²

Counsel who wish to avoid the above results should consider requesting that a mental health official be appointed to the defense team and cloaked with the attorney-client privilege.⁶³ Any statements the accused makes to such an individual would then be protected, albeit by a different privilege.

Additional protection for the accused is provided by limits on release of the report. Initially, only the board's ultimate conclusions to the questions posed in the order are given to counsel for both sides, the convening authority, and the military judge (after referral).⁶⁴ Only the defense counsel, medical personnel (if necessary for medical reasons), and the accused's commander (upon request) are entitled to the full report.⁶⁵ The military judge may direct release of the report to other individuals.

If the defense counsel intends to present the defense of lack of mental responsibility or any expert testimony relating to the

52. *Id.* R.C.M. 707(c)(1) discussion. *See, e.g.,* *United States v. Carpenter*, 37 M.J. 291 (C.M.A. 1993) (government's negligence or bad faith can be considered in determining whether the sanity board was completed within a reasonable time); *United States v. Colon-Angueira*, 16 M.J. 20 (C.M.A. 1983) (51 days reasonable); *United States v. Palumbo*, 24 M.J. 512 (A.F.C.M.R. 1987) (45 days reasonable); *United States v. Pettaway*, 24 M.J. 589 (N.M.C.M.R. 1987) (36 days was a reasonable time for a second sanity board); *United States v. Freeman*, 23 M.J. 531 (A.C.M.R. 1986) (43 days reasonable);

53. UCMJ art. 31 (1994) (providing military members with a right against self-incrimination).

54. MCM, *supra* note 3, MIL. R. EVID. 302. Military Rule of Evidence 302 protects statements made by the accused as well as derivative evidence. Derivative evidence has been construed broadly by military courts. STEPHEN A. SALTZBURG ET AL., MILITARY RULES OF EVIDENCE MANUAL 140 (3rd ed. 1991). Even if Article 31 warnings are given, the accused may still claim the privilege. MCM, *supra* note 3, MIL. R. EVID. 302(a).

55. MCM, *supra* note 3, MIL. R. EVID. 302 analysis, app. 22, at A22-7. The drafters point out that if an accused could present an insanity defense but refuse to speak to a sanity board on grounds that it would incriminate him, the prosecution would have a difficult time rebutting the defense. *Id.*

56. *Id.* This authority stems from *United States v. Babbidge*, 40 C.M.R. 39 (1969), where the CMA concluded that the defense's presentation of an insanity defense operated as a qualified waiver of Article 31 rights. "When the accused opened his mind to a psychiatrist in an attempt to prove temporary insanity, his mind was opened for a sanity examination by the Government." *Id.* at 44.

57. MCM, *supra* note 3, MIL. R. EVID. 302(a) ("[A]ccused has a privilege to prevent any statement made by the accused at a *mental examination ordered under R.C.M. 706 . . .*") (emphasis added).

58. 25 M.J. 270 (C.M.A. 1987), *aff'd on reconsid.*, 26 M.J. 104 (C.M.A.), *cert. denied*, 488 U.S. 889 (1988).

59. *Id.* at 274. Counsel apparently saw this as a preliminary step to requesting a formal sanity board. Counsel asked the psychologist to keep his conclusions and notes confidential. *Id.*

60. *Id.* at 276. The danger is that the government may be left without its own expert and with no way to consult with the defense's expert.

61. For a discussion of an "adequate substitute" for a sanity board, see *supra* notes 44-46 and accompanying text.

62. *United States v. English*, 44 M.J. 612 (N.M. Ct. Crim. App. 1996) (pet. granted by CAAF, Jan. 21, 1997). Since the evaluations were not ordered pursuant to R.C.M. 706, statements the accused made were not privileged under MRE 302. The court held that MRE 302 was not designed to apply retroactively. *Id.* at 615.

63. MCM, *supra* note 3, MIL. R. EVID. 502 (communications between a client or a client's lawyer and the lawyer's representative are privileged); *United States v. Mansfield*, 38 M.J. 415 (C.M.A. 1993), *cert. denied*, 114 S. Ct. 1610 (1994).

64. MCM, *supra* note 3, R.C.M. 706(c)(3)(A). The officer who ordered the inquiry, the accused's commander, and the Article 32 investigating officer, if any, can also receive the board's conclusions.

accused's mental condition, he is required to notify the trial counsel.⁶⁶ Violation of this rule may result in exclusion of the defense evidence.⁶⁷ Once this notice is received, the government has a reciprocal duty to inform the defense of the witnesses it plans to call in rebuttal of such a defense.⁶⁸ Upon receipt of this information, the trial counsel should request a copy of the full sanity board report. The government is still not entitled to the accused's statements to the board at this point. If the defense refuses to release the report, the trial counsel may have to ask the military judge to direct release.

Request for Expert Witness

Frequently, issues of mental responsibility will involve a request for an expert witness. The defense must first ask the convening authority to authorize the employment of the expert

and include the cost and reasons why the expert is necessary.⁶⁹ If the convening authority denies the request, the defense may renew the request before the military judge. The judge applies a two-prong test in deciding whether to order the production of the witness: (1) is the expert relevant and necessary? and (2) has the government provided an adequate substitute?⁷⁰

The United States Supreme Court has also held that a criminal defendant is entitled to the assistance of a psychiatrist to prepare an insanity defense.⁷¹ The accused must first establish, however, that his mental condition will be a "significant factor" in the trial.⁷² Such a showing should be based on facts and circumstances similar to those cited in a sanity board request. For example, in *Ake v. Oklahoma*,⁷³ the Supreme Court found that insanity was an issue where the defendant had previously been found incompetent to stand trial for a period of six weeks, was involuntarily committed during that time, exhibited bizarre

65. *Id.* R.C.M. 706(c)(3)(B). Once the accused's mental condition is placed in issue, the full report, less any statements made by the accused, will be given to the trial counsel. *Id.* MIL. R. EVID. 302 analysis, app. 22, at A22-8.

66. *Id.* R.C.M. 701(b)(2). The rule provides: "If the defense intends to rely upon the defense of lack of mental responsibility or to introduce expert testimony relating to the accused's mental condition, the defense shall, before the beginning of the trial on the merits, notify the trial counsel of such intention." *Id.* Notice should be written and include the names and addresses of the witnesses the defense will call in connection with these issues. *Id.* R.C.M. 701(b)(2) discussion. The rationale behind this requirement is that the government may need time to prepare its case in rebuttal. Requiring notice eliminates delays. In *Williams v. Florida*, 399 U.S. 78 (1970), the Supreme Court upheld a state rule which required the defense to give notice of alibi. The Court rejected the argument that such a rule violated the right against self-incrimination. *Id.*

67. *See, e.g.*, *Michigan v. Lucas*, 500 U.S. 145 (1991) (preclusion of evidence for the violation of a notice requirement under a state rape-shield law may be appropriate where the failure to notify was willful misconduct designed to gain a tactical advantage over the prosecution); *Taylor v. Illinois*, 484 U.S. 400 (1988) (exclusion of defense alibi witness may be appropriate where defense counsel willfully and blatantly violated discovery rule). *But see* *United States v. Walker*, 25 M.J. 713 (A.C.M.R. 1987). In *Walker*, the trial judge excluded a psychiatrist's testimony because the defense failed to give notice five weeks earlier, when motions were heard. The judge looked to Federal Rule of Criminal Procedure 12.2(b), which requires such notice to be provided to the government within the time provided for the filing of pretrial motions, to "fill in the gaps" of R.C.M. 701. The Army Court of Military Review found the exclusion an abuse of discretion, noting that normally a continuance would solve the problem. *Id.* at 717 n.6.

68. MCM, *supra* note 3, R.C.M. 701(a)(3)(B). Such notice should also be in writing. *Id.* R.C.M. 701(a)(3)(B) discussion.

69. *Id.* R.C.M. 703(d). *See* JA 310, *supra* note 41, figures 3-47 and 3-48, for sample requests for government and non-government experts. For a list of suggested fees for experts published by the Department of Justice, see Memorandum, Trial Counsel Assistance Program, TCAP Memo. No. 108 (Oct.-Nov. 1995).

70. MCM, *supra* note 3, MIL. R. EVID 702 ("If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise."). The defense has no right to a particular expert. *United States v. Burnette*, 29 M.J. 473 (C.M.A.) (the defense summarily rejected all government experts), *cert. denied*, 111 S. Ct. 70 (1990). The government may satisfy its obligation to provide an expert by tendering an adequate substitute. An adequate substitute is one who shares the same opinion as the expert requested by the defense. *United States v. Van Horn*, 26 M.J. 434, 439 (C.M.A. 1988) ("However, where there are divergent scientific views, the Government cannot select a witness whose views are very favorable to its position and then claim that this same witness is 'an adequate substitute' for a defense-requested expert of a different viewpoint."); *United States v. Guitard*, 28 M.J. 952, 954 (N.M.C.M.R. 1989) (holding that the Sixth Amendment right of compulsory process "demands that an 'adequate substitute' for a particular requested expert witness at trial not only possess similar professional qualifications as the requested witness, but also be willing to testify to the same conclusions and opinions").

71. The right to expert assistance is grounded in the Due Process Clause and Article 46 of the UCMJ, which guarantees equal access to witnesses. *Ake v. Oklahoma*, 470 U.S. 68 (1985) (holding that due process guarantees a defendant access to a competent psychiatrist when his sanity is a significant factor at trial); *United States v. Garries*, 22 M.J. 288, 293 (C.M.A.) (military members entitled to investigative or other expert assistance as a matter of military due process), *cert. denied*, 479 U.S. 985 (1986). Generally, the issue is whether the defense has shown necessity. *See* *United States v. Gonzalez*, 39 M.J. 459 (C.M.A. 1994) (to show the need for an expert or an investigator, the defense must show: (1) why the expert assistance is needed; (2) what the expert or investigator would do; and (3) why defense counsel cannot do it himself); *United States v. Kelly*, 39 M.J. 235 (C.M.A. 1994) (holding that the defense did not show why a urinalysis expert was necessary to assist the defense in light of counsel's prior experience litigating urinalysis cases, familiarity with numerous articles on the topic, phone consultations with the expert, and failure to identify any specific problems with the collection and testing of the sample in question).

72. *Kelly*, 39 M.J. at 235; *see also* *Pedrero v. Wainwright*, 590 F.2d 1383, 1391 (5th Cir.) (criminal defendant's sanity at the time of the offense must be seriously in issue or there must be reasonable grounds to doubt the defendant's sanity before there arises any duty to appoint psychiatric witnesses; showing that the defendant was a drug addict and that he had been in a mental institution a few years before the offense was insufficient to establish his entitlement to a psychiatric expert at state expense), *cert. denied*, 444 U.S. 943 (1979); *United States v. Mustafa*, 22 M.J. 165 (C.M.A. 1986) (sanity board's evaluation of the accused was sufficient; accused failed to show that sanity would be a significant factor at trial warranting services of particular psychiatrist).

behavior during his arraignment, and had to be heavily sedated once he was found competent; additionally, state psychiatrists believed Ake's mental illness was serious and might have begun years earlier.⁷⁴ However, a defense counsel's mere conclusion that his client cannot distinguish right from wrong at the time of the offense will be insufficient to justify the appointment of a psychiatrist.⁷⁵

Does the sanity board provide impartial psychiatric assistance? The answer to this question is not clear. Military courts have suggested that it does,⁷⁶ but certain circuit courts have disagreed.⁷⁷ The best argument for the defense is that due process demands that the defense have its own psychiatrist without being forced to rely on someone working for the government. The defense argument is strengthened if expertise in a particular mental disorder is needed, expertise which is lacking on the sanity board. For example, if the client was sexually abused as a child and exhibits symptoms typical of Post Traumatic Stress Disorder, perhaps a psychiatrist specializing in this area could assist the defense.

Defense counsel should be prepared to place facts on the record which support the need for a psychiatrist in each individual case. Articulate as many facts as possible which illustrate that sanity will be a major issue at the trial, like the counsel did in *Ake*. Call witnesses such as family members, co-workers, and supervisors who can describe the accused's erratic behavior. By building such a record, the defense will have a better chance of convincing a judge that it is entitled to its own psychiatrist and, if it fails, stands a greater chance of relief on appeal.

73. 470 U.S. 68 (1985).

74. *Id.* at 86-87.

75. *Volson v. Blackburn*, 794 F.2d 173 (5th Cir. 1986) (rejecting defense argument that a defendant's sanity at the time of the offense will always be a significant factor at trial whenever the defendant pleads insanity). In order for a defendant's mental state to become a substantial threshold issue, the showing must be clear and genuine, one that constitutes a "close" question which may well be decided one way or the other. It must be one that is fairly debatable or in doubt. *Cartwright v. Maynard*, 802 F.2d 1203 (10th Cir. 1986). In *Cartwright*, the evidence reflected that the defendant's actions and conduct were very normal and cooperative; he displayed a calm disposition and was never on any medication. He did not display any erratic or bizarre behavior, had no mental illness, and had no neurological problems. His electroencephalogram test was normal, and he had an average IQ. *Id.* at 1212. In addition, inconsistencies in the defendant's story contradicted his claim that he suffered "blackouts," and threats he made towards the victims for failing to pay him for work he did suggested premeditation. *Id.* at 1213.

76. *United States v. Davis*, 22 M.J. 829 (N.M.C.M.R. 1986) (holding that a sanity board provides the accused with impartial psychiatric assistance); *United States v. Garries*, 22 M.J. 288 (C.M.A.) (in the usual case, the investigative, medical, and other expert services in the military are sufficient to permit the defense to adequately prepare for trial), *cert. denied*, 479 U.S. 985 (1986).

77. *United States v. Sloan*, 776 F.2d 926 (10th Cir. 1985) (concluding that denial of defense requested psychiatrist to rebut government psychiatrist who examined defendant and found him competent and sane violated due process as it deprived the accused of the benefit of such an expert by requiring the accused to share the expert's services with the government); *Smith v. McCormick*, 914 F.2d 1153 (9th Cir. 1990) ("[R]ight to psychiatric assistance does not mean the right to place the report of a 'neutral' psychiatrist before the court, rather it means the right to use the services of a psychiatrist in whatever capacity defense counsel deems appropriate, including to decide, with the psychiatrist's assistance, not to present to the court particular claims of mental impairment.").

78. *United States v. Mansfield*, 38 M.J. 415 (C.M.A. 1993) (citing *MANUAL FOR COURTS-MARTIAL, UNITED STATES* (1969) (C7, 1 Oct. 1982) (describing a limited defense)).

79. *See supra* notes 24-37 and accompanying text.

80. *MCM, supra* note 3, R.C.M. 916(k).

81. *Id.* R.C.M. 916(k) analysis, app. 21, at A21-62.

Partial Mental Responsibility

In addition to the defense of lack of mental responsibility, defense counsel may present evidence of partial mental responsibility. Partial mental responsibility, also called diminished capacity, refers to an impaired mental state which can negate the specific intent element of a criminal offense.⁷⁸ Evidence of partial mental responsibility can be used by the defense to present evidence of an accused's mental condition without having to satisfy the high burden of proof associated with a defense based on a lack of mental responsibility.

Partial mental responsibility has had a tortured path in the last ten years, since the changes to the mental responsibility standard.⁷⁹ Article 50a states that unless the standard for mental responsibility is met, a mental disease or defect does not otherwise constitute a defense. Rule for Court-Martial 916 states that evidence not amounting to a lack of mental responsibility is not "admissible as to whether the accused entertained a state of mind necessary to be proven as an element of the offense."⁸⁰ According to the analysis, this language was included in order to avoid confusing the factfinder with needless psychiatric testimony.⁸¹ The CMA, however, has rejected the prohibition.

In *Ellis v. Jacob*,⁸² the accused was charged with unpremeditated murder of his two year-old son, an offense which requires a specific intent to kill or to inflict great bodily harm.⁸³ The defense wanted to present psychiatric testimony that the accused, in the time leading up to the death, had not been get-

ting much sleep, was under a lot of pressure, and as a result could have been psychologically impaired.⁸⁴ The defense expert also would have testified that the accused did not and could not form the specific intent necessary for the crime.⁸⁵ The military judge refused to allow the testimony.⁸⁶ In granting the accused's petition for extraordinary relief, the CMA held that partial mental responsibility is a rule of substantive law which the president could not eliminate, as it is beyond his rule-making authority.⁸⁷ After observing that the legislative history of Article 50a reflects that it parallel federal law on insanity, the CMA concluded that federal courts have distinguished the diminished capacity defense, which is not admissible, from evidence rebutting a mens rea element.⁸⁸ Congress never intended to exclude the latter.⁸⁹

Three years later, the CMA again addressed this issue. In *United States v. Berri*,⁹⁰ two defense psychiatrists testified about the accused's lack of mental responsibility in his trial for attempted murder, maiming, and aggravated assault.⁹¹ Neither side questioned the experts about specific intent, and the judge's instructions failed to explain that their testimony could rebut specific intent.⁹² On appeal, the CMA examined the testimony in detail and concluded that the accused was entitled to

an instruction that allowed the factfinder to consider such testimony on the mens rea issue.⁹³

Partial mental responsibility can be invaluable to the defense because it allows the defense to present evidence of the accused's mental condition to negate a mens rea element of a crime without shouldering the burden of proof necessary for lack of mental responsibility. Examples of the mens rea element include knowledge, premeditation, or intent. Counsel, of course, must remember that such testimony is only admissible when a specific intent crime is at issue.

Trial Considerations

At trial, the issues of lack of mental responsibility and partial mental responsibility can be raised by expert or lay testimony. Military Rule of Evidence 302 allows a prosecution expert to testify about the accused's mental condition once the defense has raised the issue with expert testimony.⁹⁴ Despite the rule's reference to expert testimony, the CMA has held that even lay testimony by the defense opens the door to testimony by a government expert.⁹⁵ The government expert cannot testify about

82. 26 M.J. 90 (C.M.A. 1988).

83. See UCMJ art. 118 (1994).

84. *Ellis*, 26 M.J. at 91. The accused and another soldier testified about the accused's physical, emotional, and mental condition. *Id.*

85. *Id.* In its opinion, the CMA noted that the basis for this proffered testimony was not clear. *Id.* at 94. Whenever counsel proffer evidence which is eventually excluded, they should clearly articulate for the record the substance of the excluded evidence.

86. *Id.* at 91. The judge based his ruling on Article 50a and R.C.M. 916(k)(2). *Id.*

87. See UCMJ arts. 36, 56 (1988).

88. *Ellis*, 26 M.J. at 93 (citing *United States v. Pohlot*, 827 F.2d 889 (3d Cir. 1987), *cert. denied*, 108 S. Ct. 710 (1988); *United States v. Gold*, 661 F. Supp. 1127 (D.D.C. 1987); *United States v. Frisbee*, 623 F. Supp. 1217 (N.D. Cal. 1985)). The CMA initially noted that the military standard for insanity is identical to the federal standard. Compare UCMJ art. 50a with 18 U.S.C. § 17. In *Pohlot*, the third circuit looked at the wording of the federal statute and the legislative history and determined that Congress only intended to bar affirmative defenses. 827 F.2d at 897. The court concluded that admitting psychiatric evidence to negate mens rea does not constitute a defense, it merely allows an element of the offense to be negated. *Id.* In *Frisbee*, a district court held that Congressional intent to limit a defendant's ability to rebut specific intent still allows expert testimony, subject to the limitations of F.R.E. 704(b). 623 F. Supp. at 1223.

89. *Ellis*, 26 M.J. at 93. The CMA looked at the proffered testimony in the case and held that testimony of sleep deprivation and its effect on possible psychological impairment was admissible. As to the other line of testimony, regarding the accused's intent and his ability to form intent, the CMA ruled that the defense had not adequately laid a foundation for such evidence. *Id.* at 94.

90. 33 M.J. 337 (C.M.A. 1991).

91. *Id.* at 339. All of these offenses require specific intent. See UCMJ arts. 77, 118 (attempted murder requires specific intent to kill or inflict great bodily harm); MCM, *supra* note 3, ¶ 50b (maiming requires intent to cause injury), ¶ 54b(4)(b) (intentional infliction of grievous bodily harm requires specific intent to inflict grievous bodily harm). The accused's offenses arose out of a confrontation with a shipmate in a motel parking lot. The accused, who had argued earlier in the day with this sailor, carried a shotgun. After the other sailor tried to run away, the accused shot him in the right arm and side. After his victim fell to the ground, the accused shot him again at "point blank range." The victim lost part of his right arm and underwent two major surgeries. *Berri*, 33 M.J. at 339.

92. *Berri*, 33 M.J. at 338. The judge had concluded that the psychiatric testimony did not rebut specific intent. As the CMA pointed out, he "effectively barred the members from considering the expert evidence on mens rea." *Id.* The court further noted that the members were free to consider lay testimony on the issue and to draw appropriate inferences from such testimony. *Id.*

93. *Id.* at 343. The court observed that the psychiatrists testified that the accused suffered from post-traumatic stress disorder (PTSD), dissociative episodes, and paranoid explosive personality disorder. One psychiatrist said that during PTSD episodes, a person would be "looney-tunes." *Id.* at 339. A second psychiatrist described the dissociative episodes as periods when the accused would neither understand reality nor know who he was. *Id.* at 340. This psychiatrist also stated that the accused was aware of much of his conduct but "it was as if he was watching someone else do it." *Id.*

anything the accused said to the board unless the accused first introduces such statements. Once the accused opens the door by introducing his statements, the MRE 302 privilege is waived.⁹⁶

The sanity board report is not admissible as an exception to the rule against hearsay; to present information from the sanity inquiry, the proponent must call one of the board members.⁹⁷ A board member can testify only about her own conclusions, not those of other board members.⁹⁸ In the military, an expert can opine whether the accused had the mental state constituting an element of a crime.⁹⁹ In the federal courts, Federal Rule of Evidence 704(b) prohibits such testimony. This difference is one of the few areas where the military has declined to adopt the federal position.¹⁰⁰ The rationale for this distinction is that military court members are better educated and sophisticated enough to disregard expert testimony that confuses civilian jurors.¹⁰¹ The military approach gives both sides much greater latitude in deciding how they want to present their case.

Deliberations on Findings

The accused is presumed to be sane.¹⁰² Under the current standard, the defense has the burden of establishing lack of mental responsibility by clear and convincing evidence.¹⁰³ Clear and convincing is a standard lower than proof beyond a reasonable doubt but higher than a preponderance.¹⁰⁴

Because of this burden of proof, special voting procedures apply when lack of mental responsibility is raised. Since the government still has the burden of proof on the charged offense, the factfinder must follow a two-tiered voting process.¹⁰⁵ In a trial with members, the members first vote on guilt or innocence for each offense.¹⁰⁶ If the accused is found guilty of any offense, the members then vote on the defense of mental responsibility for that offense.¹⁰⁷ If a majority of the members concludes that the accused is not mentally responsible, the

94. MCM, *supra* note 3, MIL. R. EVID. 302(b)(2). For a sample direct examination of a defense psychiatrist, see JA 310, *supra* note 41, para. 4-15.

95. *United States v. Bledsoe*, 26 M.J. 97 (C.M.A.) (drafters never intended that the prosecution be barred from introducing expert testimony about the accused's sanity unless the defense introduced expert testimony), *cert. denied*, 488 U.S. 849 (1988); *see also* *United States v. Matthews*, 14 M.J. 656 (A.C.M.R. 1982).

96. MCM, *supra* note 3, MIL. R. EVID. 302(b)(1). *But see Bledsoe*, 26 M.J. 97 (door was not opened to the accused's statements when a defense expert testified about stress and financial problems that the accused was experiencing).

97. *United States v. Benedict*, 27 M.J. 253 (C.M.A. 1988). The trial judge in *Benedict* admitted the findings of a sanity board which concluded that the accused was mentally responsible for offenses involving indecent liberties with a young girl. *See also supra* note 36. The CMA held that the report should not have been admitted as it was not a report of a regularly conducted activity. *Benedict*, 27 M.J. at 260-61 (citing MIL. R. EVID. 803(6)). The court first looked at the 1969 Manual, which was in effect at the time of trial, and a line of cases which expressly rejected admission of the sanity board report as a hearsay exception. *Id.* at 260 (citing MANUAL FOR COURTS-MARTIAL, UNITED STATES, ¶ 122c (1969); *United States v. Smith*, 47 C.M.R. 952 (A.C.M.R. 1973); *United States v. Rausch*, 43 C.M.R. 912, 917 n.3 (A.F.C.M.R. 1970); *United States v. Parmes*, 42 C. M.R. 1010 (A.F.C.M.R. 1970)). The court then addressed the government's contention that the Military Rules of Evidence, adopted in 1980, superseded this position. The CMA held that a sanity board report is not a "regularly conducted business activity" and that it is not the "regular practice" to prepare such a report. *Benedict*, 27 M.J. at 261 (citing MIL. R. EVID. 803(6)). The court noted that the sanity board is appointed ad hoc, in connection with possible criminal prosecution. Psychiatric opinions are complex and speculative, and the admission of those opinions without the benefit of cross-examination would cause confrontation clause concerns. *Id.*

98. *Id.* at 262.

99. *See, e.g., United States v. Combs*, 39 M.J. 288 (C.M.A. 1994) (holding that a forensic psychiatrist should have been allowed to testify that the accused did not form the intent to kill or to inflict great bodily harm when he shook his 17 month-old son).

100. *See* MCM, *supra* note 3, MIL. R. EVID. 101(b) (courts should apply the rules of evidence generally recognized in United States district courts); *Id.* R.C.M. 1102 (amendments to the Federal Rules of Evidence apply to the military rules 180 days after the effective date of such federal rules).

101. *Id.* MIL. R. EVID. 704 analysis, app. 22, at A22-48.

102. *Id.* R.C.M. 916(k)(3)(A).

103. UCMJ art. 50a(b) (1994). Prior to the Military Justice Act Amendments of 1986, *supra* notes 25-32 and accompanying text, once insanity was placed in issue, the prosecution had to prove that the accused was sane beyond a reasonable doubt. 1984 MANUAL, *supra* note 9, R.C.M. 916(k)(3)(A) discussion; *United States v. Morris*, 43 C.M.R. 286, 289 (C.M.A. 1971) (government's burden of proof extends not only to elements of charge, but also to accused's sanity). Shifting the burden of proof to the defense has withstood constitutional challenge. *United States v. Freeman*, 804 F.2d 1574 (11th Cir. 1986).

104. BLACK'S LAW DICTIONARY 251 (6th ed. 1990).

105. MCM, *supra* note 3, R.C.M. 921(c)(4). *See also* U.S. DEP'T OF ARMY, PAM. 27-9, LEGAL SERVICES: MILITARY JUDGES' BENCHBOOK, para. 6-7 (30 Sept. 1996) [hereinafter BENCHBOOK].

106. MCM, *supra* note 3, R.C.M. 921(c)(4) and discussion. For most offenses, two-thirds of the members are required for a finding of guilty. *Id.* R.C.M. 921(c)(2)(B). For any offense which carries a mandatory death penalty, a unanimous vote of guilt is required. *Id.* R.C.M. 921(c)(2)(A).

107. *Id.* R.C.M. 921(c)(4).

accused is found not guilty only by reason of lack of mental responsibility.¹⁰⁸ Otherwise, the verdict is guilty.

As with any affirmative defense,¹⁰⁹ the military judge must instruct the members on the defense if it is reasonably raised by the evidence.¹¹⁰ This duty to instruct arises *sua sponte*. Because the instructions in a mental responsibility case are so complicated, the judge may want to give instructions in writing.¹¹¹

Disposition When the Accused is Found Not Guilty by Reason of Lack of Mental Responsibility

If the accused is found not guilty by reason of lack of mental responsibility, new procedures described in Article 76b of the UCMJ provide for civil commitment.¹¹² The code now allows the military to rely on procedures already available in federal courts and to transfer the accused to the custody of the Attorney General. Before doing so, however, certain steps must be taken. First, a sanity board must be conducted after the court-martial. Then, within forty days of the verdict, the court-martial must conduct a hearing.¹¹³ At the hearing, the burden of proof is on the accused to show that "his release would not create a substantial risk of bodily injury or serious damage to property of another due to a mental disease or defect."¹¹⁴ The standard is either clear and convincing evidence or preponderance, depending on the type of crime of which the accused has been found not guilty by reason of lack of mental responsibility.¹¹⁵ If the accused fails to meet the appropriate burden, the

GCMCA may commit him to the Attorney General. The Attorney General then turns the person over to the state where the person is domiciled or was tried, if such a state will accept him. Otherwise, the Attorney General will hospitalize the person in a suitable facility until either a state will accept the person or his release would not create a substantial risk of bodily injury to another or damage to property.¹¹⁶

These new procedures were designed to fill a vacuum in the *Manual for Courts-Martial*, which had no provision for an accused who was found not guilty by reason of lack of mental responsibility. Such an accused was free to walk away from a courtroom, unlike his civilian counterpart tried in federal district court. The command had to deal with the soldier through either medical or administrative channels.¹¹⁷

Presentencing Phase

If the accused is convicted, evidence of the accused's mental condition may play a significant role during the presentencing phase of the court-martial. Rarely will psychological problems rise to the level of lack of mental responsibility, but the evidence may be useful as extenuation or mitigation. Information of this nature may be admitted as extenuating evidence when it tends to explain why a crime was committed.¹¹⁸ Even if unrelated to the accused's crimes, it can be offered as mitigating evidence.¹¹⁹ Since the rules of evidence are relaxed during the

108. UCMJ art. 50a(e)(1) (West Supp. 1996); MCM, *supra* note 3, R.C.M. 921(c)(4). In a trial by judge alone, the judge would conduct the same type of analysis. See UCMJ art. 50a(e)(2).

109. An affirmative or special defense is one in which the accused admits he committed the offense but denies criminal liability. BENCHBOOK, *supra* note 105, para. 5-1.

110. *United States v. Jones*, 7 M.J. 441 (C.M.A. 1991) (instruction that defense may or may not have been raised was in error, as it allowed the members to decide whether an issue was raised). When deciding whether a defense has been raised, no consideration should be given to its source or credibility. MCM, *supra* note 3, R.C.M. 920(e) discussion; see also *United States v. Tulin*, 14 M.J. 695 (N.M.C.M.R. 1982) (holding that the trial judge erred in excluding evidence of duress on the grounds that it was insufficient to warrant an instruction); *United States v. Coleman*, 11 M.J. 856 (N.M.C.M.R. 1981) (holding that the trial judge erroneously excluded evidence of insanity by ruling that it would not raise the issue of mental responsibility and that the members were entitled to weigh the evidence); but see *United States v. Hensler*, 44 M.J. 184 (1996) (holding that the trial judge was not required to incorporate evidence of voluntary intoxication into a mental responsibility instruction).

111. In addition to being read orally, all instructions may be given in writing, and if both parties agree, portions of the instruction may be in writing. MCM, *supra* note 3, R.C.M. 920(d).

112. UCMJ art. 76b (West Supp. 1996). Section 133 of the National Defense Authorization Act for Fiscal year 1996 added Article 76b to the UCMJ. Pub. L. No. 104-106, 110 Stat. 186 (1996). The act was signed by President Clinton on 10 February 1996. Article 76b became effective for all courts-martial referred after 11 August 1996, six months after the enactment of the new law. *Id.* For a general discussion of all the 1996 amendments to the UCMJ, including Article 76b, see Joint Service Committee, *supra* note 13, at 138.

113. UCMJ art. 76b(2) (citing 18 U.S.C. § 4242). Apparently, this sanity inquiry is in addition to any sanity inquiry that may have been completed prior to trial.

114. 18 U.S.C. § 4243(d) (1994).

115. If the accused has been found not guilty by reason of lack of mental responsibility of an offense involving bodily injury to another or serious damage to property of another, or substantial risk of such injury or damage, the standard is clear and convincing evidence. If the accused has been found not guilty by reason of lack of mental responsibility of any other offense, the standard is preponderance of the evidence. *Id.*

116. *Id.* § 4243(e) (1994).

117. See generally AR 635-200, *supra* note 46, chs. 5, 13, 14; U.S. DEP'T OF ARMY, REG. 40-501, STANDARDS OF MEDICAL FITNESS, ch. 3 (30 Aug. 1995); U.S. DEP'T OF ARMY, REG. 600-8-24, OFFICER TRANSFERS AND DISCHARGES, ch. 4 (21 July 1995); U.S. DEP'T OF ARMY, REG. 635-40, PHYSICAL EVALUATIONS FOR RETENTION, RETIREMENT, OR SEPARATION, chs. 3, 4 (1 Sept. 1990).

presentencing phase, defense counsel have wide latitude in the types of evidence that can be admitted.¹²⁰

Such evidence could include testimony that an accused suffers from a personality disorder, post-traumatic stress disorder, alcoholism, or a substance abuse disorder, or that the accused was sexually abused as a child. Counsel should be careful so that any information offered follows their presentencing strategy. In *United States v. Bono*,¹²¹ the defense introduced a report of the accused's mental status that had been prepared by a military psychiatrist while the accused was in pretrial confinement.¹²² Among other things, the report: described disciplinary problems the accused experienced when he was first confined; diagnosed the accused as having a sociopathic personality disorder; and mentioned that, as a juvenile, the accused had a history of petty crimes and psychiatric commitment.¹²³ As the appellate court pointed out, the report was not helpful to the defense case, as it indicated that past attempts at reform measures had failed and that the accused was not amenable to rehabilitation.¹²⁴ These and other mistakes resulted in a finding of ineffective assistance of counsel.¹²⁵ Counsel in such a situation should consider redacting the negative information, asking opposing counsel to stipulate to certain conclusions in the report, or annotating the case file to explain why the report was not introduced.

Post-Trial Phase

The accused's mental condition can also become an issue during the post-trial phase. A convening authority may not approve a sentence while the accused lacks the mental competency to cooperate in and to understand post-trial proceedings.¹²⁶ Counsel who are faced with a client who becomes mentally unbalanced after the trial should request that the convening authority order a sanity board.¹²⁷ Depending on the results of that board, counsel may want to request a post-trial hearing to determine whether the accused is competent to participate in the post-trial proceedings.¹²⁸ At the hearing, the same standard for competency applies as competency to stand trial.¹²⁹

Conclusion

As Major Sugna begins winding down, he says to you, "Dealing with issues involving an accused's mental condition can be challenging. The burden of proof and special procedures associated with the litigation of mental responsibility and competency can ensnare the unwary." You close your notebook, thank your boss for his time and leave his office, realizing that SSG Johnson's case offers you an excellent opportunity to gain experience with this fascinating area of military criminal practice.

118. MCM, *supra* note 3, R.C.M. 1001(c)(1)(A). The rule provides that: "[A] matter in extenuation of an offense serves to explain the circumstances surrounding the commission of an offense, including those reasons for committing the offense which do not constitute a legal justification or excuse." *Id.*

119. *Id.* R.C.M. 1001(c)(1)(B). The rule provides, in part: "[A] matter in mitigation of an offense is introduced to lessen the punishment to be adjudged by the court-martial, or to furnish grounds for a recommendation of clemency." *Id.* The rules also state that "[e]vidence relating to any mental impairment or deficiency of the accused" is an additional matter that may be considered by the court-martial. *Id.* R.C.M. 1001(f)(2)(B).

120. *Id.* R.C.M. 1001(c)(3).

121. 26 M.J. 240 (C.M.A. 1988).

122. *Id.* at 241. The accused, a Marine, had been convicted by judge alone of unauthorized absence and larceny of a car from another Marine. *Id.* at 240-41.

123. *Id.* at 241. The report noted that after his initial problems adjusting to confinement the accused behaved satisfactorily in the brig. It also indicated that no emotional or mental illness existed "that should be taken into consideration for extenuation and mitigation when considered for punishment for his alleged crimes." *Id.*

124. *Id.* at 242. The court noted that the American Psychiatric Association describes a sociopathic personality disorder as an "Antisocial Personality Disorder which is manifested by continuous and chronic antisocial behavior in which the rights of others are violated." *Id.* at 241.

125. *Id.* The defense counsel failed to object to the admission of the accused's confession to the Naval Investigative Service, which included numerous acts of uncharged misconduct. *Id.*

126. MCM, *supra* note 3, R.C.M. 1107(b)(5). Likewise, an appellate authority may not affirm the findings when the accused lacks the ability to understand and cooperate in post-trial proceedings. *Id.* R.C.M. 1203(c)(5).

127. *Id.* R.C.M. 1203(c)(5). The sanity board may limit its examination to determining the accused's competency to understand and participate in the post-trial process. *Id.*

128. *See id.* R.C.M. 1102(d) (judge may conduct a post-trial session at any time up until authentication of the record of trial). After authentication, such a request would have to go to the convening authority.

129. *Id.* R.C.M. 1107(b)(5); *see also id.* R.C.M. 909.