

5-2019

Military Rules: Expert Qualifications, Admissibility of Expert Testimony, and Competency Hearings

Joshua E. Kastenber

University of New Mexico - School of Law, joshua.kastenber@law.unm.eduFollow this and additional works at: https://digitalrepository.unm.edu/law_facbookdisplayPart of the [Courts Commons](#), and the [Military, War, and Peace Commons](#)

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CONTRIBUTORS

Eric Carpenter, JD, is an associate professor at the Florida International University College of Law in Miami, Florida. Professor Carpenter joined the faculty in 2013. Before that, he was the chair of the Criminal Law Department at The Judge Advocate General's Legal Center and School in Charlottesville, Virginia. Prior to attending law school, Professor Carpenter retired from the U.S. Army after 20 years of distinguished active duty service, including initial service as a helicopter pilot. As a judge advocate, he prosecuted and defended several serious cases, which included serving as the lead defense attorney on a capital murder case from 2007 to 2009. His research interests are in military justice, sexual violence against women, and capital litigation.

Mary Connell, EdD, is a board-certified clinical and forensic psychologist who has been in independent practice in Fort Worth, Texas, for 37 years. With expertise in child sexual abuse, rape, and domestic violence, she has evaluated and treated victims and perpetrators, and she has provided testimony and consultation in family, civil, criminal, and military courts. Dr. Connell is a Fellow of Division 42 (Psychologists in Independent Practice) of the American Psychological Association (APA) and a Fellow and past president of the American Academy of Forensic Psychology. She has also served on the APA Committee on Professional Practices and Standards and the Ethics Committee.

Kathleen Coyne, JD, is a Temple University Law School graduate admitted to practice in California, Pennsylvania, and Florida. She is a nationally recognized, award-winning criminal defense lawyer, having practiced public defense in

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San Diego, Philadelphia, New York, and as a federal defender for over 30 years. She has been featured in national media and has lectured extensively on defending sexual assault cases, insanity and mental defenses, working effectively with experts, cross-examining psychological experts, eyewitness identification, ethics, child witness testimony, childhood suggestibility, syndrome evidence, and investigation of complex child abuse cases. She consults on sexual assault and complex cases, conducts training, and develops defense resources as a Highly Qualified Expert/Attorney Advisor for the Marine Corps Defense Services Organization.

Deborah Davis, PhD, is a professor of psychology at the University of Nevada, Reno, and a member of the faculty of the National Judicial College, also located in Reno. She received her PhD from Ohio State University and teaches in the areas of social psychology, cognitive psychology, psychology and law, and forensic psychology. Dr. Davis pursues research in several areas of psychology and law, including sexual consent communications, jury decision making in sexual assault cases, eyewitness memory, and interrogations and confessions. She has served on the editorial boards of multiple journals and has published over 100 articles and book chapters. For 25 years, she ran a trial consulting firm offering jury research and a variety of trial preparation services for attorneys.

Karen Franklin, PhD, is a forensic psychologist and adjunct instructor at Alliant University in San Francisco, California. Her published research on hate crimes, multiple-perpetrator rape, and professional ethics has garnered several awards, including Distinguished Scientific Achievement in Psychology. She completed a rigorous postdoctoral fellowship in forensic psychology through the University of Washington and has testified in more than 30 state and federal jurisdictions, including in multiple U.S. military courts. Drawing on her prior careers as a legal affairs journalist and criminal investigator, she is a frequent media commentator and hosts a prominent forensic psychology and criminology blog (<https://forensicpsychologist.blogspot.com/>).

Marcus N. Fulton, JD, is an appellate judge with the Navy-Marine Corps Court of Criminal Appeals at the Washington Navy Yard in Washington, DC. An active duty officer in the U.S. Navy's Judge Advocate General's Corps, he is admitted to practice before the Supreme Court of the United States, the United States Court of Appeals for the Armed Forces, and the Supreme Court of Ohio. Captain Fulton has been practicing military law for over 20 years. He has represented clients at both the trial and appellate levels in matters ranging from unauthorized absence to murder. Before joining the appellate court, Captain Fulton served as a military judge for 4 years in the Navy-Marine Corps Trial Judiciary's Hawaii and Northern Judicial Circuits. As of November 2018, he has been appointed by the President to be an appellate military judge on the U.S. Court of Military Commissions Review, also in Washington, DC.

Michael C. Gottlieb, PhD, is a forensic psychologist and clinical professor at the University of Texas Southwestern Medical Center in Dallas. Dr. Gottlieb is board certified in family psychology from the American Board of Professional Psychology and is a Fellow of the American Psychology/Law Society as well as four other divisions of the American Psychological Association. At The University of Texas Southwestern Medical Center, he teaches professional ethics and family systems therapy. An active scholar, Dr. Gottlieb has written or cowritten 70 peer-reviewed articles and book chapters, presented nearly 100 original papers, and offered over 165 professional workshops locally, nationally, and internationally. He has received more than 30 awards for his professional accomplishments and sits on the editorial boards of six scholarly journals.

Joshua Kastenberg, JD, LL.M., is an assistant professor and Lee & Leon Karelitz Professor in Evidence and Procedure at the University of New Mexico School of Law in Albuquerque. Before his 2016 retirement from active duty service in the U.S. Air Force, Professor Kastenberg was a military judge who in 5 years presided over 200 trials. During a 20-year career with the U.S. Air Force Judge Advocate General's Corps, he served as prosecutor and defense counsel, advised the Department of Defense on cybersecurity and cyberwarfare matters, twice deployed to Iraq, and oversaw the military's compliance with international law.

Robert D. Merrill, JD, is a judge advocate in the United States Marine Corps, currently serving as a battalion commander in Montgomery, Alabama. He is a decorated military officer who has served as a military judge, senior defense counsel, trial counsel, staff judge advocate, and battalion judge advocate. Prior to his graduation from Harvard Law School and service as a judge advocate, Lieutenant Colonel Merrill served as an infantry officer, including as a rifle company commander during Operation Phantom Fury, the Second Battle of Fallujah, in Iraq.

Andrew R. Norton, JD, is a military judge for the United States Air Force Trial Judiciary at Joint Base Andrews, Maryland. He presides over general and special courts-martial worldwide. A graduate of the University of Missouri School of Law, he is a member of the Missouri Bar. Lieutenant Colonel Norton received a direct commission as an Air Force Judge Advocate in October 2006 and has served in a variety of positions, including as a military justice instructor at The Air Force Judge Advocate General's School, Area Defense Counsel, and two tours as a senior defense counsel supervising nine trial defense counsels and personally defending the most serious cases in the Air Force.

Daniel Reisberg, PhD, is the Patricia & Clifford Lunneborg Professor of Psychology at Reed College in Portland, Oregon. His research examines the accuracy and completeness of human memory, with an emphasis on how

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people remember the emotional events they have experienced. Dr. Reisberg has provided training seminars for defenders, prosecutors and judges, and also for police and other investigators. He has testified in civil, criminal, and family courts on issues of perception and memory, including eyewitnesses' identifications and narrative reports on crimes; earwitnesses' identifications of someone's voice; and the evaluation of confession evidence. Dr. Reisberg is the author of many books, including *The Science of Perception and Memory: A Pragmatic Guide for the Justice System* (2014).

Brian M. Thompson, JD, is senior air staff counsel for the Administrative Law Directorate, Office of The Judge Advocate General, at the Pentagon in Washington, DC, currently detailed as chief legal counsel to the Air Force Inspector General's Senior Officer Inquiries Division. He was previously the U.S. Air Force's chief senior trial counsel (prosecutor), during which time he supervised all Air Force senior trial counsel and personally tried the Air Force's most complex and high-profile cases. He also served as staff judge advocate at Joint Base Charleston, where he and his personnel were responsible for processing all military justice actions and prosecuting all cases on the base. Colonel Thompson has served as a legislative fellow in the office of Senator Richard Durbin of Illinois, the Assistant Majority Leader (Washington, DC); deputy staff judge advocate, circuit defense counsel, and area defense counsel.

**FORENSIC
PSYCHOLOGY
IN MILITARY
COURTS**

Introduction

Why Forensic Psychology in Military Courts?

Christopher T. Stein and Jeffrey N. Younggren

In military courts-martial, opportunities abound to explore the intersection of psychology and law. As civilian criminal jury trials have become virtually extinct, the military justice system remains a haven for hard-fought, vigorously litigated trials. With an increasing number of cases involving sexual assault and intimate partner violence in the military, psychologists are playing an ever-expanding role in courts-martial: from consulting on strategy and jury selection; to educating military panels on the science of memory, suggestibility, and coercive control; to performing forensic assessment for competency to stand trial and recidivism.

Psychologists are needed in the military justice system now more than ever. Yet many civilian psychologists are wary of getting involved in a military system they know nothing about. Or worse yet, they want to get involved but do not know how. Others mistakenly believe there is commonality among the various legal systems regarding process, regulation, procedure, and law, and they carry the error of that assumption into military trials. This can lead to disastrous consequences for all involved. Among the various legal systems, none is quite as unique as the judicial system found in the military—a system with which few are familiar.

Similarly, many military attorneys want help from psychologists, but they do not really understand what they need and cannot articulate to military judges and convening authorities how psychologists will assist in guaranteeing fair trials and just outcomes. Emerging research in psychology and the law is showing that psychological concepts and scientific principles are applicable to

all aspects of criminal cases, a fact that most lawyers are not aware of. Although it is becoming common practice to have a psychologist on the trial team, many lawyers are unprepared to effectively employ this invaluable resource. They leave this potent weapon holstered because they do not know how to use it. The popular image of the psychologist as an unscientific, touchy-feely counselor blinds them to the myriad ways psychology is transforming what we know about criminal behavior and how we present evidence within the criminal justice system.

The purpose of this volume is twofold: (a) to educate psychologists on the unique nature of the military legal system and (b) to assist attorneys in identifying appropriate roles and responsibilities for psychologists who work within this system. The goal of this volume is to make the military justice system easy to understand—the players, the process, and the rules—and to introduce psychologists to the wealth of opportunities that exist for working within this dynamic forum. It also will help attorneys understand how to use the extremely valuable resource they have been given in the form of a psychological expert.

This volume should be of interest to civilian forensic psychologists looking to expand their practice into a potentially lucrative new market and for research psychologists who may find a fertile field for their ideas to take root. It will also be invaluable to those who provide mental health services within the Department of Defense (DoD), who are often called upon, with little training or experience, to fill an expert role within the military justice system. Lawyers—military and civilian, prosecutors and defense counsel—will also find great value in the topics covered within. Coverage of the science long hidden behind the veil of academia is opened up in a practical way to attorneys who are in the arena of combat in the courtroom. Ideally, in addition to the libraries of practicing psychologists and attorneys, this volume will find its way into the introductory curriculum for graduate psychology and law students, as well as military attorneys going through initial training as a Judge Advocate. Too often the lessons covered in this volume are stumbled upon through trial and error late in a career when they could have been far more effective if systematically taught at the beginning.

This volume is a call to psychologists to get involved in the military justice system and to lawyers to get them involved and use psychologists effectively. As such, we have approached the content in a practical fashion, although not to the exclusion of thorough scholarship in the law and psychology. Chapters 1 through 4 introduce the reader to the military justice system and explain those areas of military law most relevant to psychologists and psychological science. Chapters 5 through 9 address the roles of the psychologist in courts-martial and the aspects of psychology most prominent in military trials. They also will help psychologists wrestle with the ethical issues inherent in the cross-domain military practice. Finally, Chapters 10 through 12 are uniquely pragmatic: They are focused on the nitty-gritty of partnering with military counsel—both prosecution and defense—in criminal trials.

Throughout the volume, readers learn from a diverse array of professionals. We have included military attorneys, civilian attorneys, and law professors; prosecutors, defense counsel, and judges; psychologists in private practice; and professors in academia. Our goal is to provide readers with actionable information supported by rigorous legal research and peer-reviewed clinical science.

In Chapter 1, Kathleen Coyne, JD, a Highly Qualified Expert in the Defense Counsel Assistance Program, draws on over 35 years of experience to introduce readers to the military justice system: its background, structure, and processes. Contrary to popular perceptions of this system as alternately arcane or a “kangaroo court,” the military justice system is a sophisticated and complete criminal code that, in many ways, is arguably both fairer and more efficient than civilian systems. It is true that, unlike civilian justice systems run by lawyers, the military justice system is commander-driven. Operational military commanders, with the advice and counsel of their lawyers, prefer criminal charges against those accused of crimes, refer them for trial by court-martial, and select the panel of military members (similar to a civilian jury) that will serve as the fact finder. They also decide, upon a formal request, whether and to what extent to fund expert assistance for both the prosecution and the defense. Understandably, this can create tension and cause concern for both trial participants and outside observers. Becoming familiar with the outline of the military justice system and the context in which mental health providers serve can help psychologists navigate these foreign waters.

U.S. Navy Captain Marcus N. Fulton, JD, an appellate judge on the Navy-Marine Corps Court of Criminal Appeals, continues the overview of the military justice system in Chapter 2 by introducing the reader to the procedures, parties, and terminology of military trials or courts-martial. For many civilian psychologists, this is the most intimidating part of working with the military—a court-martial can feel like a secret society with defined customs, peculiar procedures, and acronyms abounding. When we speak with psychologists who are new to the system, this is usually where they desire assistance. They know the science and are eager to contribute, but they need a primer on the parties, procedures, and terminology to get them going. This chapter is that primer; it demystifies the court-martial process, explains some of the most frequent letters and numbers bandied about, and describes the important players. For example, when military attorneys talk about 412 and 513, they are not reporting the time or denoting in which building the trial will be held, but rather are referring to the Military Rules of Evidence (MRE) relating to sexual history and mental health, respectively.

In Chapter 3, Assistant Professor Joshua Kastenber, JD, explains the rules on expert qualifications and testimony, the protection of privileged information within the expert relationship, and the military’s competency determination process. Expert testimony is permitted if it will help the trier of fact (judge or panel of members) understand the evidence, is based on sufficient facts or data, and is the product of reliable principles and methods. Although the

military judge usually applies a liberal standard for admission of expert testimony, it still must be the product of a reliable theory or technique that has been tested, peer reviewed, and subjected to scientific standards. In addition to general standards for experts and expert testimony, the military's process for holding a competency hearing is of interest to forensic psychologists. Although internal DoD mental health professionals almost always perform the Rule for Court-Martial (RCM) 706 inquiry (or "sanity board"), outside experts are often asked to evaluate the quality of this inquiry.

Chapter 4 explores additional legal rules that are essential for psychologists practicing in the military court system. U.S. Marine Corps Lieutenant Colonel Robert D. Merrill, JD, a former trial court judge, reviews how military law treats mental health conditions and discusses access to patient records and the piercing of psychotherapist–patient privilege. A military accused has a constitutional right to confront witnesses against him or her. Certain forms of mental disorder undoubtedly have high probative value on accuracy of testimony, bias, and credibility. At the same time, however, rules of evidence strictly guard patient privacy and confusion of the issues, limiting the ability to learn about and introduce such mental health evidence. In the absence of clear guidance under the law, however, each service tends to handle mental health records slightly differently, and these differences matter at the trial level. In order to assist the trial team in obtaining, or alternately protecting, mental health records and to properly set expectations about what information will be available, psychologists need to understand the law and processes on this issue. This chapter analyzes MRE 513 (the rule concerning psychotherapist–patient privilege under military law), the process for requesting access to mental health records, and the standards that exist for admitting into evidence issues of mental health. It covers the single most frequent intersection of psychology and the law in military trials and represents an in-depth treatment unavailable anywhere else.

Chapter 5 signals the transition from law to psychology. Michael C. Gottlieb, PhD, and Jeffrey N. Younggren, PhD, address potential role conflicts in military courts-martial. Military practitioners frequently expect mental health professionals to be both a trial consultant and a forensic scientist. This is because the military rarely funds separate consulting and testifying experts: one expert is expected to perform both roles. While this is not a common practice in many civilian jurisdictions, it is permissible within the military system, is arguably not a violation of any existing ethical prohibitions, and almost always works well. The rules allow experts to compartmentalize their roles, providing expert testimony in one area while preserving attorney confidences in another. Although this is clearly a boundary crossing, it is not a boundary violation. This chapter focuses on the ethical principles that make assuming multiple roles possible and the issues practitioners should look out for in identifying areas of professional risk.

In Chapter 6, Mary Connell, EdD, outlines the various roles psychologists can occupy in military proceedings. They might serve as trial consultant from the outset, assisting with case strategy decisions and jury selection; then testify

in a motions hearing in an effort to gain access to a witness's mental health records; then go back to consulting on cross-examination approaches; then consult or testify about the effect of alcohol on memory; and then, after conviction, testify regarding rehabilitation potential during the punishment phase.

Although Chapter 5 explores the ethical dimension of multiple roles, this chapter focuses on the practical applied aspects of serving as a psychologist in a military proceeding. If executed well, the psychologist can provide immeasurable benefit to the trial team in each role. If done poorly, however, each role could undermine credibility and effectiveness in each other role. This chapter outlines the various demands in a military practice and suggests how psychologists can effectively manage these multiple roles without undermining their credibility before the fact finder or compromising the rights of the accused.

Professors Deborah Davis, PhD, and Daniel Reisberg, PhD, review two of the most common roles psychologists are asked to fill in military trials—that of trial consultant and that of educator—in Chapter 7. They focus on the most frequent role: trial consultant. While experts are usually retained with a view toward testimony on some specific issue, they are actually called to testify infrequently. Far more often they are asked to play a consulting role as they educate counsel on psycholegal issues and provide wise counsel accumulated over years of experience. Military trial attorneys have various levels of experience, but usually no more than about 45 trials over 5 years. Many more are in their first or second year of practice and look to the psychologist, with vastly more experience, to help direct the trial team. Thus, a psychologist can prove invaluable to the team by reviewing the evidence and providing feedback, assisting with panel selection, helping prepare inexperienced and nervous witnesses to testify, suggesting trial strategy approaches, and rehearsing arguments with counsel.

In Chapter 8, Drs. Reisberg and Davis move from the role of educating the trial team as a consultant to that of educating the fact finder as a testifying witness. This chapter discusses research on the most common areas that are ripe for testimony and suggests best practices for approaching the educator role. MRE 702 permits a qualified expert to testify on an issue, if the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue. That is, if the expert's specialized understanding of a subject can help enlighten an untrained lay panel member, it usually will be allowed. Thus, psychologists are often called upon to simply teach the fact finder about some psychological principle that could help the panel make sense of the evidence. This may be through "cold" testimony, where the expert knows nothing of the specific facts of the case, or it could be after a thorough review of the evidence and listening to witness testimony. In military courts, psychologists regularly testify about human memory, the effects of alcohol on perception and memory, suggestibility in child abuse allegations, and coerced confessions, to name a few.

In Chapter 9, Karen Franklin, PhD, writes about a role that is traditionally the "bread-and-butter" of a forensic psychologist's practice but presents the

most challenges when applied to a military setting: the psychologist as assessor. Forensic psychologists may be called upon to assess military accuseds for issues like competency and risk of sexual or violent reoffense. Military practice provides unique opportunities for partnership, but also challenges, in this area. All too often, nonforensically trained psychologists in the local mental health office will have performed a “sanity board” on a military accused without using accepted competency assessment tools. The forensic expert must understand that process, be prepared to critique it, and be ready to perform a forensically sound assessment. Further, a forensic psychologist can add substantial value by performing a comprehensive forensic psychological assessment that could uncover mitigating circumstances, personal beliefs ripe for treatment, and estimate risk of future dangerousness. Unfortunately, however, forensic psychologists are often not retained until a couple weeks before trial and are not funded for travel until the day before, creating obstacles that must be overcome. This chapter explores common forensic assessment tools and techniques that can be helpful in military cases and suggests approaches for overcoming common hurdles present in the military system.

Chapter 10 moves back to the law, with U.S. Air Force Lieutenant Colonel Andrew R. Norton, JD, a trial judge and former senior defense counsel, offering an intensely practical—and helpful—view into the team concept in military courts. In military practice, appointed psychologists become part of the trial team. Generally, the team spends nearly every waking minute together from a couple days before trial until it is over. This means early breakfast meetings discussing strategy, sitting in the courtroom through all aspects of trial, and late dinners to prepare for the next day. The result of this is an intense bond, owing to the unique military culture and values, that kindles excellent results for trial. Lieutenant Colonel Norton starts with the practical aspects of becoming part of the team, such as making travel arrangements and preparing for trial, and ends with the legal aspects, such as the attorney–client privilege and interviewing the opposing party. This chapter explores the nature of the team concept, the legal protections surrounding it, and recommendations for fulfilling the team role effectively and legally.

Colonel Brian M. Thompson, JD, the former Chief Senior Trial Counsel of the Air Force, offers a prosecutor’s perspective on psychologist–prosecutor collaboration in Chapter 11 of this book. Psychologists new to military courts often have myriad questions about how things work—everything from who they interact with, to how they get to the base from the airport, to what exactly they will do when they get there. Even experienced experts find they learn something new about the military and their roles in every trial. This chapter provides the nuts and bolts of supporting a military prosecution team and relays some of the best practices in prosecutor–psychologist collaboration by one of the military’s most experienced prosecutors.

This volume closes with an invaluable contribution to those tasked with defending military members with mental health conditions. In Chapter 12, Associate Professor Eric Carpenter, JD, offers an integrated approach to defend-

ing those with mental health conditions. The military's screening process and strict accession standards means there are far fewer servicemembers suffering from the very serious mental illnesses found in many civilian criminal defendants. Yet, this inevitably means those in the military justice system lack the depth of experience dealing with the mentally ill and may tend to overlook mental health conditions as a contributing factor to misconduct. Professor Carpenter points out how psychologists can be essential in helping defense attorneys recognize underlying issues in military clients, understand how mental health conditions may have played a role in the charged misconduct, and communicate that mitigating and extenuating information to a judge or panel. This chapter offers insights for understanding an impaired military accused, developing a strategy for findings and sentencing that incorporates the reality of the mental health issues, and working as a team to best assist the accused through the trial process.

A careful reader of this volume from front to back will appreciate the way the chapters build on and play off each other. The reader will also notice that, at times, multiple authors cover the same subject but offer valuable and differing perspectives of those subjects. This is both unavoidable and intentional. Each author, by virtue of his or her background and role in the court-martial process, has a unique perspective to offer. We believe that including these different views creates a rich composite that should prove far more useful than any individual perspective alone. From the legal, to the scientific, and to the practical, the collection of writings available in this volume should empower psychologists to work effectively within the military justice system and enable better lawyer-psychologist teaming on issues of paramount importance. Now, more than ever, that is what is needed within the military justice system.