**Cornerstone**

**Legal Breakout Facilitator Guide**

The purpose of this breakout is for participants to discuss some legal issues that may arise during command. The questions associated with the fact patterns are for discussion leaders to ask members of their respective breakout group. Note that legal personnel from the NCR will be present to assist during your discussions.

This guide includes materials on search and seizure, restitution, sexual assault, officer misconduct, social media misconduct, NJP and courts-martial, investigations, gifts, and criminal justice reporting.

Read to breakout group: “In dealing with legal matters, commanders must commit to the process, not the result. Being consistent and exercising authority in an objective manner will facilitate good order and discipline, and ensure fairness. As a baseline, your first call on military justice matters should always be to your staff judge advocate. The staff judge advocate to the general court martial convening authority is your staff judge advocate and is responsible for providing you advice.”

Fact patterns:

 **1. Search and Seizure/Restitution**

 **2**. **Sexual Assault**

 **3. Social Media Misconduct**

 **4. Prohibited Activities and Conduct Policy**

 **5. Ethics**

**1. [Search and Seizure/Restitution] During your first full day in command, your sergeant major informs you that in the last month, four Marines have reported cell phones, money, and an X-Box stolen from their barracks rooms. This morning, LCpl Smith reported his cell phone was missing and that LCpl Sticky-Fingers was seen leaving LCpl Smith’s room shortly before the phone went missing. When LCpl Smith confronted LCpl Sticky-Fingers, he denied stealing the cell phone, however LCpl Smith was able to see four cell phones, an X-Box and a bag of a green leafy substance through an opened door of LCpl Sticky-Fingers’ wall locker. LCpl Smith immediately reported the theft to the duty, but LCpl Sticky-Fingers was seen leaving in his car with a cell phone in his hand before the duty could stop him. LCpl Sticky-Finger’s car was spotted at the enlisted club**.

**(a) What actions should be taken prior to a search authorization?**

* If there is probable cause to believe that evidence of a crime exists in a certain area, any officer or SNCO/NCO on your staff has the authority to freeze the scene until a proper command authorized search & seizure can be obtained.
* This means that you would post a Marine outside the door and ensure that no one enters or exits the scene while another Marine briefs the appropriate convening authority. While the scene is frozen, you may order the suspected Marine out of the barracks room or prevent him from entering the barracks or the car.

**(b) When is it appropriate to authorize a search?**

* Searches must be authorized by a competent authority, i.e., the commander who exercises control over the area subject to the search. The unit battalion commander likely has control over LCpl Sticky-Fingers’ barracks room; the installation commander exercises control over the parking lot at the enlisted club. Many bases, such as Camp Pendleton, assign area commanders who may also authorize searches within their respective areas. There will be instances where multiple commanders could authorize a search (e.g. unit CO, Area Co, and Installation CO could authorize search of barracks). When in doubt, consult with your SJA to determine who the competent authority would be.
* Searches must be based on probable cause - a reasonable belief that a crime has been committed and contraband or evidence of the crime will be found in the particular place to be searched.
* Probable cause is based on an examination of the totality of the circumstances. Several factors should be considered, including: type of evidence presented to the commander (oral or physical); reliability of the evidence (anonymous tip or first-hand account); timing of the evidence (observed today or 6 months ago); the training and experience of the person presenting the evidence (e.g., NCIS agent trained to recognize evidence of criminal behavior) and the nexus between the evidence or search location and the crime.

**(c) What are some additional factors to consider when preparing a search authorization?**

* ALWAYS document why you believe there is probable cause and include a list of the factors considered. In the Navy/Marine Corps, we use OPNAV 5580/10 (Affidavit for Search and Seizure) and OPNAV 5580/9 (Command Authorization for Search and Seizure) to detail exactly where a searcher can look and what is being searched for.
* Carefully consider the scope of your search authorization. Searches can only be executed on areas where the type of evidence sought could be found. If your scope is too narrow and only lists one item, such as a 60” television, you can only search in areas that could fit a 60” television (i.e., a searcher can’t open drawers). Consider whether there is a probable cause nexus to electronic devices (phones/computers) that permits including them in the search authorization.

**(d) What are the implications of searching without proper authority?**

* Searching without probable cause or ordering a subterfuge search (e.g., health and comfort inspection based on reports of smoking in the barracks) will likely cause all evidence seized to be suppressed and prevented from being used in a court-martial. Furthermore, the “fruit of the poisonous tree” doctrine will suppress any information or evidence that was derived from or learned of during this search. For example, if evidence of LCpl Sticky-Fingers dealing drugs was discovered on the phones seized from his room, that evidence will be suppressed in addition to the phone being suppressed.

**(e) What is your authority to order a search of PPV Housing on and off of the base? How about a POV off-base?**

* Public Private Venture housing is always going to be a complex issue. Whether an installation commander can search this housing will depend on the terms of the contract, for instance, whether the terms designate that the property remains within military control. Other factors to look at include whether the property is occupied by military or civilian occupants, is it inside or outside the gate, degree of control exercised by the military, and whether the property is under exclusive federal jurisdiction or concurrent federal/state jurisdiction. If the status of a given house you wish to search is in questions, consult with your SJA to determine how far your authority reaches.
* For POVs off base and PPVs with concurrent jurisdiction or exclusive state jurisdiction, have law enforcement (NCIS or CID) apply for a state or federal search warrant from an appropriate magistrate. Your SJA and law enforcement will coordinate on the application.

**(f) After being advised of his Article 31(b) rights, LCpl Sticky-Fingers confesses to stealing all the items and selling them, but has already sent the money back to “help his sick mom.” Do the victims have any right to restitution?**

* A complaint may be filed pursuant to Article 139 UCMJ within 90 days. The commander will appoint an investigating officer to determine whether the items were wrongfully taken by LCpl Sticky-Fingers. If the IO determines by a preponderance of the evidence that LCpl Stick-Fingers wrongfully stole the items, the commander can order repayment. The order goes to IPAC and they repay the victims by garnishing LCpl Sticky-Fingers’ wages at the rate of 1/2 of 1 month’s pay until the victims are fully repaid.
* Alternatively, restitution may be made a term of a Pretrial/Plea Agreement with LCpl Sticky-Fingers. (Payment before trial is the best COA).

**2**. **[Sexual Assault] On your first Sunday in command, your OOD informs you that a Marine reported she was sexually assaulted in the barracks last night.**

**(a) What should the commander do first?**

* Ensure the safety and security of the victim.
* Notify NCIS immediately.
* Ensure the victim is afforded medical treatment procedures and access to available victim services; notify the SARC and Victim Advocate (VA) as soon as possible. The SARC and VA will also ensure the victim receives the appropriate services.

**(b) Does the commander need to report this allegation to anyone?**

* Submit OPREP-3/SIR.
* The victim's commander must provide the installation commander, and the first O-6 and GO in both the victim and perpetrator's chain of command a detailed written incident report within 8 days – the 8- Day Incident Report (SAIRO). https://ehqmc.usmc.mil/sites/family/mfb/SitePages/Home.aspx
* DTM 14-007 provides detailed instruction on how to prepare and route the Sexual Assault Incident Response Oversight (SAIRO) Report.
* See also HQMC SAPR’s Commander’s toolkit for additional information.

**(c) Who must investigate the sexual assault allegation?**

* DoDIs 5505.18 and 5505.19 require NCIS to investigate all sexual assaults including those against a domestic partner or a child. Adult “sexual assault” includes the following offenses under the UCMJ: Rape; Sexual Assault; Aggravated Sexual Contact; Abusive Sexual Contact; Sexual misconduct violating Art. 120c, UCMJ; and attempts to commit these offenses. Additional conduct may constitute “sexual assault” if it occurred prior to 1 January 2019; therefore, investigators will have to refer to the criminal statutes as they existed at the time the criminal conduct occurred.
* NCIS must investigate reports of SA that range from rape to over-the-clothes touching of breasts, groin, inner thigh or buttocks.

**(d) What if the commander does not believe that the allegation is credible when initially reported?**

* Pursuant to SECNAVINST 5430.107, NCIS must be notified regardless of the commander's initial assessment. An assessment of the evidence will occur after completion of the NCIS investigation.

**(e) What needs of the victim and accused should commanders consider?**

* MPO. Issue an MPO whenever necessary to safeguard a victim, quell a disturbance, or ensure the safety of a person. Ensure the subject and the protected person are notified when an MPO has been issued and are provided a copy redacted for Personally Identifiable Information, except the names of the parties involved.
* An MPO should not be issued against a victim or witness for the purpose of keeping them separated from a suspect.
* Use the updated DD Form 2873, FEB 2020 when issuing MPOs. The form is at: https://www.esd.whs.mil/Portals/54/Documents/DD/forms/dd/dd2873.pdf. All previous versions of DD Form 2873 are obsolete.
* Review MCO 1752.5C prior to issuing an MPO to protect a sexual assault victim to understand the additional requirements in such cases.
* MARADMIN 216/20 requires Military Protective Orders (MPOs) be entered into the National Crime Information Center (NCIC) protection order file (POF) and the Marine Corps authorized criminal justice information system. Commanders issuing MPOs should discuss these requirements with their SJA.
* Within 24 hours of issuing an MPO, coordinate with the responsible military law enforcement agency (LEA) to place the MPO into the NCIC POF for the duration of the order. LEAs must be provided a copy of the completed DD Form 2873.
* If an MPO is modified, commanders must notify the appropriate LEA within 24 hours by issuing a new DD Form 2873. Commanders who cancel the MPO must use DD Form 2873-1, located at: https://www.esd.whs.mil/Portals/54/Documents/DD/forms/dd/dd2873-1\_2020.pdf.
* If a member against whom an MPO is issued transfers to another unit: (1) not later than the date of the transfer, the commander of the unit from which the member is transferred shall notify the gaining commander of (A) the issuance of the protective order; and (B) the individuals involved in the order; and (2) not later than seven days after receiving the notice of the MPO, the gaining commander shall notify the appropriate military LEA of the MPO within their geographical area.
* Prior to issuing the MPO, consider the purpose of the MPO and the collateral consequences for the person subjected to the order. Further, consider issuing a direct order for no contact between the parties in cases not requiring protection of a person. A no contact order should never be used as a “work around” to avoid entering MPOs into NCIC. If protection of a person is required, an MPO is the appropriate order, not a no contact order.
* Issuing an MPO against an alleged victim without sufficient reason or as a matter of routine response to their reporting a criminal offense, may be a form of retaliation under Article 132, UCMJ, or MCO 5354.1E.
* Reassignment of the Accused. Commanders may temporarily reassign or remove a member of their unit accused of a sexual assault offense for the purpose of maintaining good order and discipline. Per MARADMIN 031/14, this is normally accomplished via intra-unit or local unit transfers as opposed to PCS orders.
* Expedited Transfer of Victim. For sexual assaults falling under the Sexual Assault Prevention and Response Program (SAPR), commanding officers shall ensure that victims are provided reasonable protection from the alleged offender, to include processing an eligible victim’s request for an expedited transfer to another location. COs shall approve or disapprove the request for transfer within 72 hours of receiving the signed and dated transfer request by considering factors found in MCO 1752.5C,DoDI 6495.02, and NAVMC 1752.5 (SAPR/Expedited Transfer Program and Procedures).
	+ RESERVES: Some units within MFR are limited in their ability to effectuate an expedited transfer of Obligated SMCR Marines (in a drilling status). This will depend on location and MOS. CO’s have developed solutions, such as allowing alternate drill days/weekends for alleged victims of sexual assault and/or Marines accused of sexual assault.
	+ Military Dependent Personal Safety Moves. Dependents of Service Members who are victims of abuse by the Service Member may apply for a Personal Safety Move. (JTR, Para. 051205). Contact your local Family Advocacy Program Office for specific guidance.

**(f) Once the investigation is concluded, who determines whether or not there will be criminal charges?**

* Pursuant to Department of the Navy policy, the initial disposition authority for special victim cases must be an O-6 Special Court-Martial Convening Authority (SPCMCA), or higher, known as a Sexual Assault Initial Disposition Authority (SA-IDA).
* The SA-IDA (the O-6 SPCMCA) must address allegations of: Rape or sexual assault in violation of UCMJ Article 120(a) or (b); aggravated sexual contact and abusive sexual contact in violation of Article 120(c) and 120(d); rape of a child, sexual assault of a child, and sexual abuse of a child in violation of Article 120b; forcible sodomy in violation of Article 125 (for forcible sodomy offenses allegedly committed prior to 1 January 2019); or attempts to commit any of these offenses in violation of Article 80, UCMJ. The O-6 SPCMCA must also address all other alleged offenses arising from the same incident whether committed by the accused or alleged victim.
* Before an SA-IDA makes an initial disposition decision, The National Defense Authorization Act for FY 15 requires the victim of sexual-related offenses occurring within the United States to be afforded the opportunity to express a preference about whether the their case should be handled at court-martial or in a civilian court with jurisdiction. If the victim expresses a desire to have their case prosecuted in civilian court, the command must ensure the cognizant civilian authorities are notified of the victim’s preference. The commander must ensure the victim is notified of the civilian authority’s response once received, or, after consulting with the SJA, notify the victim that no civilian authority has jurisdiction over the offense.
* When the SA-IDA is making their initial disposition decision, they must consider the victim’s preference; review the report of investigation; review the Article 32 report, if applicable; and consult with his or her SJA.
* Initial dispositions include: no action, administrative action, NJP, disposition of charges (i.e., preferral and referral of charges (need an Article 32 hearing for a GCM), or dismissal of charges), or forwarding to a superior commander (Rule for Courts-Martial 306). The SA-IDA may NOT forward the charges to a subordinate commander.
* AdSep may be initiated by the lower level commander once the SA-IDA decision has been made, BUT the SA-IDA or GCMCA must first decide administrative separation is appropriate and delegate authority to convene the board. When a board is convened pursuant to this delegated authority, the order appointing the board shall contain specific reference to this source of delegated authority.
* RESERVES: If NO UCMJ jurisdiction exists (alleged sexual assault occurred when SNM was not in a duty status) OSJA, MFR, and the Command will work with local law enforcement and NCIS to gather evidence for civilian prosecution and possible Administrative Separation Processing.
* Submit Sexual Assault Disposition Report to Judge Advocate Division at final action.

**3. [Social Media Misconduct] The Victim/Witness Assistance Coordinator (VWAC) in your unit, Sgt Victor, advises you, the XO, and the 1stSgt that LCpl Alpha from your S-3 section reported being a victim of non-consensual distribution of a consensually taken picture of herself engaged in a sexually explicit act with LCpl Bravo. LCpl Alpha reported that LCpl Bravo wrongfully shared the image with his SNCOIC, SSgt Charlie, as well as other unknown Service Members on a social media website. Both Marines exchanged disparaging comments regarding LCpl Alpha. In addition to posting disparaging comments, SSgt Charlie is reported to have wrongfully distributed the same downloaded images to other SNCOs within the unit via text message. LCpl Bravo and SSgt Charlie are both members of your unit, outside of the S-3 section.**

**(a) Who should you consult for guidance?**

* Contact NCIS and your SJA. The misconduct alleged by LCpl Alpha falls within the conduct proscribed by Article 117a, UCMJ. This misconduct may also constitute a violation of MCO 5354.1E (Prohibited Activities and Conduct Prevention and Response) which may be prosecuted under Article 92, UCMJ. See MARADMIN 168/17 in regard to required “DASH” reporting via the command Equal Opportunity Representative/Advisor. Also evaluate whether the alleged misconduct meets the threshold for OPREP-3/SIR reporting per MARADMIN, MCO 3504.2A, and MCO 5354.1E.

**(b) Does rank of the accused matter in deciding on forum?**

* Maybe. Many factors must be taken into consideration and balanced, including, to the extent practicable, the military service of the accused and appropriateness of the authorized punishment available to a particular accused. The goal should be a disposition that is warranted, appropriate, and fair. (see discussion to R.C.M. 306(b))

**(c) Does the duty status of the alleged Marine offender matter?**

* RESERVES: Yes. You must be able to prove SNM was in a duty status (inactive duty training (IDT) or active duty) when the offense was committed to establish UCMJ jurisdiction. If the image was not distributed while LCpl Bravo was in a duty status then Art. 2 UCMJ jurisdiction would not exist. However, LCpl Bravo would remain subject to administrative processing IAW the MCO 1900.16 w/CH 2 (MARCORSEPMAN), MARADMIN 223/17, and MCO 5354.1E.

**(d) LCpl Bravo: You decide to address LCpl Bravo's misconduct at Battalion NJP:**

* **Who do you want to attend the NJP hearing?**
	+ Service Members are afforded the right to a personal appearance before the NJP authority, except when appearance is prevented by the availability of the NJP authority or by extraordinary circumstances. (See para. 4.c.(1), Part V, MCM)
	+ The Service Member may be accompanied by a spokesperson who may speak for the Service Member, but may not question witnesses except as allowed by the NJP authority. (See para. 4.c.(1)(B), Part V, MCM)
	+ Witnesses, including those adverse to the Service Member, should be in attendance if their statements will be relevant and they are reasonably available. (See para. 4.c.(1)(F), Part V, MCM)
	+ The presence of representative members of the command as observers is authorized and encouraged to demonstrate integrity and fairness of the imposition of NJP. (See para. 0110.c., JAGINST 5800.7F w/CH 3)
	+ It is permissible to conduct a public NJP. However, this is not a recommended COA because it is difficult to rehabilitate a Service Member after a public shaming. We also do not recommend formation NJPs.
* **What evidence do you want to be able to consider?**
* The Military Rules of Evidence, other than with respect to privileges, do not apply at NJP proceedings. Any relevant matter may be considered (see para. 4.c.(3), Part V, MCM).
* The accused is entitled to present matters in defense, extenuation, and mitigation orally, in writing, or both. The accused may also have witnesses attend the proceeding if they are reasonably available and relevant. (See A-1-c, JAGINST 5800.7F w/CH 3)
* The accused is also entitled to examine documents and physical objects considered by the commanding officer as evidence in determining whether and how much punishment to impose. (See A-1-c, JAGINST 5800.7F w/CH 3). We recommend a package of the evidence be provided to the LSSS for the defense counsel to review with the accused along with the NJP notification so that the accused may make an informed decision about whether to accept NJP or demand trial by court martial. Ensure all PII and Law Enforcement Sensitive information is redacted/removed from this package.
* **What if you learn during the hearing that LCpl Bravo has not had an opportunity to consult with counsel?**
* The hearing should be halted and the accused given an opportunity to consult with counsel.
* While there is no right for an accused to consult with counsel prior to NJP, absent exigent circumstances, COs should ensure that their Marine fully understands the NJP process, their rights, and its ramifications.
* Failure to provide the opportunity for an accused to consult with counsel prior to NJP does not preclude the imposition of NJP; it does preclude the admissibility of the record of NJP in aggravation at a later court-martial (see para. 0109.a.(1), JAGINST 5800.7F w/CH 3).
* **What if you learn during the hearing that LCpl Bravo may have been involved in the distribution of other images of LCpl Alpha that LCpl Bravo recorded non-consensually?**
* The hearing should be halted and NCIS contacted to further investigate.
* The accused may be involved in the wrongful distribution of a *non-consensually* recorded image, and this offense carries a more severe maximum punishment than mere non-consensual distribution of a *consensually* taken picture. Distribution of a non-consensual “indecent visual recording” may be a violation of Article 120c, UCMJ.
* **After you review the evidence and hear from witnesses, you decide to impose punishment. What factors should guide your decision?**
* The commanding officer should consider the five principles of sentencing: rehabilitation, punishment, the protection of society, preservation of good order and discipline in the military; and deterrence of both the accused and others.
* **What if you decide that punishment is not appropriate?**
* The commanding officer has a range of options from imposing no punishment to suspending, mitigating, remitting, or setting aside an imposed punishment (see para. 5, Part V, MCM; see also MCO 5800.16, Volume 14).
* **What administrative actions are required after the NJP?**
* A Unit Punishment Book (UPB) form (NAVMC 10132) will be used to record the imposition of NJP for enlisted Marines. Once the UPB is complete with all signatures, a copy is provided to the member and IPAC or Administrative section for unit diary reporting and scanning into the Marine’s official military personnel file (OMPF) and Electronic Service Record (i.e., 3270 in MCTFS) (see para. MCO 5800.16, Volume 14).
* The commanding officer imposing the NJP will cause to be prepared a summary transcript of the proceedings. This may be accomplished by using the form prescribed in JAGMAN Appendix A-1-f or a locally prepared form. This summary will be appended to the UPB form (see MCO 5800.16, Volume 14).
* When an appeal from NJP is forwarded to higher authority for decision, compliance with JAGMAN sections 0116 and 0117 is required. Furthermore, applicable Page 11 entries, the Marine’s Record of Service (Cpl and below), the original UPB form, the summarization of proceedings, and all allied papers shall be forwarded to higher authority (see MCO 5800.16, Volume 14).
* Commanders are required to process Marines for administrative separation following the first substantiated incident of certain types of sexual harassment. For example, engaging in sexual harassment (see para. 6210.8.c, MCO 1900.16 w/CH 2 (MARCORSEPMAN)).
* A 6105 counseling entry is not required in cases where the basis requires mandatory processing. 6105 counseling should only be used when a Marine will be given an opportunity to correct deficient behavior.

**(e) SSgt Charlie: You decide that NJP is not sufficient for a SNCO engaged in wrongful distribution of consensually recorded intimate images.**

* **What are your options?**
* Summary court-martial, special court-martial, non-BCD special court martial, or general court-martial.
* **You decide to refer the case to a summary court-martial. Are there any downsides to this COA?**
	+ - For sergeants and above, summary courts-martial may not adjudge confinement, hard labor without confinement, or reduction except to the next pay grade. In the case of SSgt Charlie (E-6), he may only be reduced to E-5 and no confinement could be imposed (see R.C.M. 1301(d)(2)).
		- The Military Rules of Evidence (Part III of the MCM) apply to summary courts-martial; summary courts-martial must also arrange for the attendance of necessary witnesses for the prosecution and defense, including those requested by the accused (see R.C.M. 1304(b)(2)(E)).
		- The summary court-martial officer will have to be familiar with the Military Rules of Evidence and be prepared to take action on motions of the accused. The command will also be responsible for providing significant administrative support to the summary court-martial officer, to include arranging for the presence of witnesses.
		- If the accused pleads not guilty and the summary court-martial becomes contested, the proceedings may take on a level of complexity that the summary court-martial officer is not prepared for. Furthermore, upon conclusion of the proceeding, the summary court-martial is required to undergo a review by a judge advocate to ensure compliance with applicable Rules for Courts-Martial (see Article 64, UCMJ).
		- Summary courts-martial are not criminal courts; therefore, a finding of guilty at summary court-martial does not constitute a criminal conviction (see Art. 20(b), UCMJ).
* **When notified that you will refer his case to Summary Court-Martial (SCM), SSgt Charlie exercises his right to object to SCM. What do you do now?**
	+ - The accused has a right to object to SCM prior to arraignment, even if that person also refused NJP and demanded trial by special or general court-martial for the same offenses (see R.C.M. 1303).
		- The convening authority may refer the charges to a special court-martial.
		- Commanders also have the authority to refer offenses to a special court-martial required to be tried by a judge alone in which no discharge is authorized and only six months confinement, reduction to lowest enlisted pay grade, and forfeiture of 2/3 pay for six months are authorized. The accused may only object to this forum if a conviction would require the DoD to notify local jurisdictions that the accused should be registered as a sex offender or if the maximum punishment authorized is greater than two years (with the exception of drug cases under Art. 112a) (see Art. 16(c)(2), UCMJ); R.C.M. 2012(f)(2)(E)). Commanders should consult their SJAs to determine if this is an appropriate forum.
		- If a commander with only special court-martial convening authority determines the appropriate disposition is a general court-martial, then the charges should be forwarded to the first general court-martial convening authority in the chain of command.
* **Why might SSgt Charlie have objected to Summary Court-Martial?**
	+ - SSgt Charlie realizes that a conviction at summary court-martial for a substantiated incident of sexual harassment violating MCO 5354.1E will require mandatory administrative separation processing. (see MCO 1900.16 w/CH 2 (MARCORSEPMAN)) and he may receive an Other-Than-Honorable characterization of service. He may believe that trial before members or military judge at a special or general court-martial is more likely to result in an acquittal, which would also negate the mandatory processing requirement. Further, if he is found guilty at a court-martial where a discharge is authorized and he does not receive a punitive discharge, the lowest characterization of service he may receive at an administrative separation board is a general (under honorable conditions), absent DC (M&RA) approval (see MCO 1900.16 w/CH 2).
* **While awaiting special court-martial, a fitness report occasion comes due for SSgt Charlie. Should you write the fitness report or wait until the trial is completed? If you write the report, can you make any mention of the misconduct?**
	+ - The RS will not comment on pending NJP, court-martial, civil/criminal action, or investigation. Discussion of these matters, if the MRO was found innocent or non-culpable, would be premature and prejudicial and thereby unfairly penalize the Marine. If the Marine is found guilty, the results can be included in the reporting period when the adjudication (including the appellate process) is completed. The RS should also refrain from giving the MRO a lower attribute marking for the alleged misconduct (see para. 12e, MCO 1610.7A (Performance Evaluation System).
* **You refer SSgt Charlie to a special court-martial and he has elected to be tried by members, with enlisted representation. How do you select members for the court-martial panel?**
	+ - The members detailed to a court-martial shall be those persons who, in the opinion of the convening authority, are best qualified for the duty by reason of their age, education, training, experience, length of service, and judicial temperament (see Art. 25, UCMJ; R.C.M. 502(a)(1)).
		- An enlisted accused may request enlisted persons serve as members of the special court-martial. The enlisted members must be in a number comprising at least one-third of the total number of members unless eligible enlisted members cannot be obtained because of physical conditions or military exigencies (see R.C.M. 503(a)(2)).
		- When a request for enlisted representation is made, the convening authority should detail an appropriate number of enlisted members to the court-martial and, if appropriate, relieve an appropriate number of commissioned or warrant officers.
		- Generally, the S-1, or appropriate administrative personnel section, will generate a roster of all potential members. The command will provide questionnaires to the potential eligible members that will be used by the convening authority to determine those persons who are best qualified. Best practice is to contact the SJA to ensure appropriate procedures are followed when selecting court-martial members. The Commander must consider all ranks senior to the accused (by date of rank). The Command shall not use rank as a proxy to select members to the court martial panel.
* **After you select members, you learn that your XO provided some unofficial guidance to the members on how the case should be resolved. What should you do?**
	+ - No person subject to the UCMJ may attempt to coerce or, by any unauthorized means, influence the action of a court-martial member (see R.C.M. 104), intentionally or unintentionally.
		- The commander should notify his SJA, who will notify the trial counsel and the defense counsel.
		- The commander should take appropriate measures to prevent the actual or perceived appearance of unlawful command influence. Some solutions may be to select new members OR select from an adjacent command (see Art. 37, UCMJ; R.C.M. 503(a)(3)).
* **SSgt Charlie is convicted by members and sentenced to forty-five days confinement; forfeiture of 2/3 pay for two months; reduction to E-4; and a reprimand. Immediately after the trial, the defense counsel submits a clemency request asking that you not confine SSgt Charlie and that you take action so that his family will not lose pay. What can you do at this point?**
	+ - The commander may defer the confinement, adjudged forfeitures, or adjudged rank reduction which postpones the running of the sentence; this is, however, not a suspension of the sentence or a form of clemency (see R.C.M. 1103). (Note: there is a provision for automatic forfeitures based on a sentence not at issue in this scenario. For requests for deferment and waiver of automatic forfeitures, speak to your SJA.)
		- In deciding whether to grant a deferment, the commander should consider: the probability of the accused’s flight; the probability of accused committing other offenses, intimidation of witnesses, or interference with the administration of justice; the nature of the offenses of which the accused was convicted (including the effect on the victim); the sentence adjudged; the command’s immediate need of the accused; effect of deferment on good order and discipline; the accused’s character, mental condition, family situation, and service record (see R.C.M. 1103(d)(2)).
* **When you take your Convening Authority's action, can and should you grant clemency?**
	+ - Clemency is the process permitting the accused to submit any matters that may reasonably tend to affect the convening authority’s decisions concerning whether to take action on the findings or sentence (see R.C.M. 1106).
		- The convening authority is required to consider the clemency matters submitted before taking action (see R.C.M. 1109(d)(3) and 1110(d)).
		- **Note that a convening authority has limited authority to grant clemency if a serious offense is involved. Call your SJA to determine what, if any, clemency may be granted.**
		- In some cases, the convening authority may, but is not required to, take action on the sentence. If the convening authority decides to act, the action will be in writing and provide an explanation for the decision. It shall clearly state if any part of the sentence is disapproved. For minor offenses **or** when acting in accordance with PTA, the convening authority may disapprove a legal sentence in whole or in part, mitigate the sentence, or change a punishment as long as the punishment imposed by court-martial is not increased (see R.C.M. 1111(e)).
* **SSgt Charlie (now Cpl) has completed his confinement. Do you need to process him for separation?**
	+ - Yes. Processing is still required unless the sentence approved by the convening authority includes a punitive discharge. **NOTE:** If court-martial does not award a punitive discharge, the lowest characterization of service he may receive at an administrative separation board is a general (under honorable conditions), absent DC (M&RA) approval.
* **If SSgt Charlie (now Cpl) had been tried at a “limited special court-martial” where no discharge is authorized, would this change the separation process?**
	+ - Yes. Due to the limits placed on the sentencing authority of limited special courts-martial, Marines subject to a limited special court-martial were never placed in jeopardy of receiving a punitive discharge. Therefore, they can be processed for administrative separation and subject to an Other-Than-Honorable characterization of service through the regular separation authority.

**4. [Prohibited Activities and Conduct Policy] Good order and discipline amongst junior enlisted Marines of Charlie Company has been in steady decline ever since a few key SNCO billets were gapped. Although morale is still high you can tell standards are not being readily enforced and have declined. You anticipate the situation will resolve itself with the arrival of your new 1stSgt. 1stSgt Standards comes in with a great reputation and the few interactions you have had with him prior to his check in have been positive. After a few months of 1stSgt’s leadership you notice standards are back up in Charlie Company with the exception of a few Marines. One morning as you are walking into the Battalion building you notice 1stSgt Standards counseling LCpl Disaster in the open for being without a proper shave. The 1stSgt is being firm in his counseling and you do not observe anything to cause concern. Later in the day, you overhear Cpl Witness tell another Marine in the hallway that 1stSgt Standards told LCpl Disaster that he looked like a “bum” for not having an appropriate shave during the counseling.**

**(a) Is this a violation of MCO 5354.1E? What do you do?**

* No, it is not a violation of the order. From what you observed, and taking into account what Cpl Witness observed, it was a proper verbal (and written) counseling addressing performance or conduct deficiency. In this case failure to abide by standards.
* However, is there a need to call or compare a Marine that is being counseled in public a “bum?” The 1stSgt may have made the comparison for emphasis with no motive to humiliate the Marine. However, he has just provided the Marine with the ability to allege that he was harassed or bullied. Under MCO 5354.1E harassment can include, “offensive jokes; slurs; epithets or name calling;…ridicule or mockery; insults or put-downs…” and bullying can include, “teasing; taunting; oral or written berating of another for the purpose of belittling or humiliating…” These examples are broad in scope and can capture conduct that is best handled through mentorship and education. Context is important on the spectrum[[1]](#footnote-1) of PAC prohibited activities when making a determination to substantiate or not substantiate.
* Talk with your 1stSgt about the situation. Advise them that they leave themselves open to allegations of PAC order violations. While an allegation may be unsubstantiated it takes time and resources to adjudicate. Inform 1stSgt Standards that counseling does not require extraneous language. Use of extraneous language can make a counseling a personal vice a professional interaction.
* ADMIN NOTE: Keep your counseling simple, do not opine on whether or not you believe the 1stSgt’s conduct was a violation of the PAC order. Giving your opinion may conflict you out of handling a potential complaint made by LCpl Disaster. Additionally, you provide another line of argument for appeal by either 1stSgt or the LCpl, should a complaint into the above actions be made. To avoid this scenario an option is to have your SgtMaj address the situation with the 1stSgt.

**(b) What if 1stSgt Standards adds other colorful or expletive language? What if the 1stSgt has counseled more than one Marine in the same manner? What if the same Marine has been counseled in this manner on multiple occasions?**

* Within the decision space of what is and is not conduct that violates the PAC order, as more factors are added we come closer to substantiation. Commanders are faced with the challenge of broad definitions found within the PAC order and the requirement to mandatorily document via page 11 counseling any substantiated violations of the PAC order. You will be faced with scenarios in which an officer or senior enlisted leader with a good record has an allegation leveled against them by a Marine that may not be the best performer and has even had some disciplinary issues. Assisting you in your decision making process will be your SJA and EOA. Prior to your decision to substantiate or not substantiate a PAC violation you are required under the order to receive both an SJA and EOA sufficiency review of the command investigation. It is important to engage both the SJA and EOA in resolution of a PAC complaint and remain engaged until closure.
* If the conduct complained of is potentially on the low end of the spectrum of prohibited conduct, discuss with your SJA and EOA the “reasonable person standard.” Discuss whether the conduct falls under the category of proper counseling. Some factors to consider in you decision making are: is this a pattern or isolated incident; whether the conduct requires a page 11 counseling entry or is mentorship and education sufficient to address the issue; is it a weakness in counseling technique by the subject or is the conduct of the subject malicious[[2]](#footnote-2). Your discussions will help assist you in making your determination.
* Most of your appeals will come from these borderline cases. Ultimately, you want to be consistent in your decision making and be able to articulate the justification for your decision if it is appealed. Reasonable minds may differ on substantiation or non-substation on these borderline cases. As long as your decision is reasonable and supported by the facts it should not be over turned.

**(c) A few weeks later, LCpl Disaster makes a complaint to the Battalion EOR of bullying and harassment by 1stSgt Standards (alleging a hostile working environment). LCpl Disaster not only includes the counseling incident described above but other incidents in which 1stSgt Standards has counseled LCpl Disaster publicly. LCpl Disaster is not interested in informal resolution. What do you do?**

* Ensure the EOA is informed so that the EOA can take the appropriate actions. The EOA will need to conduct an intake interview, provide you with a prima facie analysis, and make the appropriate DASH reporting and assign a DASH number to the case. Contact your SJA and inform them of the complaint and what you know so far. Once you receive the EOA’s prima facie analysis consult with your SJA on the best way ahead. You must make a decision to either dismiss or accept the complaint. If you accept the complaint you are required to convene[[3]](#footnote-3) an investigation and look into the matter. (For the purposes of this vignette, you have accepted the complaint.)
* Some actions to consider and talk through with the SJA and your staff. Based on the nature of the complaint should these two Marines be physically separated and an MPO be issued? If it is determined that they should be separated who do you move? If you move LCpl Disaster you risk a follow on complaint of reprisal. However, you do not want to move the 1stSgt until this situation is resolved. Have the EOA or your SgtMaj discuss with LCpl Disaster his preference. If LCpl Disaster prefers to move, your decision is simplified (document this discussion and election by LCpl Disaster). If an MPO to the 1stSgt is not issued (while this may seem overboard for this scenario it’s a forcing function to protect the 1stSgt from not contacting LCpl Disaster about the case which may lead to a more serious charge of obstruction of justice) a member of Battalion leadership should talk to the 1stSgt about letting the process get to the truth and not to interfere with it.

**(d) Based on the EOA’s prima facie analysis and discussion with your SJA you decide to accept the complaint and appoint an investigating officer. A few days later the investigating officer informs you that LCpl Disaster had reported to the Company XO suspected waste of government resources by members of the Company staff. After LCpl Disaster made this report his leave was cancelled by 1stSgt Standards. This action was not disclosed to the EOA during the initial intake. What do you do?**

* Inform the IO to hold off on the investigation until further notice. Call the SJA and IG to discuss whether the IG needs to handle this latest revelation as it was potentially a retaliatory action by 1stSgt Standards based on a protected communication made by LCpl Disaster. Retaliation (negative or omission of favorable personnel action taken against an individual based on that individual making a protected communication) is the exclusive jurisdiction of the IG.
* ADMIN NOTE: The PAC order is currently under re-write with major revisions to substantiation, definitions, and the appeals process. The above problem is based on the current order.

**5. [Ethics]** **A letter arrives addressed to your command from a local military appreciation society made up of local businesses and civic groups. The appreciation society makes two separate offers to your command: 1) to provide, free of charge, a wooden gazebo for the “smoke pit” of your command’s barracks, in order to provide Marines from the command with a gathering place and shelter from the elements, and 2) a BBQ lunch for your Marines, to include food, non-alcoholic beverages, and beer. The estimated value of the wooden gazebo is $1300.00. The estimated value of the BBQ lunch for your command’s Marines is $600.00.**

**(a) Call the SJA.**

* Accepting gifts from outside sources can be problematic.
1. **What concerns or questions, if any, do you have regarding the source of these offers?**
* The composition of the society may make it a “prohibited source.” A prohibited source is (1) any person who is seeking official action by the Marine Corps or DoN, (2) any person who does business or seeks to do business with the Marine Corps or DoN, (3) any person who conducts activities regulated by the Marine Corps or DoN, (4) any person who has interests that may be substantially affected by the performance or nonperformance of official duties by Marine Corps or DoN personnel, or (5) is an organization a majority of whose members are described by (1) through (4). Gifts from prohibited sources require heightened sensitivity because of the risk of embarrassing the Marine Corps or DoN and, depending upon the value of the gift, may require routing through Judge Advocate Division and the DoN OGC for approval.
1. **Can the offered gazebo be accepted as a gift? If so, by whom?**
* The gift cannot be accepted by you as the commander in your personal capacity, but can be accepted as a gift to the Marine Corps. Officers exercising special court-martial convening authority are authorized to accept gifts of personal property to the Marine Corps of a value not exceeding $3000.00. This authority may NOT be delegated.
1. **Is the gazebo a “fixture?”**
* If so, fixtures and other forms of real property (as opposed to personal property) must be routed to the Under Secretary of the Navy for approval. In this case, the removable nature of the gazebo probably means it’s not a fixture, so approval authority remains with the SPCMCA.
1. **Can you as the commander accept the offered BBQ lunch as a gift? Why or why not?**
* The offer of food and non-alcoholic beverages can be accepted, but the offered beer cannot. Any Marine commander may accept gifts of consumable or perishable products such as food, nonalcoholic beverages, flowers, candy, etc., intended for personnel of that command, provided the acceptance of the gift does not violate applicable policy. Alcoholic beverages and tobacco may not be accepted. The authority is limited to items which will be consumed at one specific event (command picnic, pool party, etc.).
1. The spectrum ranges from non-issues, situations for mentorship, administrative action, to adjudication of criminal conduct. The line between situations for mentorship and administrative action is where commanders will spend most of their time. [↑](#footnote-ref-1)
2. This list of considerations is not exhaustive. [↑](#footnote-ref-2)
3. This is your investigation. It is mandatorily reviewed by your CG and in some cases gets appealed to SECNAV. When appointing an investigating officer select the best qualified and scrub the report for completeness. [↑](#footnote-ref-3)