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ADMISSIBILITY OF EVIDENCE FROM COMPELLED MENTAL EXAMINATIONS:

MRE 302 AND BEYOND

A Thesis

Presented to

The Judge Advocate General's School, United States Army

The opinions and conclusions expressed herein are those of the author and do not necessarily represent the views of either The Judge Advocate General's School, The United States Army, or any other governmental agency.

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ADMISSIBILITY OF EVIDENCE FROM COMPELLED MENTAL EXAMINATIONS:

MRE 302 AND BEYOND

by Captain Lawrence D. Kerr

ABSTRACT: This thesis examines the origin, history, and operation of Military Rule of Evidence 302, Privilege Concerning Mental Examination of an Accused. The Rule and its case law is analyzed in comparison to federal civilian law and model standards promulgated by the American Bar Association. This thesis concludes by recommending several changes in the Rule.

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ADMISSIBILITY OF EVIDENCE FROM COMPELLED MENTAL

- EXAMINATIONS: MRE 302 AND BEYOND

Captain Lawrence D. Kerr*

I am aware that today the insanity defense is not at all popular. Its purposes, its prevalence, and its consequences are poorly understood. We must be mindful, however, that the insanity defense is integral to the moral foundation of the criminal law. We cannot ignore our obligation to assure that the defense is administered fairly, that the inquiries conducted are thorough, that the data is scrutinized, and that the rights of those who assert the defense are guarded zealously. 1/

1. INTRODUCTION.

Insanity is a defense to any charge. 2/ Current military law 3/ and rule 4/ place the burden of proof on the accused to prove the defense by clear and convincing evidence. By its very nature, the defense poses difficult questions. 5/ Unfortunately, the formulation of a substantive standard for the insanity defense does not solve all of the problems. The procedure by which the insanity defense is administered, both before and during a trial, raises serious constitutional issues that many lawyers may find more perplexing than the substance of the defense itself. 6/

One of these problems arises when the trial counsel attempts to introduce evidence from a compelled mental examination or "sanity board." A sanity board is often necessary in a case in which the accused intends to introduce expert testimony on his mental condition because it usually provides the only source of expert testimony available to the government to rebut the accused's expert. 7/ Accordingly, an accused can be compelled to submit to a sanity board as a condition precedent to presenting expert testimony. 8/

The primary concern of both military and civilian compelled mental

examinations was that, after requiring the accused to be interviewed by a government expert, the prosecution would use the accused's statements to prove the *actus reus* ^{9/} of the offense instead of his mental state. ^{10/} As as will be discussed later, ^{11/} there is now doubt whether such a practical or constitutional distinction can be made.

Although military and civilian courts have cited various justifications for compelled mental examinations, there is a tremendous "tension" ^{12/} between the the government's practical need ^{13/} to have the accused examined by a government expert and the accused's right to be free from self-incrimination. ^{14/} And because both military ^{15/} and civilian ^{16/} courts have consistently held that an accused does not have the right have his counsel present at such an examination, the accused's right to the assistance of counsel ^{17/} is also implicated.

Military Rule of Evidence 302, Privilege Concerning Mental Examination of an Accused [MRE 302], is the military's solution to balancing the needs of the government against the rights of the accused. This article examines the origin and operation of MRE 302 and its counterpart, Rule for Court-Martial 706[RCM 706] and compares MRE 302 to the federal law and standards recently proposed by the American Bar Association. This article also proposes answers to some of MRE 302's more difficult questions. ^{18/}

II. CASE LAW ORIGINS OF MRE 302.

A. Early Case Law.

Earlier versions of the Manual for Courts-Martial provided that an accused whose sanity appeared in question must be referred to a sanity board. ^{19/} No privilege has ever been attached to communications between the accused and a military psychotherapist. ^{20/} Accordingly, the government could compel an accused to answer incriminating questions by a sanity board expert and then introduce those statements against the accused at trial. The only issue was whether the accused had been properly advised of his rights under Article 31(b), Uniform Code of Military Justice[UCMJ]. ^{21/}

For example, in *United States v. Wimberley*, 22/ the accused was charged with premeditated murder for fatally stabbing a forty-one year old German gasthaus proprietress. Before trial, the defense counsel requested 23/ a sanity board, which came to the conclusion that the accused was sane at the time of the offense. The government's main witness in its case-in-chief was the examining military psychiatrist. While testifying to the jury, the psychiatrist related statements concerning the offense that the accused had made at the sanity board. The defense objected to the testimony alleging that the psychiatrist had defectively paraphrased Article 31 warnings to the accused. The motion was denied and the accused was eventually sentenced to death. 24/

On appeal before the Court of Military Appeals, appellate defense counsel enlarged the scope of the trial defense counsel's initial objection. The defense argued that the psychiatrist should not have been able to testify about statements made by the accused since the accused had been forced to undergo the examination. The defense urged the court to adopt the rationale of 18 U.S.C. § 4244, which extended a form of limited testimonial immunity to all statements made by a defendant at a court-ordered mental examination. 25/ After holding that the accused's Article 31 warnings had been complete, the court declined to apply §4244 and further stated that there were valid reasons for the military's refusal to adopt any form of doctor-patient privilege. 26/ Although much of *Wimberley* would be vitiated by later case law and, ultimately, MRE 302, the decision has never been expressly overruled. 27/

B. The *Babbidge* Rule

Three years after the *Wimberley* decision, the Court of Military Appeals faced related problems in the seminal case of *United States v. Babbidge* 28/ The accused, charged with making a threat by telephone, retained a private psychiatrist who planned to testify that the accused was temporarily insane at the time of the offense. The trial counsel learned of this so he attempted to have the accused examined by a sanity board. The accused, following the advice of his defense counsel (who was most likely aware of the *Wimberly* decision), refused

to cooperate at the sanity board. 29/

At trial, after the government rested its case, the defense announced that its first witness would be the accused's civilian psychiatrist. The trial counsel objected to the psychiatrist's testimony arguing that since the accused had refused to cooperate at the sanity board, it would be unfair for the government not to be able to rebut the defense's psychiatrist with a government psychiatrist. The trial counsel then proposed that if the accused would cooperate at a government sanity board, he would introduce only the board's conclusory medical opinion, i.e., no actual statements. The trial counsel's motion was granted and the court recessed for a sanity board. 30/

At the sanity board, the accused was not administered Article 31 warnings since no statements would be used at trial. Eventually, the government introduced a written stipulation stating the sanity board's conclusory opinion that the accused was sane at the time of the threat. 31/

On appeal of his conviction, the accused contended that the military judge's ruling requiring him to cooperate at the sanity board as a condition precedent to the admission his psychiatrist's testimony violated Article 31 regardless of the fact that no actual statements were admitted. The Court of Military Appeals affirmed the conviction holding that, "[w]hen 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. His action constituted a *qualified waiver* of his right to silence under Article 31." 32/

In reaching its conclusion, the *Babbidge* court re-examined the former §4244. The court borrowed two theories from federal case law which had interpreted that statute. First, because the government must provide the defendant with psychiatric services and the government has the burden of proving his sanity, a common sense application of the fifth amendment permits the government to rebut the defense with its own psychiatric evidence. 33/ Second, admission of conclusory opinions derived from a government mental examinations is distinguishable under the fifth amendment from the admission of statements, even if those statements form the bases of those opinions. 34/

In dissent, Judge Ferguson argued that the protections of Article 31 were

broader than those of the fifth amendment. 35/ He also questioned, as had numerous commentators 36/ and as would some federal civilian courts, 37/ whether the admission of any evidence derived from compelled psychiatric examinations

violated the fifth amendment. *Babbidge*, a watershed opinion in the development of MRE 302, was the Court of Military Appeals' first attempt to resolve the Hobson's choice an accused faces when he asserts the insanity defense. 38/

C. Other Cases Having an Impact on the Development of MRE 302

In *United States v. Wilson*, 39/ the accused was charged with the premeditated murder of his wife. After the Article 32, UCMJ, investigation, the accused was taken to an Army hospital for a sanity board. Upon advise from his defense counsel, he refused to submit to psychological testing or answer questions concerning the offense. Instead, he only answered questions about his background and current events. Based on this sparse information and his medical records, the sanity board came to the conclusion that the accused was sane at the time of the offense. 40/

Two prominent German psychiatrists retained by the accused testified at trial that he was insane. The German psychiatrists related several statements that the accused had made to them that supported their opinions. In rebuttal, the government called the the chief military psychiatrist who had examined the accused at the sanity board. Before testifying, the military psychiatrist reviewed the part of the trial transcript that contained statements made to the German psychiatrists. The military psychiatrist then used the the accused's statements in the transcript to support his opinion that the accused had been sane. 41/

The accused contended on appeal of his conviction that the military psychiatrist's testimony was improperly admitted for two reasons. First, even

though the accused only made statements about his background and current events at the sanity board, he had not been advised of his right to counsel. 42/ Second, the statements the accused made to the German psychiatrists which were contained in the trial transcript and related through the military psychiatrist were "fruits of the poisonous tree" and violated article 31. 43/

The Court of Military Appeals rejected both contentions and upheld the conviction. The court first reaffirmed *Babbidge's* distinction between the impermissible use of actual statements and the permissible use of conclusory medical opinions. 44/ But, unlike *Babbidge*, which addressed only Article 31 and the fifth amendment, the *Wilson* court went on to hold that the statement versus medical conclusion dichotomy was valid even though the accused was not advised of his right to counsel. The court also rejected the notion that the statements made to the German psychiatrists were indirectly collected and admitted in violation of article 31. 45/ *Wilson* is significant because it addressed sixth amendment issues not present in *Babbidge*. 46/

One year after the *Babbidge* and *Wilson* opinions, the Court of Military Appeals enforced the prohibition against the use of unwarned statements made at a sanity board. In *United States v. White*, 47/ the accused was charged with murdering his friend at a nightclub. The accused asserted the insanity defense at trial and testified that he did not remember shooting the victim. In rebuttal, the government called the military psychiatrist who had examined the accused at a sanity board. The psychiatrist initially stated his medical opinion that the accused had been sane. The defense counsel cross-examined the psychiatrist but did not make reference to any statements. The psychiatrist testified on redirect that the accused had *stated* to him that he did remember the shooting. The trial counsel emphasized the accused's inconsistent statements to the jury during his final argument. The jury then convicted the accused of premeditated murder. 48/

The court reversed the conviction holding that the admission of the accused's unwarned actual statements to the psychiatrist were improperly admitted because the accused had not been warned of his right to counsel. 49/ The *White* opinion is significant because it solidified the notion that the *Babbidge* rule was qualified waiver that pertained only to medical conclusions. 50/

Although *Babbidge* is undoubtedly the premiere case in the development of MRE 302, one issue not addressed by *Babbidge* is the sanity board procedure. Because of the *Wimberly* rule, defense counsel in the early cases were not only worried that the sanity board experts would relate the accused's statements at trial; they were also concerned that those statements would be used to either discover additional evidence or to form the basis for a later prosecution. *United States v. Johnson* 51/ was first time the Court of Military Appeals addressed the pretrial disclosure of statements made at a sanity board.

In *Johnson*, the accused was charged with premeditated murder. As in *Wilson*, the accused's defense counsel advised him not to cooperate at the sanity board. After the military judge denied the defense's request for a government funded civilian psychiatrist, the defense requested a sanity board without an Article 31 rights warning so that the accused's statements would be inadmissible at trial. 52/ The military judge was sympathetic to the defense counsel's concern that the sanity board report might be used by the government to discover additional evidence, so the judge issued a three part protective order designed to prevent premature release of the report. 53/ The judge further ordered that the trial counsel would get only the bare conclusory opinions of the board. 54/ Although *Johnson's* actual holding only addressed whether an accused has the right to have the government pay for a civilian defense psychiatrist, the opinion is significant because the court commended the judge's actions and most of his order would become codified in RCM 706. 55/

The last significant case to have an impact on the formulation of MRE 302 is *United States v. Frederick*. 56/ The accused was charged with premeditated murder. Before trial, the military judge ordered a sanity board with the following conditions: 1) Article 31 warnings were to be given; 57/ 2) the defense counsel would be present at the sanity board; 58/ and, 3) the trial counsel would not be given a copy of the report. 59/

The sanity board report turned out to be inconclusive, so the military judge ordered another sanity board over the objection of the defense counsel. 60/ The judge further ruled that "if the defense called a psychiatrist as a defense witness, the Government would be given access to any psychiatric reports the witness may

have previously prepared."61/

At trial, the defense called two of the psychiatrists from the first sanity board. They related several statements made by the accused at the sanity board which supported their conclusion that the accused had been insane. The trial counsel asked then one question on cross-examination relating to the accused's statements. The trial counsel eventually called a military psychiatrist from the second sanity board, who related only his medical opinion that the accused had been sane. 62/

On appeal of the accused's conviction, appellate defense counsel established that the record failed to show that the first sanity board psychiatrists had warned the accused of his Article 31 rights as had been ordered by the military judge. The defense contended that, although the *Babbidge* rule permitted the admission of the second sanity board's medical opinions, the admission of the accused's statements to the first sanity board violated Article 31. 63/

The court rejected the defense's argument holding that by eliciting the accused's statements on direct examination the defense counsel consented to the admission of the additional statements brought out by the trial counsel's cross-examination. 64/ *Frederick's* holding that a defense counsel may open the door to the admission of actual statements made by the accused to a sanity board became the last major part of M.R.E. 302.

D. Conclusion

After *Frederick*, the following six building blocks of MRE 302 were in place: 1) there is no general psychotherapist-patient privilege in the military; 65/ 2) the government can force an accused to submit to a sanity board as a condition precedent to asserting the insanity defense through the use expert testimony; 66/ 3) an accused does not have a right to the presence of counsel at a sanity board; 67/ 4) the government cannot use the sanity board report to discover additional evidence or form the basis for a later prosecution; 68/ 5) the assertion of the insanity defense through expert testimony is a qualified waiver to Article 31 and permits the government to introduce, as a minimum, the sanity

board's conclusions; 69/ and, 6) the government can introduce an accused's unwarned statements if the defense opens the door to them. 70/

The next section of this article briefly examines the operation of MRE 302 and compares its federal civilian counterpart and the model rule proposed by the American Bar Association.

III. OPERATION OF MRE 302.

MRE 302 in its present form went into effect on September 1, 1980 71/ and reads as follows:

Rule 302. Privilege Concerning Mental Examination of an Accused.

(a.) General rule. The accused has a privilege to prevent any statement made by the accused at a mental examination ordered under R.C.M 706 72/ and any derivative evidence obtained through use of such statement from being received into evidence against the accused on the issue of guilt or innocence or during sentencing proceedings. This privilege may be claimed by the accused notwithstanding the fact that the accused may have been warned of the rights provided by Mil. R. Evid. 305 at the examination.

(b.) Exceptions.

(1) There is no privilege under this rule when the accused first introduces into evidence such statements or derivative evidence.

(2) An expert witness for the prosecution may testify as to the reasons for the expert's conclusions and the reasons therefor as to the mental state of the accused if expert testimony offered by the accused has been received into evidence, but such testimony may not extend to statements of the accused except as provided in (1).

(c.) Release of evidence. If the defense offers expert testimony concerning the mental condition of the accused, the

military judge, upon motion, shall order release to the prosecution of the full contents, other than any statements made by the accused, of any report prepared pursuant to R.C.M. 706. If the defense offers statements made by the accused at such examinations, the military judge may upon motion order the disclosure of such statements made by the accused and contained in the report as may be necessary in the interests of justice.

(d.) Noncompliance by the accused. The military judge may prohibit an accused who refused to cooperate in a mental examination authorized under R.C.M. 706 from presenting any expert medical testimony as to any issue that would have been the subject of the mental examination.

(e.) Procedure. The privilege in this rule may be claimed by the accused only under the procedure set forth in Mil. R. Evid. 304 for an objection or a motion to suppress. 73/

Four basic aspects of MRE should be noted at this point. First, MRE 302 does not apply unless a sanity board has been conducted under RCM 706. 74/ Second, although MRE 302(a) states that the privilege only applies to statements and derivative evidence made to the sanity board, i.e., not to conclusory opinions, subsection (b)(2) provides that a sanity board expert 75/ may not testify about the basis of his opinion unless the defense first offers some expert testimony (from the sanity board or elsewhere) on the accused's mental state. Third, an accused may open the door to the basis of the government expert's conclusions only if he first introduces any expert (not lay) 76/ testimony on his mental state. On the other hand, an accused may open the door to his specific statements made to the sanity board only if he first introduces one or more statements from that sanity board. Thus, the "triggers" that apply to statements as opposed to opinions are different.

MRE 302 leaves many issues unresolved. The rule does not clearly specify if the government could properly introduce on its case-in-chief statements made to the sanity board or the board's bases of opinions solely on the issue of sanity as opposed to guilt. 77/ It is also not clear whether statements introduced by the defense from one sanity board would open the door to statements made at a subsequent sanity board. 78/ Nor does the rule address whether the accused's statements to the sanity board could be admitted at trial solely as the underlying basis for the expert's conclusions, i.e., the expert's "reasons therefor" as prescribed by MRE 302 (b)(2). 79/

Although RCM 706(c)(3)(A) allows the trial counsel to obtain the conclusions of the sanity board before trial, MRE 302 (c) states that the full sanity board report minus specific statements can be obtained by the trial counsel only after the accused first introduces expert testimony on his mental state at trial. 80/ This means that a trial counsel may have to obtain a recess to study the full report once the defense has introduced its expert testimony. 81/ Similarly, the trial counsel can obtain specific statements in the report only after the defense has opened the door at trial. 82/ The trial judge is given great discretion in deciding how far the door has been opened. 83/

MRE 302 is primarily a product of case law, but the rule is much broader than its case law origins. It applies to both the merits of a case and to sentencing. 84/ Most importantly, it also applies whether or not the accused was warned of his rights under Article 31. 85/

IV. THE FEDERAL MODEL.

The federal civilian privilege has its origin in examinations conducted to determine competency to stand trial. The former 10 U.S.C. §4244 gave a district court judge the authority to order a competency examination and, at the same time, gave the defendant a privilege concerning his statements made at that examination. 86/ In 1975, the privilege portion of § 4244 was duplicated in FRCP 12.2 (c). 87/ In 1984, § 4244 was completely revised to address other matters. 88/ FRCP 12.2(c) now contains the federal civilian privilege for compelled

examinations to determine both competency and sanity at the time of the offense:

*Rule 12.2. Notice of Insanity Defense or Expert
Testimony of Defendant's Mental Condition.*

* * * * *

(c) *Mental Examination of the Defendant.* In an appropriate case the court may, upon motion of the attorney for the government, order the defendant to submit to an examination pursuant to 18 U.S.C. 4241 or 4242. No statement made by the defendant in the course of any examination provided for by this rule, whether the examination be with or without the consent of the defendant, no testimony by the expert based upon such statement, and no fruits of the statement shall be admitted in evidence against the defendant in any criminal proceeding except on an issue respecting mental condition on which the defendant has introduced testimony. 89/

Although the wording of MRE 302 and FRCP 12.2(c) is obviously different, the operation of the two rules is quite similar. 90/ Both establish privileges to statements, derivative evidence 91/, and conclusory medical opinions. And both provide that an accused may open the door to the admission of such evidence.

Even though the similarities between the two rules outnumber the differences, those differences are significant. One is that FRCP 12.2 (c) has been amended several times to conform to developing federal case law, 92/ while MRE 302 was amended only once, and that amendment occurred on the same day it went into effect. 93/ Other specific differences are apparent. For example, FRCP 12.2 (c) does not state that the privilege applies only to the issue of guilt. Thus, a possible guilt *versus* sanity distinction, which existed in a former version of FRCP 12.2 (c), has been eliminated. 94/ But perhaps the most important difference between MRE 302 and FRCP 12.2 (c) pertains to when, how, and to what extent the defense may unintentionally open the door to the admission of specific evidence.

These and other differences will be discussed throughout this article.

V. THE ABA MODEL.

The American Bar Association [ABA] has attempted to assist legislatures in this area. Recently added to the ABA's Standards for Criminal Justice is chapter seven entitled "Criminal Justice Mental Health Standards." 95/ The chapter contains ninety-six standards designed for use by both lawyers and psychotherapists. It provides a suggested procedure that follows an offender from the first police contact through release from incarceration. Standard 7-3.2 is similar to both MRE 302 and FRCP 12.2(c):

Standard 7-3.2 Use of disclosures or opinions derived from pretrial mental evaluations.

(a) Admissibility of disclosures or opinions in criminal proceedings. No statement made by or information obtained from a person, or evidence derived from such statement or information during the course of any pretrial mental health or mental retardation professional interview or mental evaluation, or during treatment or habilitation, and no opinion of a mental health or mental retardation professional based on such statement, information, or evidence is admissible in any criminal proceeding in which that person is a defendant unless the disclosure or opinion is otherwise admissible under standard 7-3.9 96/ and:

* * * * *

(ii) is otherwise relevant to an issue raised by defendant concerning defendant's mental condition and defendant intends to introduce the testimony of a mental health or mental retardation professional to support the defense claim on this issue. 97/

The ABA Standard is similar to MRE 302 in that it extends a privilege to both opinions and statements ("disclosures"). However, the Standard is different from MRE 302 in several regards: 1) it does not provide for a two-tier reciprocal door opening procedure for opinions *versus* statements; 2) it applies to all uses of privileged evidence and not merely to "the issue of guilt;" and, 3) it permits the door to be opened if the mental state of the defendant is merely "raised by defendant" instead of requiring the actual introduction of such evidence (thus leaving open the question if the door can be opened either by notice of the intent to assert the insanity defense, on *voir dire*, or on opening statement).

Although the ABA Standard, like FRCP 12.2 (c), is silent on the issue of rights warnings, the Standard's commentary recognizes the case law which has held that once the defendant injects the issue of his mental state, fifth amendment objections are deemed waived. 98/

The remainder of this article discusses some major unresolved issues in MRE 302. FRCP 12.2(c) and the ABA Standard will be used to suggest some possible solutions.

VI. SOME UNRESOLVED ISSUES IN MRE 302.

Few reported cases address MRE 302: although there is no proven explanation for this, it is the author's observation that one reason is that many defense counsel are unfamiliar with MRE 302 and do not use it as a basis for objection. Several major questions in MRE 302 are largely unanswered. The following section attempts to answer some of these questions by comparing existing military law to federal civilian law and the ABA Standards.

A. Right to Counsel at the Sanity Board.

As stated earlier, military case law has held that an accused does not have a right to have his counsel present at a sanity board. 99/ Furthermore, sanity board experts do not have to advise the accused of his right to counsel either before or during the board, 100/ and the accused's defense counsel is not entitled to notice of the board. 101/

Neither MRE 302 102/ nor RCM 706 103/ specifically addresses the presence of counsel at the sanity board, although MRE 302(a) does state that the privilege applies regardless of whether the accused was advised of his rights (which include his right to counsel). 104/ Similarly, federal statutory law 105/ and FRCP 12.2(c) 106/ are silent on this issue. However, civilian cases, like their military counterparts, have long held that an accused does not have a right to counsel at compelled mental examinations. 107/

Both military and civilian courts have justified their holdings with the notion that an accused only has a right to have counsel present at "critical stages" 108/ of the prosecution where counsel is needed to prevent the possibility of unfair and inaccurate procedures which, if undetected, could not be attacked at trial. It was fairly well settled that a compelled mental examination was not a critical stage 109/ until the Supreme Court's decision in *Estelle v. Smith*. 110/

In *Smith*, the defendant was charged with capital murder and tried in a Texas

state court. 111/ He was administered a pretrial competency examination by a state psychiatrist based upon an informal court request. 112/ The defendant was not given *Miranda* warnings prior to the examination, and his retained counsel was not notified in advance that the examination would encompass the issue of the defendant's "future dangerousness." 113/ At trial, the defense counsel offered no psychiatric evidence and had not indicated before trial that he would rely on any type of mental status defense. 114/

After the defendant was convicted of capital murder, the case proceeded to the sentencing phase. The defense counsel called three lay witnesses who testified that the defendant had a good character and reputation, and had thought that the pistol used in the murder would not work because of a bad firing pin. 115/ The prosecutor called the state psychiatrist who conducted the pretrial mental examination to testify about the defendant's future dangerousness. 116/ The much surprised defense counsel objected to this testimony because the psychiatrist's name did not appear on the state's witness list. The trial judge denied the objection and the defendant was sentenced to death. 117/

In reviewing the defendant's petition for *habeas corpus* relief, the Supreme Court held that the defendant's fifth and sixth amendment rights were violated by the admission of the state psychiatrist's testimony. 118/ With regard to the sixth amendment violation, the Court held:

It is central to the Sixth Amendment principle that in addition to counsel's presence at trial, the accused is guaranteed that he need not stand alone against the State at any stage of the prosecution, formal or informal, court or out, where counsel's absence might derogate from the accused's right to a fair trial. Here, respondent's Sixth Amendment right to counsel clearly had attached when Dr. Grigson examined him at the Dallas County Jail and their interview proved to be a "critical stage" of the aggregate proceeding against the respondent. Defense counsel, however, were not notified in advance that the psychiatric examination would encompass the issue of their client's future

dangerousness, and the respondent was denied the assistance of his attorneys in making the significant decision of whether to submit to the examination and to what end the psychiatrist's findings could be employed. 119/

The Court decided, contrary to the decisions of previous lower courts, that in certain cases a pretrial mental examination is a "critical stage" at which the accused enjoys a right to the assistance of counsel and must be advised of that right. 120/ However, the holding of the case is quite narrow and does not mean that the a prosecutor is barred from introducing any evidence from pretrial mental examinations if counsel was not present at the examination. The Court stated in *dicta* that, "a different situation arises where a defendant *intends to introduce* psychiatric evidence...." 121/ Furthermore, the Court seemed to base its decision not so much on the fact that the defense counsel was not actually present during the examination, but because the defendant did not have an opportunity to *consult* with his counsel before the examination. Although *Smith* did not specifically decide the issue of a right to the actual presence of counsel at the examination, opinion indicated that the accused would not have such a right. 122/

Smith involved only the sentencing phase of a trial, but the opinion's *dicta* 123/ and subsequent federal cases 124/ make it clear that the holding applies equally to guilt proceedings. Any doubt about this issue was put to rest in the Court's next and, to this date, only other opinion that has specifically addressed the admissibility of evidence from compelled mental examinations.

In *Buchanan v. Kentucky*, 125/ the Court applied its *dicta* from *Smith* which suggested that a prosecutor can introduce evidence from a compelled mental examination in a guilt proceeding if the defense counsel opens the door to expert mental status evidence by introducing it at trial. The defendant was charged with capital murder in Kentucky. At trial, his counsel attempted to establish the defense of "extreme emotional disturbance" by having a social worker read from a psychological report that had been prepared concerning a burglary committed ten months before the alleged murder. 126/

On cross-examination, the prosecutor had the social worker read from an involuntary hospitalization psychological evaluation prepared after the alleged murder and pursuant to the joint request of the prosecution and defense. 127/ The defense counsel unsuccessfully objected to the cross-examination alleging that he was not given the opportunity to be present at the second examination and that the defendant had not been advised of his right to counsel as required by *Smith*. 128/

The Court affirmed the conviction holding that neither the defendant's fifth or sixth amendment rights were violated by the prosecutor's cross-examination of the social worker. The Court distinguished *Smith* on two grounds. First, in *Smith*, the defense counsel was not notified of the examination, while in *Buchanan* the defense had actually joined in the request for it. 129/ Second, the defense counsel in *Smith* did not in any way open the door to expert mental status evidence, while in *Buchanan* the defense counsel open the door by having the social worker read from the first psychological report. 130/ The Court stated:

Petitioner attempts to bring his case within the scope of *Smith* by arguing that, although he agreed to the examination, he had no idea, because his counsel could not anticipate, that it might be used to undermine his "mental status" defense. Petitioner, however, misconceives the nature of the Sixth Amendment right at issue here by focusing on the use of Doctor Lange's report rather than the proper concern of this amendment, the consultation with counsel, which petitioner undoubtedly had. * * * Given our decision in *Smith*..., counsel was certainly on notice that if, as appears to be the case, he intended to put on a "mental status" defense..., he would have to anticipate the use of psychological evidence by the prosecution in rebuttal. 131/

The Court decided, as it had suggested in *Smith*, that an accused is entitled to only to consultation with counsel concerning the use of evidence from a compelled

mental examination, and that defense counsel should not assume that the government is limited to any specific use of the evidence once the defense opens the door. In the Court's view, defense counsel are *presumed* to know that if they open the door to the accused's mental state with expert testimony, the government is allowed to rebut with evidence from a compelled mental examination.

The Supreme Court's decisions in *Smith* and *Buchanan* are relevant to the right to counsel in military practice. Since MRE 302 and RCM 706 are silent on the the right to counsel at sanity boards, and since no military cases have addressed this issue under MRE 302, *Smith* and *Buchanan* provide the most recent guidance on the sixth amendment issues in MRE 302. ^{132/} Specifically, these two cases will probably cause military appellate courts to give wide latitude to judges who admit evidence once the door is opened (either intentionally or unintentionally) by defense counsel. Furthermore, military courts will probably hold that defense counsel are *presumed* to know the ramifications of introducing expert mental status evidence.

Although *Smith* and *Buchanan* strongly imply that a military accused would not have a right to have his attorney actually present at a sanity board, neither case addresses the harsh realities that a military trial attorneys face when they must cross-examine the government's sanity board experts at trial. Most military trial attorneys know that, once attacked at trial, a presumptively neutral sanity board expert may become an adversary instead of an impartial expert. ^{133/} Though this problem may operate against either side, it is especially painful for the defense counsel if one considers the fact that he cannot attend the sanity board and, therefore, cannot effectively determine how to impeach the board's conclusions at trial.

This problem seems to apply equally to civilian trials and some civilian commentators ^{134/} have suggested that compelled mental examination procedures should be flexible to permit either the attendance of defense counsel or mechanical recording of the interview. An example of a model rule that addresses both theses procedures is the reflected in the ABA Criminal Justice Mental Health Standards:

Standard 7-3.6. Procedures for conducting mental evaluations.

* * * * *

(c) Presence of attorney during evaluation.

(i) When the scope of the evaluation is limited to defendant's present mental competency, the defense attorney is entitled to be present at the evaluation but may actively participate only if requested to do so by the evaluator.

(ii) When the scope of the evaluation is not limited to defendant's present mental competency, the defense attorney may be present at the evaluation only with the evaluator's approval, and if present may actively participate only if requested to do so by the evaluator.

(iv) The prosecutor may not be present at any mental evaluation of defendant.

(d) Recording the evaluation. All court-ordered evaluations of defendant initiated by the prosecution should be recorded on audiotape or, if possible, on videotape, and a copy of the recording should be provided promptly to the defense attorney. The defense may use the recording for any evidentiary purpose permitted by the jurisdiction. If the defense intends to use the recording at trial, it should notify the court. Upon receiving notice, the court should promptly provide to the prosecution a copy of the recording. Upon the defense motion, the court may enter a protective order redacting portions of the recording before it is forwarded to the prosecution.

(e) Joint evaluation. Joint evaluations should be encouraged. They should be permitted when agreed upon by the prosecutor and defense attorney. A joint evaluation involves

either a simultaneous evaluation by two or more mental health or mental retardation professionals or a single evaluation by a mental health or mental retardation professional agreed on by both parties. 135/

The Standard adopts a flexible approach to compelled mental examinations and can be readily applied to military practice. Although neither MRE 302 nor RCM 706 address the procedures in the Standard, military trial judges have historically issued liberal orders concerning sanity boards. 136/ The Standard provides excellent guidance for a military trial judge who wish to accommodate a defense request for a supplemental order concerning a RCM 706 sanity board.

Though no federal cases have specifically held that either the attendance of counsel at or the recording of compelled mental examinations is constitutionally required, one important case extensively analyzed the question. In *United States v. Byers*, 137/ the United States Circuit Court of Appeals for the District of Columbia analyzed these two issues *en banc*. Judge (now Justice) Scalia, writing for the plurality opinion, stated that although neither presence of counsel nor recording is required under the sixth amendment, recording "may be a good idea." 138/ In dissent, Chief Judge Bazelon, urged that the presence of counsel is necessary to protect the accused's sixth amendment rights and that recording is the only effective substitute. 139/ Judge Bazelon, perhaps the leading judicial expert in mental health law, 140/ suggested that recording examinations would have several salutary effects:

- 1) The presence of a recorder would ensure that overreaching by the government expert does not occur. 141/
- 2) Recording would assist the court's determination regarding the voluntariness and reliability of the accused's statements. 142/
- 3) The accused may be less apprehensive at the examination if he knows his defense attorney will have an opportunity to review

the interview. 143/

4) Recording frees the expert from constant note-taking and thus improves the free flow of communication. 144/

5) Recent studies have found that the disruptive effect of recording are overstated. 145/

6) Experienced experts have stated that the presence of videos do not affect their interviews. 146/

7) Because the experts who conduct the interviews will have to eventually be cross-examined at trial, the "pressure" of a recorded interview may improve their abilities to communicate their opinions at trial. 147/

8) The desire to protect the confidentiality of interviewing is not involved since the expert and accused know that the interview is being conducted with a view toward trial. 148/

9) Recording is now a commonly-used tool of the modern expert and is used extensively in training and research. 149/

The medical profession also supports recording of compelled mental examinations. The American Psychiatric Association, although expressing some minor reservations about recording interviews because of the relatively sparse research, suggests a "case-by-case experimentation on a voluntary basis." 150/ The American Psychological Association expresses a much stronger view in favor of recording:

Video or audio recording of the interview may have some inhibitory consequences, but the problems engendered by such a procedure

may be outweighed by a just resolution of the state-individual balance. Recording, when requested by defense, had the significant attribute of protecting defendant's constitutional rights while permitting a free flow of exchange during the interview by the government forensic experts. It will have the additional salutary benefit of greatly enhancing the accuracy of fact-finding, facilitating efforts to secure information derived from the clinical interview, and permitting a more valid cross-examination. As a practical matter, for ease of interview, a transcript should be made of the recording. 151/

Federal law provides for videotape recording of certain court ordered mental examinations. Recently amended 18 U.S.C. §4247(f) provides: "Upon written request of defense counsel, the court may order a videotape record made of the defendant's testimony or interview upon which the periodic report is based pursuant to [involuntary hospitalization procedures]. Such videotape record shall be submitted to the court along with the periodic report." 152/ Thus, although federal law does not specifically provide for recording of examinations conducted to determine sanity at the time of the offense, § 4247(f) is evidence that Congress does not feel that recording of interviews is disruptive or impractical.

The defense counsel would not be the only possible beneficiary of recording sanity boards. Since in most insanity defense trials the defense counsel must vigorously impeach the government's sanity board experts with detailed questions concerning the reasons for their conclusions, the door to the accused's statements is usually opened wide for the government's rebuttal. In these situations, the government should be able to introduce portions of the recorded sanity board interview for several purposes such as the rule of completeness, 153/ basis of opinion, 154/ or prior consistent statement. 155/ Studies have shown that juries usually convict when the government experts testify in favor of the government, 156/ so a prudent trial counsel would be wise to maximize the admission of evidence from the sanity

board. And since defense counsel seldom have insanity clients testify, a recorded sanity board may be the only chance a trial counsel has of showing the jury firsthand that the accused is capable of rational thought.

No military or federal case has yet to hold that an accused has a constitutional right to have a compelled mental examination recorded. On the other hand, the United States Court of Appeals for the District of Columbia, the American Bar Association, the American Psychiatric Association, and the American Psychological Association believe that the practical benefits of recording examinations outweighs its detriments. Military trial judges are free to fashion supplemental orders to allow recording, and a change to RCM 706 to permit recording if requested by the defense seems reasonable and fair.

B. Rights Warnings at the Sanity Board.

Although military courts once required that an accused be warned of his Article 31 rights at a sanity board, 157/ the requirement no longer exists. 158/ Furthermore, MRE 302's privilege applies regardless if the accused was warned. 159/ and military sanity board experts are instructed that warnings are unnecessary. 160/

Concerns about self-incrimination at sanity boards have not caused much litigation in the military. 161/ but the issue has been the subject of considerable federal litigation 162/ and has been a favorite topic for civilian commentators. 163/ The vast majority of federal cases has held that when an accused first introduces evidence concerning his mental state, the fifth amendment does not prevent the introduction of testimony by a government expert who did not first warn the accused of his *Miranda* rights. 164/

It seemed clear that *Miranda* did not apply to compelled mental examinations until the Supreme Court's decision in *Estelle v. Smith* 165/ As will be recalled, in *Smith*, a state psychiatrist examined the defendant pursuant to a state statute after his conviction for capital murder but before his sentencing hearing. Smith's counsel was not notified before the examination. 166/ At the sentencing hearing, the prosecutor called the state psychiatrist to testify that, based on specific statements made by the defendant during the examination, he posed a serious future threat to society. The defense counsel, who had by then learned of the mental examination but had received only a conclusory report, 167/ objected to the testimony because he had not been notified that the prosecutor planned to call the psychiatrist and the conclusory psychiatric report contained no references to any statements made by the defendant. The objection was denied and the defendant was sentenced to death. 168/

The Supreme Court held that the defendant's fifth amendment 169/ rights were violated because he had not been given his *Miranda* warnings before the examination. The Court rejected the state's contention, adopted by other courts, 170/ that the examination was like a routine competency examination and that the accused's statements were "nontestimonial," and, therefore, not protected by the

fifth amendment:

[when the state psychiatrist at trial] went beyond simply reporting to the court on the issue of competence and testified for the prosecution at the penalty phase on the crucial issue of respondent's future dangerousness, his role changed and became essentially like that of an agent of the State recounting unwarned statements made in a post-arrest custodial setting. 171/

The Court then held that the defendant should have been given his *Miranda* warnings before the examination. 172/

The Court also rejected the state's alternate theory that, since the defendant had already been convicted before the state psychiatrist testified, the defendant's statements were not admitted on the "issue of guilt."

"the availability of the [Fifth Amendment] privilege does not turn upon the type of proceeding in which its protection is invoked, but upon the nature of the statement or admission and the exposure to which it invites." * * * We can discern no basis to distinguish between the guilt and penalty phases of respondent's capital murder trial so far as the the protection of the Fifth Amendment privilege is concerned. 173/

Despite its holding, the Court indicated several times in the opinion that its decision would have probably been different if the case was one in which the defendant had asserted the insanity defense on the merits of his case. 174/ The Court stated:

[w]hen a defendant asserts the insanity defense and introduces supporting psychiatric testimony, his silence may deprive the State of the only effective means it has of controverting his proof on an issue that he has interjected into the case. Accordingly,

several courts of appeals have held that, under such circumstances, a defendant can be required to submit to a sanity examination conducted by the prosecution's psychiatrist. 175/

Smith's holding affected a considerable number of death penalty cases and it generated a considerable amount of commentary 176/ and litigation 177/. Most of those who have interpreted the opinion have come to the conclusion that it is very narrow and based on unusual facts. 178/ However, *Smith's* implications left unanswered many questions concerning fifth amendment issues in compelled mental examinations.

Smith has direct application to military practice. Since MRE 302 still contains the language "on the issue of guilt," 179/ unwary military trial judges may wrongly think that evidence from a sanity board may be admitted before the defense opens the door on that limited purpose instead of on proof of the *actus reus*, and that a jury instruction will cure any possible prejudice. Both MRE 302 and the original version of FRCP 12.2(c) 180/ contained the phrase "issue of guilt," which was taken from the former 18 U.S.C. §4244. 181/ FRCP 12.2(c) was amended in 1983 to delete this phrase in light of *Smith*. 182/ As will be discussed later, 183/ the admissibility of sanity board evidence is contingent on the defense first opening the door.

The most comprehensive and important analysis of the fifth amendment issues in *Smith* is contained in the District of Columbia Circuit Court's opinion *United States v. Byers*. 184/ The facts of *Byers* are similar to the facts in *United States v. Frederick* discussed earlier, 185/ in that the district court ruled that the accused had opened the door to specific unwarned statements made at a court-ordered mental examination by referring to them during the defense's case. 186/ The defense contended on appeal 187/ that the accused should have been given his *Miranda* warnings and should have had his counsel present. 188/

The circuit court of appeals first reviewed four theories that federal courts had fashioned which allow the government to admit evidence from unwarned compelled mental examination after the defense has asserted the insanity defense at trial through expert testimony. These theories were: 1) an accused waives his

fifth amendment protection by voluntarily making psychiatric evaluations an issue in the case (the "waiver" theory); 189/ 2) compelled psychiatric examinations are real or physical rather than testimonial evidence, and, therefore, are not protected by the fifth amendment (the "real vs. testimonial" theory); 190/ 3) because an accused does not object during the presentation of his defense case to own statements (which are technically hearsay), the defendant is thereby estopped from objecting to the government's use of them its rebuttal case (the "estoppel" theory); 191/ and, 4) the fifth amendment only protects statements introduced to show that the accused actually committed the offense and not statements introduced on the narrow issue of sanity (the "guilt vs. sanity" theory). 192/

After an extensive analysis of these four theories, the court decided to rely on none of them. First, the court reasoned that the Supreme Court's decision in *Smith* categorically rejected the "real vs. testimonial" theory 193/ and casted great doubt on the "guilt vs. sanity" theory. 194/ The court then decided that it was fiction at best to think that an accused's decision to "waive" his right to silence could be considered "free and unconstrained" 195/ when the accused had been ordered to undergo the examination. Last, the court rejected the "estoppel" theory reasoning that when a defendant introduces his own statements on his defense case, he makes no express or implied promise that he will not object to the government's use of them. 196/

Instead of attempting to either pigeon-hole its decision into one of the four existing categories or create a new one, the court decided the issue on pure policy grounds:

All of these theories are easy game, but it is not sporting to hunt them. The eminent courts that put them forth intended them, we think, not as explanations of the genuine reason for their result, but as devices--not more fictional than many others to be found--for weaving a result demanded on policy grounds unobtrusively into the fabric of the law. Whether they have described this policy as the need to maintain a "fair

state-individual balance" (one of the values underlying the Fifth Amendment...), or as a matter of "fundamental fairness," or merely a function of "judicial common sense," they have denied the Fifth Amendment claim primarily because of the unreasonable and debilitating effect it would have upon society's conduct of a fair inquiry into the defendant's culpability. As expressed in *Pope*:

It would be a strange situation, indeed, if, first, the government is to be compelled to afford the defense ample psychiatric service and evidence at government expense and, second, if the government is to have the burden of proof,...and yet is to be denied the opportunity to have its own corresponding and verifying examination, a step which perhaps is the most trustworthy means of attempting to meet that burden.

We agree with this concern, and are content to rely upon it alone as the basis for rejection of the Fifth Amendment claim. 197/

The logic in this quote, including the passage from *Pope v. United States*, is extremely similar to the Court of Military Appeals' reasoning in *Babbidge*, 198/ which case remains the theoretical heart of MRE 302. *Byers* and *Pope* were the only two cases recently specifically cited as justification for unwarned compelled mental examination by the Supreme Court in *Buchanan v. Kentucky*, 199/

In *Buchanan*, discussed earlier, 200/ the defendant, charged with murder, employed a defense of "extreme emotional disturbance" by having a social worker read to the jury several psychological evaluations that were conducted after a previous burglary arrest. 201/ On cross-examination, the prosecutor had the social worker read from a psychiatric evaluation prepared pursuant to a joint request of the defense and prosecutor for the purpose of determining if the defendant should be involuntarily committed to a hospital after the alleged murder. The defense counsel objected to the prosecutor's cross-examination based on *Smith* in that the defendant had not been warned of his rights and that the

defendant's counsel was not present at the examination^{202/} The objection was overruled and the defendant was sentenced to death. ^{203/}

The Court affirmed the conviction distinguishing *Smith* on its facts, noting while Smith's counsel had neither placed at issue Smith's competency to stand trial nor offered a mental defense, Buchanan's defense counsel joined in a motion for the for the second evaluation and his entire defense strategy was to establish a "mental status" defense. ^{204/} The Court then contrasted the operation of the fifth amendment in the two cases:

We further noted [in *Smith*]: 'A criminal defendant who neither initiates a psychiatric examination nor attempts to introduce any psychiatric evidence, may not be compelled to respond to a psychiatrist if his statements can be used against him at a capital sentencing proceeding.' This statement logically leads to another proposition: if a defendant requests such an evaluation or presents psychiatric evidence, then *at the very least* the prosecution may rebut this presentation with evidence from the reports of the examination that the defendant requested. The defendant would have no Fifth Amendment privilege against introduction of this psychiatric testimony by the prosecution. ^{205/}

Buchanan's holding that a defense counsel may open the door to prosecution rebuttal is consistent with the holding of other federal courts. However, the opinion is significant more for what it does not say than what it says. The Court chose not to rely on any theories such as "waiver;" instead, its opinion is similar to *Eyers* in that it seems to rely on pragmatic policy considerations. Also, the Court's use of the language "at the very least" in the above quote indicates that the Court will most likely give a prosecutor wide latitude in rebutting a mental status defense.

Buchanan and *Eyers* may have a direct impact on the way military courts interpret MRE 302. As stated earlier, military courts and the drafters of MRE 302

adhere to the theory that the accused's decision to assert the insanity defense through expert testimony "implied partial waiver,"^{206/} of his rights under the fifth amendment and Article 31. However, in spite of the outdated "waiver" label, the policy considerations upon which MRE 302 was based are presently supported by the Supreme Court.^{207/} Accordingly, military courts might view MRE 302 more as a rule of policy than pure procedure.^{208/}

Perhaps the most troubling aspect whether Article 31 warnings should be given at a sanity board is the literal wording of the statute.^{209/} Article 31 (a) states that "No person...may *compel* any person....to answer and answer to which may *tend to incriminate him*." ^{210/} Now that the "guilt vs. sanity" dichotomy has been called into question, ^{211/} can it be said that compelling (i.e., by threatening the loss of the right to assert the insanity defense) an accused to answer questions about his sanity at the time of the offense does not violate this statute? The same question is even more troubling when one considers the language of Article 31(b), which flatly prohibits *requesting any statement from an accused* without first advising him of his rights. ^{212/} Even the seldom applied Article 31 (d) raises questions in that it prohibits the admission at trial of *any statement* obtained through the use of *coercion, unlawful influence, or unlawful inducement*. ^{213/} Is it proper to identify the only defense an accused has, i.e., a mental status defense, and then "coerce" or "induce" the accused to make statements which may weaken or destroy that defense? Even the civilian cases that hold that *Miranda* does not apply to compelled mental examinations cannot be totally relied upon because *Miranda* is a judicial rule of exclusion while Article 31 is an absolute statutory rule of preclusion. ^{214/} However, even though the pure language of Article 31 may seem to be incompatible with sanity boards, the policy reasons for them as identified in cases like *Babbidge*, *Byers*, and *Buchanan* justify their use.

The last issue discussed in this area is whether a defense counsel should request a judge to order that Article 31 warnings be given at the sanity board notwithstanding the fact that military law does not require them. Some military ^{215/} and civilian ^{216/} opinions show that rights warnings have been given at mental examinations. Two questions arise.

First, if the sanity board experts administer a warning, does this, in effect, destroy the protections created by *Babbidge* and MRE 302? 217/. The answer to this question is clearly no because MRE 302(a) provides that the privilege exists even though rights warnings were given. 218/

The second, more difficult question, is whether medical experts have an ethical obligation to inform the accused that there will be no confidentiality attached to the interview and that the results could incriminate him. Technical Manual 8-240, Psychiatry in Military Law, 219/ does not provide guidance to the military expert concerning his ethical duties. On the hand, both the American Psychiatric Association 220/ and the American Psychological Association 221/ have provided ethical guidance to their members concerning compelled mental examinations. The American Bar Association has attempted to combine the guidance from these two medical associations and legal considerations into the following standard:

Standard 7-3.6. Procedures for conducting mental evaluations.

(a) Duty of attorney to explain nature of evaluation to evaluator. Whoever initiates the evaluation should inform the mental health or mental retardation professional conducting the evaluation and ensure that the professional understands:

(i) the specific legal and factual matters relevant to the evaluation;

(ii) the rules governing disclosure of statements or information obtained during the evaluation and governing disclosure of opinions based on such statements or information; and,

(iii) the applicability of evidentiary privileges.

(b) Duties of defense attorney and evaluator to explain nature of evaluation to defendant. In any evaluation, whether initiated by the court, prosecution, or defense, the defendant's attorney and the mental health or mental retardation

professional conducting the evaluation have independent obligations to explain to defendant and to ensure defendant understands to the extent possible:

- (i) the purpose and nature of the evaluation;
- (ii) the potential uses of any disclosure made during the evaluation;
- (iii) the conditions under which the prosecutor will have access to information obtained and reports prepared; and,
- (iv) the consequences of defendant's refusal to cooperate in the evaluation as provided in standard 7-3.4(c) and 7-4.6(b). 222/

The ABA believes that the defense attorney and the mental health expert share joint responsibility for informing the accused of the consequences of his decision to submit to a compelled mental examination. The American Psychiatric Association believes that a psychiatrist has an independent duty to give detailed warnings to the accused similar to those in the ABA Standard. 223/ The American Psychological Association's view is similar. 224/ Although, for obvious reasons, military defense counsel should inform their clients of the general sanity board procedure and implications of asserting the insanity defense, they should also explain, in as much detail as possible, the operation of MRE 302. 225/

If a military sanity board's expert decides to advise the accused of the implications of submitting the examination, his task is obviously more difficult than the defense counsel since the expert must consider the ethical, legal, and medical implications of his choice of words. One civilian commentator with experience as psychiatrist and professor of law 226/ has suggested that a pre-printed consent form be used. 227/

In conclusion, though it can be assumed that most military accused will be informed of the full consequences of their decision to submit to a sanity board, military mental health experts must ask themselves if they can comfortably rely on someone else to discharge their professional ethical duties. And even though

military sanity board experts enjoy a legal presumption of impartiality. 228/ they should consider adopting a warning procedure that would preserve the appearance of impartiality in the eyes of the accused and those related to military justice.

C. Premature Release of the Sanity Board Report to the Trial

Counsel. -

An interesting question arises when the trial counsel obtains the results of the full sanity board report before trial in violation of RCM 706(c)(5) 229/ and MRE 302(c). 230/ As stated earlier, 231/ the reason for keeping the report from the trial counsel is the concern that he could use the report either to discover additional evidence to prove the *actus reus* or to form the basis for a subsequent prosecution. 232/ Cases in which the defense intends to concede the commission of the *actus reus* and to rely on the insanity defense would not involve such concerns. As mentioned earlier, the drafters of MRE 302 suggested that the defense counsel should consider releasing the entire sanity board report to the trial counsel before trial. 233/ This would preclude an unnecessary delay after the defense opened the door through introduction of expert testimony.

The following hypothetical case illustrates the kind of problem that may result from a premature release of the sanity board report. An accused is charged with premeditated murder by stabbing the victim with a knife, which the government has not found. The defense believes the government can prove the murder through circumstantial evidence. The defense also suspects that the accused was insane at the time of the offense, so the defense requests a sanity board. At the board, the accused relates where he hid the knife. If the trial counsel obtains this information uses it at trial, the trial counsel will have clearly violated MRE 302. This is true even though the statement may be relevant to the issue of sanity, such as suggesting that the accused appreciated the wrongfulness of his act as evidenced by his disposal of the murder weapon. 234/

The drafters' analysis to MRE 302 suggests that a trial counsel who has read the entire sanity board report before the trial may be disqualified from prosecuting the case in chief. 235/ The drafters also reasoned that since MRE 302 provides a form of testimonial immunity, premature disclosure would raise "significant derivative evidence problems." 236/ Professor Saltzburg addressed this issue and suggests three possible solutions: "(1) proceeding with trial in hopes of showing that neither the statements nor derivative evidence will be

used; (2) assigning a new trial counsel to the case who has not been privy to the information; or (3) transferring prosecution of the case to another jurisdiction in hopes of completely extinguishing any taint." 237/ Only two military cases have dealt with this problem.

In *United States v. Littlehales*, 238/ the defense made a pretrial motion to disqualify the trial counsel for committing prosecutorial misconduct because the trial counsel had interviewed the sanity board doctors before trial. The Air Force Court of Military Review refused to overrule the trial judge's ruling that the interview was permissible and not in violation of MRE 302. 239/ The court noted that the trial counsel did not discuss with the sanity board psychiatrist any specific statements made by the accused. The court rejected the defense's contention that the interview itself was *per se* derivative evidence. The court stated:

Neither the editorial comment nor the drafters' analysis to Military Rule of Evidence 302 provides any insight as to what constitutes "derivative evidence" beyond suggesting that it might be equated with testimonial immunity making even the remotest connection subject to being called "derivative evidence....." We think it an unwarranted interpretation of the term "derivative evidence" to expand it to include interviews where no attempt is made to gain access to statements given by the accused to his psychiatrist. 240/

Littlehales gives some insight into what derivative evidence is, 241/ but the opinion should be read with caution because the accused did not assert the insanity defense at trial: this explains why the court addressed the issue from the standpoint of prosecutorial misconduct instead of a violation of MRE 302.

One month after the Air Force Court of Military Review decided the *Littlehales* opinion, it faced MRE 302 head-on in *United States v. Bledsoe*. 242/ The accused was charged with several minor offenses. He asserted several defenses, one of them was insanity. After the accused opened the door through the use of expert testimony, the trial counsel asked the judge to release the full

sanity board report. The trial counsel then candidly remarked to the trial judge that he already knew of several privileged statements from the sanity board. The trial judge released the report and admitted the statements contained in it over the objection of the defense. The accused was convicted of all charges. 243/

The Air Force Court held that any possible error due to either the premature release of the statements or their subsequent introduction was harmless in light of the compelling evidence of guilt against the accused. The court declined to recommend any particular sanction for trial counsel who obtain premature access to privileged information. More importantly, the court refused to adopt a presumption of prejudice to the admission of the statements as applied in the case of an improperly admitted confession. 244/ Because *Bledsoe* was decided on the harmless error doctrine, it offers little guidance for future cases. 245/

Federal law offers better advice in this area. Federal statutes prescribing the procedure of the federal court-ordered mental examinations are very similar to the procedure outlined by RCM 706 and MRE 302. 246/ One federal court of appeals case has decided the issue in considerably more detail than *Littlehales* or *Bledsoe*.

In *United States v. Stockwell*, 247/ the accused was charged with several violent offenses surrounding an armed bank robbery. The accused intended to assert the insanity defense, so the court ordered a government mental examination. Before trial and without approval of either the judge or defense counsel, the prosecutor listened to the complete tape recording of the court-ordered examination. The prosecutor then conducted a detailed interview of the psychiatrist who did the examination. The interview led to a number of background documents such as the accused's school, military, and service records, all of which the prosecutor planned to use at trial to portray the accused as a malingerer and general liar. The defense counsel learned of the trial counsel's actions so he filed a pretrial motion asking the court to conduct a hearing similar to that as prescribed by the Supreme Court in *Kastigar v. United States* 248/ to determine if the prosecutor should be disqualified. 249/

The Second Circuit Court of Appeals declined to overrule the district court's decision not to conduct a *Kastigar* hearing. The court opined that, although

FRCP 12.2(c) does grant a form of immunity, it is different than traditional testimonial immunity in that evidence from a compelled mental examination may be used only be used on the issue of sanity while normal immunized testimony cannot be used in any manner. 250/ The court affirmed the conviction holding that the appellate record showed no improper use of the accused's privileged statements at trial. However, the court strongly criticized the prosecutor's decision to listen to the tapes. The court further opined that in an appropriate case a trial judge should conduct a *Kastigar* hearing. 251/

Although *Stockwell* is by far the most helpful case in the area, the case's direct applicability to present military practice appears, at least on the surface, to be questionable. First, the "guilt *versus* sanity" theory that the court relied may no longer be valid. 252/ Second, the current version of FRCP 12.2(c) proscribes the use of the "fruits" 253/ of privileged statements, while the MRE 302 specifically proscribes "derivative" 254/ evidence. The Court of Military Appeals has decided that the "derivative evidence" doctrine is broader than the "fruit of the poisonous tree" doctrine: in the case of derivative evidence the government must put the defendant the same place he would have been in if immunity had not been granted. 255/

Even though the terminology used in the *Stockwell* opinion may be somewhat inaccurate or out-of-date, the logic of the case remains sound. If a strict testimonial immunity analysis 256/ were applied to compelled mental examinations, both FRCP 12.2 and MRE 302 would be unconstitutional because an accused who asserts the insanity defense can never be put in the same position that he would have been in if he had not been forced to submit to a sanity examination. This is true even if the government experts only relate their conclusions, since those conclusions are, in the broadest sense, derivative of his statements. 257/ Although *Stockwell* provides by far the best guidance for military judges facing these issues, only future litigation will provide precise guidance.

D. What Opens the Door to MRE 302?

1. Brief Overview of Door Opening Procedure.

Perhaps the most important questions concerning MRE 302 for a trial attorney is what actions by the defense counsel open the door to the introduction of specific types of privileged evidence. As will be recalled, the door opening provision of MRE 302(b) is as follows:

- (1) There is no privilege [to statements of derivative evidence from the sanity board] under this rule when the accused first introduces into evidence such statements or derivative evidence.
- (2) An expert for the prosecution may testify as to the reasons for the expert's conclusions and the reasons therefore as to the mental state of the accused if expert testimony offered by the defense as to the mental condition of the accused has been received into evidence, but such testimony may not extend to statements of the accused except as provided in (1). 258/

Under the plain wording of the MRE 302(b) there are two different door opening triggers: one for the reasons for the expert's conclusions and another for specific statements made at the sanity board. The accused can open the door to the reasons for government expert's conclusions if he first offers any expert testimony and that testimony is received into evidence. The door to specific statements from the sanity board can be opened only if the accused specifically introduces statements from the sanity board.

2. Some Specific Questions.

Though the wording MRE 302(b) seems clear enough, there are many permutations of the rule that can cause confusion. For example:

- Can the door be opened in some way by the defense's actions either in

requesting or consenting to the sanity board, giving notice of the intent to assert the insanity defense, through questioning on *voir dire* or by remarks on opening statement?

-Does the plain wording of MRE 302(b)(2) mean that the trial counsel can properly introduce on his case-in-chief (before the door is opened) the sanity board's bare conclusions minus the "reasons therefor?"

-Can the defense effectively block sanity board evidence by introducing no expert evidence of its own, and, instead, relying only on lay witnesses, i.e., the "lay insanity defense?"

-If several sanity boards were conducted and the accused introduces statements from only one of them, does this open the door to statements from the others?

-If the accused introduces statements from his own private expert(s) that support his assertion that he was insane, does this prevent the trial counsel from introducing specific statements made to the sanity board that were inconsistent with those made to the accused's private expert?

These and other questions are discussed in the following sections.

a. Opening the Door Before the Actual Introduction of Defense Evidence.

RCM 701 (b)(2) states that "[i]f the defense intends to rely upon the defense of lack of mental responsibility, or introduce expert testimony relating to the lack of mental responsibility, the defense shall, before the beginning of the trial on the merits, notify the trial counsel of such intention." 259/ FRCP 12.2(a) 260/ and ABA Standard 7-6.3 261/ contain similar requirements. RCM 706(a) 262/ and MRE 302 263/ do not specifically state whether a sanity board requested or consented to by the defense should be treated any differently than one that was requested by the trial counsel. However, since RCM 706 (b) 264/ effectively transforms all sanity boards into "ordered" sanity boards regardless of their origins, there is no distinction under MRE 302 between sanity boards requested by the defense and sanity boards requested by other persons.

FRCP 12.2 (c) achieves the same effect by expressly stating that its privilege applies "whether the examination be with or without the consent of the defendant." 265/ Thus, a plain reading of MRE 302 and its federal counterpart indicates that an accused does not in any open the door merely because he requests or consents to a compelled mental examination.

Several federal cases suggest that if the defense merely requests a government mental examination or or notifies the government it intends to assert the insanity defense, the government should be given wide latitude in presenting psychiatric evidence. 266/ Furthermore, the Supreme Court's recent language in *Buchanan v. Kentucky*, discussed earlier, 267/ seems to support this view: "[I]f a defendant *requests* such an evaluation *or presents* psychiatric evidence, then, at the very least, the prosecution may rebut this presentation with evidence from the reports of the examination that the defendant requested." 268/ One federal case has interpreted this language.

In *Schneider v. Lynaugh*, 269/ the Fifth Circuit Court of Appeals analyzed the Supreme Court's intent behind this language. The court decided stated that "[a]lthough the Court's use of the disjunctive might even suggest that the defendant's request is sufficient by itself to constitute forfeiture of the privilege, the rest of the sentence and the opinion as a whole strongly imply that the defendant must have gone further and actually introduced psychological evidence." 270/ The *Schneider* court's reading of *Buchanan* seems also to be supported by a close reading of the Court's earlier decision in *Estelle v. Smith*, 271/ which turned on the fact the defendant did not introduce mental status evidence. However, a definitive answer to the Court's language in *Buchanan* must await further litigation. Even if the Court decides that it is constitutionally permissible to introduce such evidence if a government examination is requested but not ultimately introduced by the defense, the plain wording of both MRE 302 and FRCP 12.2(c) prohibit its introduction.

One military commentator has suggested that MRE 302's privilege "does not create the same privileges for an accused who voluntarily submits to a mental examination." 272/ The authors's conclusion is based on the Army Court of Military Review's decision in *United States v. Matthews* 273/ in which the

court suggested in *dicta* that the trial counsel could properly introduce evidence from a sanity board even if the defense did not open the door through use of expert testimony. The court stated that one factor allowing admission is that the board was "voluntarily entered into by the [accused] and, at least in part, completed at the specific request of [the accused's] defense counsel." 274/ However the court's *dicta* is somewhat unclear since the case concerned mental examination conducted for administrative separation, i.e., not a sanity board. 275/ Furthermore, the plain wording of MRE 302 276/ makes it clear that the fact that an accused voluntarily submits to a sanity board ordered under RCM 706 277/ is irrelevant in determining if the door is opened to expert testimony.

Another question arises when the defense counsel not only requests the sanity board and gives notice of his intent to assert the insanity defense, but also informs the jury during *voir dire* and opening statement of his intent to call expert witnesses who will testify that the accused was insane. Should these actions permit the government to "preemptively strike" at the insanity defense by calling the sanity board experts on its case in chief? The obvious answer under the rule is, of course, no. MRE 302(b) states that the door is opened only if the accused either "first introduces ...statements" or "if expert testimony offered by the defense has been received into evidence." 278/ But must this language be applied literally? Only one military case had addressed this question.

In *United States v. Bledsoe*, discussed earlier, 279/ the defense counsel during the *voir dire* of the jury "made it clear that their client's lack of mental responsibility was a key issue...and that a defense based on that condition would be urged in his behalf." 280/ During his opening statement, the trial counsel stated that the accused was sane and that the government would offer evidence on that fact. 281/ The defense counsel objected to the trial counsel's statements based on MRE 302(b)(2) and asked for a mistrial arguing that only the defense was permitted to institute the insanity defense. 282/ The trial judge denied the motion and proceeded to permit the trial counsel to introduce the testimony of the sanity board experts on the governments case in chief. 283/

The Air Force Court of Military Review affirmed the conviction stating that:

We agree that the defense's interpretation of [MRE 302(b)(2)] is reasonable, but hasten to suggest that it must be read in conjunction with Mil. R.Evid. 611(a), which allows the trial judge to exercise reasonable control over the presentation of evidence in order to develop the facts without needless consumption of time. Clearly, a trial judge retains the traditional power to depart from the usual order of proof. While we think it is far better practice for the government to respond to a defense assertion that the accused lacks the requisite mental responsibility, we do not find, in the case before us, that the trial judge abused his discretion in allowing the government to proceed in its case in chief with testimony relating to appellant's mental state. 284/

Factors in the record supporting the court's decision were; the insanity was the pivotal issue; the defense counsel first raised insanity in *voir dire*; the testimony would have been admissible in rebuttal; and, the defense was apparently not surprised by the testimony. 285/

Although the *Bledsoe* court's decision not to find reversible error under that facts of the case may reasonable, one wonders if the court would have decided similarly if the defense had decided not to assert the insanity defense and the government still introduced the testimony of the sanity board experts. Such a practice would seem to violate *Smith*. Oddly enough, one federal case faced these facts and decided that any error was harmless.

In *Cape v. Francis*, 286/ the accused was charged with capital murder in a Georgia state court. Before the trial, the court ordered a mental examination by a state psychiatrist; the defense consented to the examination. 287/ At trial, the defendant did not assert the insanity defense, but, instead completely denied complicity; nonetheless, the state prosecutor was allowed to introduce the opinion of the state psychiatrist that the defendant was competent to stand trial and criminally responsible for his offense. 288/

The Eleventh Circuit Court of Appeals held that even though the defendant had not been warned of his rights as required by *Estelle v. Smith* and had not

asserted the insanity defense, any error caused by the admission of the state psychiatrist's testimony was harmless. 289/

The court stated that *Smith* does not establish "an absolute rule which mandates reversal in any instance where psychiatric testimony exceeds the scope anticipated by defense counsel at the time of the examination.... and that [b]y proving Cape's sanity, the State proved a fact not necessary to its burden of proof." 290/ The court noted that, unlike *Smith* in which the state psychiatrist was the only source of crucial evidence on the issue of the defendant's future dangerousness, the state psychiatrist's testimony in *Cape* was merely cumulative in light of the overwhelming evidence of guilt." 291/

Both *Bledsoe* and *Cape* show that courts are generally reluctant to rigidly apply sanctions for violations of the order of proof of expert testimony and will instead look at the record as a whole for prejudice. On the other hand, the plain wording of MRE 302 and FRCP 12.2(c) and the Supreme Court's decisions in *Smith* and *Buchanan* require the government to wait until rebuttal to introduce evidence from compelled mental examinations. The problem with the analysis of courts like *Bledsoe* and *Cape* is that they presume that defense counsel's control over the order of proof is not a significant factor in determining if the accused has been prejudiced; rather, they only look at the sum total of evidence introduced by both sides. Furthermore, they ignore the fact that, once the government introduces evidence from a compelled mental examination, the defense is "locked in" to conceding that the *actus reus* of the offense was committed and, therefore, must rely solely on insanity.

The next question arises out of MRE 302(b)(2)'s language : "An expert for the prosecution may testify as to the reasons for the expert's conclusions and the reasons therefor as to the mental state of the accused if expert testimony offered by the accused has been received into evidence...." 292/ Thus, the trial counsel does not have to wait for the accused to open the door, but can introduce the bare conclusions (minus the "reasons therefor") of the sanity board on its case-in-chief. The practical problem with such a practice is that the trial counsel is barred first laying a foundation for the expert's conclusions. This strange procedure inverts the normal practice of requiring the proponent of opinion

evidence to lay a foundation before the evidence is admitted. Even more disturbing is the question that logically follows: if the defense counsel objects to this opinion testimony for a lack of a foundation, has he inadvertently opened the door to the "reasons therefor"? It seems that common sense should prevent a trial counsel from doing this, but the plain wording of the MRE 302 does not prevent it.

The drafters' analysis to MRE 302 provides no insight into this question. Professor Saltzburg comments that, "The Rule anticipates that normally the defense, and not the prosecution, will be the first to raise the issue of mental responsibility at trial," ^{293/} but notes that the *Bledsoe* ^{294/} court held that this maxim need not be strictly followed. However, in *Bledsoe* the government experts' testimony went beyond their bare opinions on direct examination and the appellate court recognized such a practice violated MRE 302(b)(2). ^{295/} Thus, *Bledsoe* did not really decide if the admission of the bare medical conclusions on the government's case-in-chief violates the rule.

No federal court or civilian commentator has addressed this precise issue. One reason may be that both FRCP 12.2(c) and the ABA Standard do not permit such a distinction to be made. FRCP 12.2(c) provides that, "no testimony by the expert based upon such statement...shall be admitted...except on an issue respecting mental condition on which the defendant has introduced testimony." ^{296/} FRCP 12.2(c)'s bar against all "testimony" (i.e. including conclusions) precludes the government expert from giving his bare conclusion unless the defense opens the door. In this regard, FRCP 12.2(c) gives the defense counsel broader control than MRE 302 over whether the door is opened, but less control over how much or what type of evidence is allowed in rebuttal.

ABA Standard 7-3.2 is similar to FRCP 12.2(c) on the admissibility of conclusions and specifically states that "no *opinion*...based on such statement, information, or evidence [from the compelled examination] is admissible...unless [it] is otherwise relevant to an issue raised by defendant concerning defendant's mental condition and defendant intends to introduce the testimony of [an expert] to support the [defense claim]." ^{297/} Although the ABA Standard, like FRCP 12.2(c), prohibits admissibility of the government expert's opinion until the defense

opens the door, the ABA standard is different than FRCP 12.2(c) (and MRE 302(b)(2) for that matter) in that it does not seem to require that the door be opened by the actual *introduction* of defense evidence. Instead, the ABA Standard only requires that the defendant raise the issue and intend to introduce such evidence. The plain wording of the ABA Standard is different than FRCP 12.2(c) and may be interpreted to mean that if the defense gives notice of its intent to assert the insanity defense and raises the issue on *voir dire* or opening statement, the door may be opened for the government to introduce such evidence on its case-in-chief. ^{298/} For some reason the commentary ^{299/} to the ABA Standard, which makes repeated comparisons to FRCP 12.2(c), does not discuss this difference.

There seems to be no clear answer at this time whether MRE 302 establishes an absolute rule that a trial counsel must wait until his rebuttal case to introduce expert testimony from a sanity board. However, the better view would seem to be that he should, especially in light of the Supreme Court's recent decision in *Buchanan* in which the Court made repeated references to its permissible use "on rebuttal." ^{300/} Furthermore, the entire history of compelled mental examinations is based on the notion of a fair balance that must be achieved when the accused uses expert testimony. A tactical "preemptive strike" by the trial counsel would do nothing but risk upsetting that balance.

b. The Lay Insanity Defense.

One puzzle surrounding MRE 302 since its inception concerns whether the accused can assert the insanity defense solely through lay testimony and thereby prevent the government from introducing testimony from the sanity board? This notion of the "lay insanity defense" is most succinctly described by Professor Saltzburg:

The Rule is particularly cloudy with respect to the basis of offered lay testimony. According to the *Analysis*, ^{301/} a "lay" sanity witness' testimony is not derivative unless the witness has

read the sanity board's report. This seems too narrow and does not take into account the case where a "lay" sanity defense might be derivatively and very effectively built on statements made by the accused to the board. In that case, the lay testimony should be considered to be derivative for the purposes of (b)(1). That broad treatment of the term "derivative evidence" would be more in line with the policies of subdivision (a).

The Rule as originally written 302/ would have permitted the prosecution to respond to lay defense witnesses with expert testimony as long as no reference was made to specific statements by the accused. However, subdivision (b)(2) was changed on 1 September 1980 to permit the prosecution use of experts only after the defense has used its experts. 303/ Now, following an adverse finding of sanity under R.C.M. 706, the defense can theoretically rely on lay testimony and block expert rebuttal by the prosecution. 304/

Notwithstanding the clear wording of MRE 302, one military case has decided that defense reliance solely on lay insanity witnesses does not preclude introduction of expert testimony by sanity board doctors.

In *United States v. Matthews*, discussed earlier, 305/ the accused was referred to a military psychiatrist after he assaulted his First Sergeant. The examination was conducted with a view towards an adverse administrative separation, but no charges were preferred. The accused was diagnosed as having an antisocial and paranoid personality disorder. He was subsequently apprehended for possession of marihuana and another assault. He was again referred to the same military psychiatrist, who confirmed his earlier diagnosis and further found that the accused was mentally responsible. Up to this point, charges were still not preferred and neither of the examinations had been "ordered." The government then decided to charge the accused for all the three offenses. The accused's defense counsel asked the same psychiatrist to examine the accused for a third time: the diagnosis was the same. 306/

At trial, the accused asserted the insanity defense through lay witnesses. On rebuttal, the government called the same military psychiatrist who had examined the accused three times. The defense objected to the psychiatrist's testimony under MRE 302. The objection was denied and the accused was convicted of all three charges. 307/

On appeal, the Army Court of Military Review keyed in on the fact that MRE 302 only protects evidence derived from a sanity board. The court noted that none of the three examinations were sanity board examinations and, accordingly, held that MRE 302 did not apply. 308/ However, the court went further in *dicta* stating that even the examinations were sanity boards, the lay insanity defense would not block testimony from the sanity board on the government's rebuttal. The court reasoned that if the lay insanity defense were read into MRE 302, the jury would not be privy to otherwise relevant and admissible evidence from the sanity board, but would have to settle for inferior rebuttal evidence comprised of government lay witnesses and experts who only observed the accused in the court room. The court further reasoned that MRE 302, like FRCP 12.2(c), was only designed to protect the use of evidence to prove the *actus reus* of the offense and not the "issue of guilt." 309/

Matthews is a troubling opinion for several reasons. The court failed to address the obvious question of whether a prosecutor could effectively circumvent the protections of MRE 302 by arranging for the accused to be ordered to undergo an mental examination for the ostensible purpose of an adverse administrative elimination action, and then use the results at trial. Under the court's analysis MRE 302 would not apply. Furthermore, in *Kentucky v. Buchanan*, 310/ the Supreme Court analyzed evidence an involuntary hospitalization examination requested by the defense as if it were a sanity examination requested by the prosecutor. 311/ Similarly, in *Estelle v. Smith*, 312/ the Court stated that, in the area of mental examinations by the government, "the availability of the [Fifth Amendment] privilege does not turn upon the nature of the proceedings..., but upon...the exposure which it invites." 313/

Although this issue alone could comprise an article, it is sufficient to say that it is not clear if a mental examinations conducted for administrative

procedures based upon misconduct should be deprived of the protection of MRE 302 if it was reasonably foreseeable that the misconduct could result in a court-martial.

Another problem with *Matthews* is that it assumes that MRE 302 was only designed to protect the use of evidence from a sanity board to prove the *actus reus* of the offense, but could be used "on the issue of guilt" even if the defense does not use expert evidence. As discussed in detail earlier, ^{314/} the "guilt vs. sanity" dichotomy has been rejected by the Supreme Court in *Estelle v. Smith*. Furthermore, the former version of FRCP 12.2(c) that once contained this phrase, and which was cited in the *Matthews* opinion, has since been deleted from 12.2(c) in light of *Smith*. ^{315/} Last, the *Matthews* opinion also fails to take into account that the history of compelled mental examinations is based on the assumption that an accused submits to a government examination and thereby forfeits his fifth and sixth amendment rights only because the government needs such expert evidence to rebut the accused's experts. ^{316/}

One recent federal case addressed the lay insanity defense. In *Schneider v. Lynaugh*, ^{317/} the accused asserted a "lay mental status" during his sentencing phase of his trial. The accused had a drug rehabilitation counselor testify on his behalf. The prosecutor convinced the trial court that the counselor was an "expert" for purposes of opening the door to evidence from an earlier compelled mental examination. In affirming the defendant's conviction, the Fifth Circuit Court of Appeals interpreted the Supreme Court's decisions in *Buchanan* and *Smith* and held that the drug counselor was an expert for the purpose of opening the door to the introduction of expert government testimony. The court went on to state in *dicta* that:

If, for example, [the defendant] had called his family or friends to testify that he was a good fellow and could be reformed, he would not have opened the door to the use of the psychiatrist's expert testimony against him. In general, the defendant must introduce mental-status evidence that may be fairly characterized as expert testimony before the prosecution may respond with the results of a psychiatric

examination. 318/

Thus, the court recognized that the lay insanity defense could be intentionally and effectively used by a defense counsel to assert the insanity defense and, at the same time, block the government's use of its experts. In this regard, *Schneider* is in direct opposition to *Matthews*.

Based upon the Fifth Circuit Court of Appeal's *dicta* in *Schneider*, and the Supreme Court's language in *Smith* and *Buchanan*, the lay insanity defense does exist. The concerns expressed by the *Matthews* court bear consideration; however, the lay insanity defense does not really give the defense an unfair advantage because it only permits the defense to use lay testimony and the government is free to respond in kind. The law of compelled mental examinations requires a fair balance between the government and the accused: notwithstanding its awkwardness, the lay insanity defense achieves that balance.

c. What Opens the Door to Specific Statements from the Sanity Board?

The last question in this article is: What actions by the accused open the door to specific statements made at the sanity board? MRE 302(b)(1) states: "There is no privilege under this rule when the accused first introduces into evidence such statements or derivative evidence." 319/ Though MRE 302 itself does further explain this provision, the drafters' analysis states that it applies "*only when the defense makes explicit use of statements* made by the accused to a sanity board or derivative evidence thereof." 320/ Thus, drafters take the position that questions about this provision should be strictly construed in favor of the defense.

However, as Professor Saltzburg has noted, this standard may be difficult to apply at trial. 321/ For instance, would the defense's references to specific statements during the defense's *voir dire* or on opening statement open the door? These concerns are generally referred to by the drafters' caveat: "An informed defense counsel must proceed with the greatest of caution being always concerned that what may be an innocent question may be considered an 'open sesame.'" 322/ Professor Saltzburg similarly cautions: "[o]nly the most wary defense counsel should make any reference or allusion to covered evidence here unless he clearly intends to make use of the statements and is willing to see the government respond." 323/ Though MRE 302(b)(1), like (b)(2), requires actual *introduction* of evidence, the same considerations discussed earlier 324/ concerning opening the door the sanity board's conclusion would probably apply equally to specific statements, and the reasonable view is that the defense would have to actually introduce statements before the door is opened.

Certain deliberate actions by the defense would clearly open the door to the introduction of statements. Some examples are: the defense counsel impeaches a sanity board expert by attempting to show that the accused's statements at the board do not support the expert's conclusions; 325/ following a favorable finding of insanity by one or more of the sanity board experts, the defense counsel calls that expert as a defense witness and elicits specific statements in support of the

expert's finding: 326/ and, the defense obtains the full sanity board report containing specific statements and provides that report to either a defense expert or lay witness who then relates or refers to them to the jury. 327/

Other actions by the defense should not be construed as opening the door to specific statements. The trial counsel should not be able to "push" open the door by cross-examining a sanity board expert called by the defense if that expert only relates his conclusions. 328/ Also, a trial counsel should not be permitted to call a sanity board expert, either on his case-in-chief or on rebuttal, elicit the expert's conclusions, and then "hope" that a juror will submit a written question 329/ to the judge concerning statements made at the sanity board.

But there are circumstances where no clear answers exist. For instance, RCM 706 (c)(4) 330/ permits multiple sanity boards. MRE 302(b)(1) states that the door is opened to statements from a sanity board when the accused introduces "such statements." 331/ Does this mean that the door is opened to a single sanity board only by the defense's use of statements *from that particular board*? Or would use of statements made at one sanity board open the door to statements made at any other sanity board? Perhaps the best solution in this case is contained in military and civilian case law.

In the pre-MRE 302 case of *United States v. Frederick*, discussed earlier, 332/ this very problem occurred. In that case, there were two sanity boards. At trial, the defense used statements from the first board, and the government rebutted with statements made at the second board. The Court of Military Appeals held that the defense's actions specifically opened the door to statements from the second board. 333/ Similarly, the United States Court of Appeals to the District of Columbia reached the same result under similar facts in *United States v. Byers*. 334/ which was recently cited with approval by the Supreme Court. 335/ Since MRE 302 itself is based in part on *Frederick's* holding, 336/ and since the Supreme Court recently approved the holding in *Byers*, MRE 302 probably allows the government to rebut with statements from any sanity board once the defense opened the door to one of them.

Perhaps the most difficult questions concerning opening the door to specific statements arise when the defense counsel calls a defense expert. Since MRE 302

only applies to statements made at a sanity board, and since the military has no psychotherapist-patient privilege, statements made to a privately retained civilian expert are not privileged and may be elicited on cross-examination by the trial counsel. 337/ But if the defense counsel elicits statements made to a defense expert on direct examination, should the trial counsel be permitted to rebut with specific (and possibly contradictory) statements that the accused made to the sanity board? And what if the defense calls a government expert, either one from the sanity board or elsewhere, and limits his direct examination to the expert's conclusions concerning the accused's mental state? Can the prosecutor cross-examine the basis of the expert's opinion by eliciting specific statements?

These were the kinds of questions contained in the facts of the pre-MRE 302 case of *United States v. Parker*. 338/ The accused was charged with premeditated murder and assault. He was referred to a sanity board, which apparently 339/ came to the conclusion that the accused was sane. He was then examined by his private psychiatrists, who came to an opposite conclusion. At trial, the trial counsel was permitted to cross-examine, over the objection of the defense, both the sanity board and the civilian psychiatrists concerning specific statements made at both examinations. 340/

On appeal of his conviction, the defense contended that the trial counsel should not have been permitted to elicit specific statements from the sanity board even though the accused had been warned of his rights. The defense contended that the accused's statements were inadmissible because he had been compelled to undergo the sanity board upon pain of forfeiting the insanity defense. 341/

Before addressing the issue on appeal, the Court of Military Appeals traced the history of compelled mental examinations in the military and in parallel federal cases. The court reaffirmed its earlier holdings 342/ that explained the justifications for such examinations. But then instead of addressing the issue raised by appellate defense counsel concerning the sanity board testimony, the court instead answered its own question whether the trial counsel's cross-examination of the civilian psychiatrists violated its earlier decisions. 343/ The court held that the admission of the statements was not error for several reasons: the trial counsel only elicited statements in an attempt to impeach the

basis of the civilian psychiatrist's opinions; the sanity board experts had advised the accused of his rights, and the sanity board report was provided to the civilian psychiatrists; the statements were admitted only on the issue of guilt; there was substantial extrinsic evidence of the *actus reus*; and, the trial judge issued extensive cautionary instructions. 344/

An obvious limitation of *Parker's* holding is that the case was tried before the effective date of MRE 302, thus the Rule did not apply. However, even the holding itself is unclear since the court did not really address whether the defense had opened the door to statements made to either the sanity board or the civilian psychiatrists. Instead, the court decided that statements are part-in-parcel of opinions and must be examined together:

Since the psychiatrist's opinion about an accused's mental state may be based on his statements, a psychiatrist testifying for the Government on direct examination may not be able to explain adequately the basis for his opinion if he is not allowed to relate such statements. However, if he does recite such statements, they may affect the factfinder's determination as to issues other than mental responsibility. Similarly, if a defense psychiatrist cannot be questioned on cross-examination about the accused's statements to him, the cross-examiner's right to test the accuracy of the expert's opinion is curtailed. While in future cases a different result may be required by reason of Mil. R. Evid. 302--a matter on which I express no opinion--I am convinced that the military judge properly dealt with the dilemma. 345/

Thus, though the court recognized MRE 302 would pose questions concerning the separation of conclusions from statements, the court did not propose a solution under the recently promulgated MRE 302. Although that part of *Parker's* holding which states that on cross-examination a private defense psychiatrist may be forced to relate statements made to him probably survives MRE 302, the opinion is otherwise of no help in interpreting MRE 302.

In comparison to the *Parker* court's interpretation of MRE 302, both FRCP 12.2(c) and ABA Standard 7-3.2 do not attempt to make such impossibly precise distinctions between conclusions from statements if those distinctions would be artificial and confusing. Instead, the rules give civilian trial judges broader discretion in achieving the "fair state-individual balance." ^{346/}

FRCP 12.2(c) precludes the admission of both statements and opinions ("testimony") on any issue "except on an issue respecting mental condition on which the defendant has introduced testimony." ^{347/} Unlike MRE 302, the federal rule does not require the defense to introduce statements from the court-ordered mental examination in order for the government to rebut with those statements. In this regard, FRCP 12.2(c) more favorable to the government than MRE 302. Similarly, ABA Standard 7-3.2 precludes both statements and opinions unless they are "relevant to an issue raised by the defendant concerning [his] mental condition and [he] intends to introduce [expert testimony] on this issue." ^{348/} This part of the Standard is identical to FRCP 12.2(c) and is also more favorable to the government than MRE 302.

This distinction between MRE 302 and the two civilian rules can have important consequences at trial. For example, ^{349/} suppose an accused charged with premeditated murder tells his defense counsel that he had a delusion during the murder that the victim was about to kill him, so he killed in self-defense. The defense counsel then requests a sanity board, which comes to the conclusion that the delusion as related by the accused to the board is inconsistent with a true psychotic episode. The defense counsel tells the accused that the sanity board results are unfavorable. The defense then obtains a private psychiatrist to examine the accused. The accused remembers that what he told the sanity board "didn't work," so he changes his delusion to make it more extreme. At trial, the defense psychiatrist relates the accused's statements to him (but not to the sanity board) and concludes that the statements support a classic diagnosis of gross psychosis as a result of paranoid schizophrenia. The government rebuts with the conclusions of the sanity board expert, but the defense is careful not to cross-examine the government expert about the accused's statements to the board, i.e., the door

to the sanity board statements remains closed. Furthermore, the sanity board expert then informs the trial counsel that a true schizophrenic delusion remains fixed in a subjects memory and does not change. Under these facts, MRE 302 (b) would preclude the trial counsel from showing the jury that the accused changed his story and, thus, the murder was not the result of a schizophrenia psychosis. In comparison, the civilian rules would allow admission because the accused interjected the "issue" of his delusion into the case.

In conclusion, FRCP 12.2(c) and ABA Standard 7-3.2 are more realistic than MRE 302(b). The civilian rules are also more consistent with the opinions of the United States Court of Appeals for the District of Columbia in *United States v. Byers* 350/ and the Supreme Court in *Buchanan v. Kentucky* 351/. Unlike MRE 302, these rules give trial judges more latitude in allowing the prosecutor to effectively rebut any mental status issue introduced by the accused and thus achieve a better balance between the accused and the government.

VII. RECOMMENDATIONS.

A. Notice to Defense of Sanity Board.

RCM 706 allows either the convening authority or the military judge to order a sanity board ^{352/} upon the request of an investigating officer, trial counsel, defense counsel, military judge, or member. ^{353/} RCM 706(c)(3)(B) ^{354/} requires that a copy the sanity board report be provided to the defense counsel but does not specifically require that the defense counsel to be notified *before* the sanity board. Both the Court of Military Appeals ^{355/} and several federal cases ^{356/} have criticized the practice of not notifying the defense counsel beforehand. Once the accused is charged with an offense, a defense counsel should be entitled to notice that the accused has been ordered to submit to a sanity board. Accordingly, RCM 706 should be amended to specifically provide for such notice.

B. Recorded Sanity Boards.

Consideration should be given to amending RCM 706 to specifically provide for recorded sanity boards if requested by the defense. ^{357/} Recording would enable the defense to more effectively prepare for the cross-examination of the sanity board experts. On the other hand, if the defense counsel opens the door to specific statements made at the sanity board, a recording would enable the trial counsel to rehabilitate or support the sanity board experts by showing the jury exactly what took place. RCM 706 should be amended along the lines of ABA Standard 7-3.6(d). ^{358/} A proposed adaptation is as follows:

Recording the Board. If requested by the defense, all mental examinations should be recorded on audiotape or, if possible, on videotape, and a copy of the recording should be provided promptly to the defense counsel. The defense may use the recording for any evidentiary purpose permitted by the Military Rules of Evidence. If the defense intends to use

the recording at trial, it should notify the military judge. Upon receiving notice, the military judge will order that the prosecution receive a copy of the recording. Upon the defense motion, the military judge may enter a protective order redacting portions of the recording before it is forwarded to the prosecution.

C. Warnings by the Sanity Board Expert.

Technical Manual 8-240, *Psychiatry in Military Law*, should be changed to give military mental health experts uniform guidance on their ethical duties to warn the accused at a sanity board. 359/ Experts should be instructed not to conduct the sanity board unless the accused has had the opportunity to consult with a defense counsel. Furthermore, a written consent form should be used to assist the expert. A proposed form 360/ is as follows.

Interview Consent Form

(To be read to the accused by the sanity board expert in the presence of a witness)

Before you and I talk, I want to first explain why I'm here with you now. I have been directed by (convening authority/judge) to interview you and report to (him/her) about your mental state. You have been charged with the offense(s) of (name of offense(s)) and your mental state is an issue in your case. Since it is the duty of your commanders to hold soldiers accountable for the offenses they may have been committed, this information is important to the case.

I want you to understand that I am here to gather information. I am not here to provide treatment. I will be observing your actions and listening carefully to what you say. Anything you say, don't say, do, or

don't do may be used against you in a court-martial. After this interview, I will review other materials in your case 361/ and come to a conclusion about your mental state.

If I conclude you are suffering from a mental illness, it is possible that my opinion will assist your defense counsel 362/ in defending your case. If I conclude that you are suffering from a mental illness that might make it more likely you will commit crimes or hurt yourself or other people, this opinion may be used against you in court. On the other hand, if I decide you are mentally normal, my opinion may be used 363/ in court to show that you were fully responsible at the time of the offenses you are charged with.

At any time you may stop this interview. 364/ Also, at any time you can stop and ask for your defense counsel. 365/ I want you to know that I will not come to any conclusions about your mental state unless you agree to this interview, both by telling me and giving your written permission. Before I ask for your permission, I want to ask you some questions to make sure you understand the purpose of this interview.

1. Who is your defense counsel?
2. Why am I talking to you?
3. Who directed me to interview you?
4. Will I tell anyone else what we talk about?
5. If I conclude you are suffering from a mental illness, how could your case be affected?
6. If I conclude you are mentally normal, how could your case be affected?
7. Can you stop this interview whenever you wish?
8. Can what you say be used against you in a court-martial?
9. Can how you act here or what you don't say here be used against you in court-martial?

(To be filled in by the sanity board expert)

1. I have read the foregoing statement and questions to (name of the accused). Yes No
2. Based on my observations, it is my opinion that this individual fully understands and agrees to this sanity board interview. Yes No

(signature of accused)

(signature of sanity board expert)

(signature of witness)

D. Amend MRE 302 to Conform to FRCP 12.2(c).

MRE 302(a) and (b) should be amended to conform to FRCP 12.2(c). This would have several beneficial effects: 1) it would make it clear that the consent of the accused is irrelevant in determining if the door was opened; 366/ 2) it would delete the now out of date "issue of guilt" language; 367/ 3) it would specifically allow the trial counsel to rebut statements made to a civilian experts with sanity board statements; 368/ 4) it would generally give trial judges greater flexibility in deciding how when and to what extent the door has been opened to various types of evidence; 369/ and, it would enable military courts to more directly apply the abundance of federal case law in this area. A proposed amendment based on FRCP 12.2(c) is as follows:

No statement made by the accused in the course of any examination ordered under R.C.M. 706, whether the examination be with or without the consent of the accused, no testimony by the expert based upon such statement, and no fruits of the statement shall be admitted in evidence against the accused in a court-martial except on an issue respecting mental state on which the accused has introduced expert testimony.

VII. CONCLUSION.

Because of the tremendous tension between compelled mental examinations and the protections of the fifth and sixth amendments, rules like MRE 302 will always be difficult to understand and apply. Does the Rule need changed? There is much to be said an old saying: "If it ain't broke don't fix it." However, there is also wisdom in another old saying: "An ounce of prevention is worth a pound of cure." Like the fair state-individual balance that MRE 302 was originally designed to achieve, a balance between these two old sayings must be considered before its time for a change. Whether MRE 302 is for either side an "unfair balance" 370/ as it was called when it first went into effect still remains to be seen.

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1

United States v. Byers, 740 F.2d 1104, 1176 (Bazelon, C.J. dissenting). Chief Judge Bazelon is widely recognized as the leading judicial expert in the law of mental health. He is the author of numerous important opinions in that field, such as United States v. Durham, 214 F.2d 862 (D.C. Cir.1954).

2

It is an affirmative defense in a trial by court-martial 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 wrongfulness of his or her acts. Mental disease or defect does not otherwise constitute a defense.

Uniform Code of Military Justice art. 50a. 10 U.S.C.A. § 859a (1987 Supp.) [hereinafter cited as UCMJ]; *See also* Manual for Courts-Martial, United States, 1984, Rule for Courts-Martial 916 k (1) [hereinafter cited as RCM].

3

UCMJ art. 50a (b).

4

RCM 716k (3)(A).

5

"No problem in the drafting of a penal code presents larger intrinsic difficulties than that of determining when individuals whose conduct would otherwise be criminal ought to be exculpated on the ground that they were suffering from mental disease or defect when they acted as they did." **MODEL PENAL CODE** Comment to § 4.01 at 156 (Tent. Draft No. 4, 1955).

6

"[T]he real problem with the insanity defense [lies] in the fairness of its administration, not its verbal formulation." *United States v. Byers*, 740 F. 2d 1104, 1176 (D.C. Cir. 1984) (Bazelon, C.J., dissenting). "[T]rials involving the insanity defense are arduous, expensive, and worst of all, thoroughly confusing to the jury." S. Rep. 225, 97th Cong., 2d Sess. 222, *reprinted in* 1984 U.S. Code Cong. & Ad. News 3404 (quote from introduction to legislative history of Insanity Defense Reform Act, Pub. L. No. 98-473, 98 Stat. 1976 (1984)).

7

RCM 706. RCM 706 (c)(1) provides that a board, historically referred to as a "sanity board," may consist of one or more medical experts. The 1986 amendment to this subsection deleted the requirement for at least one psychiatrist. Under the new rule, the entire board may consist of one or more psychiatrists or clinical psychologists. RCM 706 is reprinted in its entirety at note 72.

8

RCM 706 provides authority for ordering an accused to submit to a sanity board. The rule is enforced at trial through Military Rule of Evidence 302, which provides that "The military judge may prohibit an accused who refuses to cooperate in a mental examination authorized under RCM 706 from presenting any expert medical testimony as to any issue that would have been the subject of the mental examination." Mil. R. Evid. 302(d)[hereinafter cited as MRE]. MRE 302 is reprinted in its entirety at pages 9-10.

9

In order to avoid confusion, the Latin phrase will be used throughout this article to indicate the act alleged minus any mental state to include insanity. As Professor Perkins has noted, commonly use phrases such as "criminal act" "are so suggestive of the crime itself...that perhaps the Latin phrase is less likely to cause confusion." Perkins, *Criminal Law*, p. 831 (3d ed. 1982).

10

See, e.g. United States v. Babbidge, 18 U.S.C.M.A. 327,331, 40 C.M.R. 39, 43 (1969), and United States v. Albright, 388 F.2d 719, 725 (4th Cir. 1968) (both opinions stating that purpose of a compelled mental examination is not to prove the *actus reus* of the offense but rather to prove sanity).

11 *See infra* text accompanying notes 173, 194.

12

MRE 302 analysis; United States v. Parker, 15 M.J. 146, 149 (C.M.A. 1983). One military commentator has written: It should be evident that the entire issue of the sanity of the accused and the right against self-incrimination is an exceedingly difficult question and one not susceptible of easy solution. Lederer, *Rights Warnings in the Armed Services*, 72 *Mil. L. Rev.* 1, (1976).

13

The United States Supreme Court has recently recognized the government's paractical need to conducts compelled mental examinations: "[W]hen a defendant asserts the insanity defense and introduces supporting psychiatric testimony, his silence may deprive the State of the only effective means it has of controverting his proof on an issue that he has interjected into the case." *Buchanan v. Kentucky*, 107 S. Ct. 2906, 2917 (1987)(Blackmun, J.) *quoting* *Estelle v. Smith*, 451 U.S. 454, 465 (1981) (Burger, C.J.).

14

"No person...shall be compelled...to be a witness against himself." U.S. Const. amend. V.; *See also*, UCMJ art. 31 (a): "No person ...may compel any person to incriminate himself or to answer any question which may tend to incriminate him."

15

See, e.g., *United States v. Wilson*, 18 U.S.C.M.A. 400, 40 C.M.R. 112 (1969); *United States v. Olah*, 12 M.J. 773 (A.C.M.R. 1981).

16

See, e.g., *United States v. Byers*, 740 F. 2d 1104, 1176 (D.C. Cir. 1984)(en banc)(Scalia, J.); *United States v. Bohle*, 445 F.2d 54 (7th Cir. 1971); *United States v. Smith* 436 F.2d 787 (5th Cir. 1971); *United States v. Albright*, 388 F. 2d 719 (4th Cir. 1968); *United States v. Cohen*, 530 F.2d 43 (5th Cir.) *cert. denied*, 429 U.S. 855 (1976); *United States v. Greene*, 497 F.2d 1068 (7th Cir. 1974), *cert. denied*, 420 U.S. 909 (1975); *United States v. Mattson* 469 F.2d 1234 (9th Cir. 1972) *cert. denied*, 410 U.S. 986 (1973); *United States ex rel. Stukes v. Shovlin*, 464 F. 2d 1211 (3d Cir.) 1972); *United States v. Baird*, 414 F.2d 700(2d Cir. 1969); *United States ex. rel. Wax v. Pate*, 409 F.2d 498 (7th Cir. 1969); *Thorton v. Corcoran*, 407 F.2d 695 (D.C. Cir. 1969); *United States v. Albright*, 388 F.2d 719 (4th Cir. 1968). *See also*, *Estelle v. Smith*, 451 U.S. 454, 465 (1981) (dicta) (concurring opinion by Chief Justice Rehnquist). For a discussion of similar state cases *see*

Annotation, Right of Accused in Criminal Prosecution to Presence of Counsel at Court-Appointed or Approved Psychiatric Examination, 3 A.L.R.4th 910 (1981).

17

"In all criminal prosecutions, the accused shall enjoy the right to...the Assistance of Counsel for his defence." U.S. Const. amend. VI.

18

The drafters of MRE 302 recognized that the rule left many questions unanswered. *See* MRE 302 analysis. This article examines only military and federal law. Much of the federal case law in this area involves Fed. R. Crim. P. 12.2 (c)[hereinafter referred to as FRCP 12.2(c)] and its former statutory counterparts. However, it should be noted at this point that many federal cases that have addressed the fifth and sixth amendment issues involving compelled mental examinations began in state criminal trials involving state statutes and procedures similar to federal rule and statutes. For the most part, federal courts review these constitutional objections similarly regardless of their origins. *See, e.g.,* Estelle v. Smith, 451 U.S. 454, 463, n. 6 (1981).

19

Manual for Courts-Martial, United States, 1951, para. 121 [hereinafter cited as MCM, 1951]; Manual for Courts-Martial, United States, 1969 (Rev. ed.), para. 121 [hereinafter cited as MCM, 1969].

20

United States v. Wimberly, 16 U.S.C.M.A. 3, 36 C.M.R. 159 (1966); United States v. Burke, 28 C.M.R. 604 (A.B.R. 1959). This article does not address whether a psychotherapist-patient privilege may arise outside of the sanity board context. Communications made at examinations by defense mental health experts not ordered under RCM 706 have been held to be outside the

scope of MRE 302 and, therefore, not privileged. *United States v. Toledo*, 25 M.J. 270, (C.M.A. 1987); *United States v. Parker*, 15 M.J. 146 (C.M.A. 1983); *United States v. Matthews*, 14 M.J. 656 (A.C.M.R. 1982). *See generally* analysis to MRE 501 (MRE 302 and RCM 706 do not create a general psychiatrist-patient privilege). *But cf.*, *United States v. Alvarez*, 519 F.2d 1036 (3d Cir. 1975), and *Edney v. Smith*, 425 F. Supp. 1038 (E.D.N.Y. 1976), *aff'd* 556 F. 2d 556 (2d Cir. 1977) (both opinions stating psychiatrist-patient communications not arising from court-ordered examinations but prepared for use in insanity defense protected by *attorney-client* privilege). *Accord.* *United States v. Toledo*, 25 M.J. 270, 275-6 (C.M.A. 1983) (*dicta* by Judge Cox).

21

UCMJ art. 31(b).

22

16 U.S.C.M.A. 3, 36 C.M.R. 159 (1966).

23

In both military and federal courts, a mental examination is considered "compelled" or "ordered" even if requested by defense counsel. This is so because even though the defense may request the examination the court's (or convening authority's) order is necessary to effect the examination. This result is implied in the language of RCM 706(b) and is expressly stated in FRCP 12.2 (c).

24

16 U.S.C.M.A. at 11-12, 36 C.M.R. at 167-8

25

18 U.S.C. §4244 at the time of the *Wimberley* opinion provided:

No statement made by the accused in the course of any examination into his sanity or mental competency provided

for by this section, whether the examination shall be with or without the consent of the accused, shall be admitted in evidence against the accused on the issue of guilt in any criminal proceeding.

18 U.S.C. §4244 (1949), *amended by* 18 U.S.C. § 4244 (1984)[hereinafter referred to as the former § 4244].

26

16 C.M.A. at 11-12, 36 C.M.R. at 167-168. Ten years before the *Wimberley* decision, the Army Board of Review suggested in *dicta* that the former § 4244 was not applicable to the military. *United States v. Burke*, 28 C.M.R. 604 (A.B.R. 1959).

27

Department of the Army Pamphlet 27-22, Military Criminal Law Evidence (No 1, July 15, 1987) states at paragraph 18-3: "The holding in *Wimberley* has not been overruled, however, and section 4244 has not been made applicable to courts-martial." This statement is only partially correct. The Court of Military Appeals did apply the former §4244 in *United States v. Holley*, 17 M.J. 361 (C.M.A. 1984). At page 370 of the opinion the court stated: "In our opinion, the decision in *United States v. Wimberley*...is not controlling, and...we will assume the exclusionary rule provided in [§ 4244] is applicable." The court went on to find that the appellant had waived the statute's protection. *Holley* was tried in 1978, two years before the implementation of MRE 302, but was not decided until 1984. The court probably held that §4244 was applicable both because federal civilian psychiatrists had conducted an examination of the accused in a federal prison under expressly under §4244 and because MRE 302 had been in effect for four years. Although MRE 302 now is generally accepted as the military's only privilege in this area, any further doubt has been finally resolved by Congress: 18 U.S.C. § 4247(j) now states: "This chapter [which includes the former §4244] does not apply to a

prosecution under...the Uniform Code of Military Justice." *Id.*

28

18 C.M.A. 327, 40 C.M.R. 39 (1969).

29

Id. at 328, 40 C. M. R. at 40.

30

Id.

31

Id.

32

Id. at 32, 40 C.M.R. at 44 (emphasis added). *Babbidge*, its progeny, the drafters' analysis to M.R.E. 302, and numerous federal cases adhere to the so-called "waiver theory" of compelled mental examinations. Although M.R.E. 302 and FRCP 12.2(c) are still constitutionally valid, recent federal and Supreme Court case law cast doubt on the validity of the waiver theory as justification for these rules. *See supra* text accompanying note 195.

33

It would be a strange situation, indeed, if first, the government is to be compelled to afford the defense ample psychiatric service and evidence at government expense and, second, if the government is to have the burden of proof...and yet to be denied the opportunity to have its own corresponding and verifying examination, a step which perhaps is the most trustworthy means of attempting to meet that burden.

18 C.M.A. at 330, 40 C.M.R. at 42 (citations omitted)(*quoting* *Pope v. United*

States, 372 F.2d 710, 720 (8th Cir. 1967)(Blackmun, J.). The court also quoted the following passage from *State v. Whitlow*, 45 N.J. 3, 210 A. 2d 763, 770 (1965) the first reported opinion that addressed the issue:

[A]n accused who asserts lack of criminal guilt because of insanity and who fully cooperates with psychiatrists engaged by him for examination purposes, answering all questions put to him including those relating to the crime itself, ought not to be allowed to frustrate a similar examination by the State by asserting the bar against self-incrimination. He ought not to be able to advance the claim and then make the rules for determination of the claim.

18 C.M.A. at 328, 40 C.M.R. at 42. *Whitlow* is generally recognized as the premiere state case in this area and is often cited for its theory of the "fair state-individual balance" needed in compelled mental examinations. *See, e.g.,* Marcus, *Pre-Trial Psychiatric Examination: A Conflict with the Privilege Against Self-Incrimination*, 20 *Syracuse L. Rev.* 738 (1969). However, courts and commentators grappled with the problems posed by such examinations before the *Whitlow* decision. *See, e.g.,* Note, *Pre-Trial Mental Examinations and Commitment: Some Procedural Problems in the District of Columbia*, 51 *Geo. L.J.* 143 (1962).

34

[T]he purpose of the examination is not the cruel, simple expedient of compelling it (incriminating evidence) from his own mouth. To repeat an earlier statement the purpose of the examination is not to determine whether a defendant did or did not do the criminal acts charged, but whether he possessed the requisite mental capacity to be criminally responsible therefore, if other proof establishes that he did do them. So limited, we find nothing in the examination, over a defendant's objection, to violate a defendant's privilege against self-incrimination.

18 C.M.A. at 329, 40 C.M.R. at 43 (parenthesis in original) (quotations omitted) (quoting *United States v. Albright*, 388 F.2d 719, 725 (4th Cir. 1968)).

35

18 C.M.A. at 31-33, 40 C.M.R. at 45-48.

36

See, e.g., Marcus, *Pre-Trial Psychiatric Examination: A Conflict with the Privilege Against Self-Incrimination*, 5 **Crim. L. Bull.** 497 (1969); Comment, *Changing Standards for Compulsory Mental Examinations*, 1969 **Wis. L. Rev.** 270 (1969); Note, *Mental Examinations of Defendants who Plead Insanity: Problems of Self-Incrimination*, 40 **Temple L. Q.** 366 (1967); Danforth, *Death Knell for Pre-Trial Mental Examinations? Privilege Against Self-Incrimination*, 19 **Rutgers L. Rev.** 448 (1965); Comment, *Compulsory Mental Examinations and the Privilege Against Self-Incrimination*, 1964 **Wis. L. Rev.** 671 (1964); Note, *Pre-Trial Mental Examinations and Commitment: Some Procedural Problems in the District of Columbia*, 51 **Geo. L.J.** 143 (1962). Commentators continue to debate the constitutionality of compelled medical examinations after 1969. *See, e.g.,* articles cited *infra* at note 163.

37

See, e.g., *United States v. Alvarez*, 519 F.2d 1036 (3d Cir. 1975); *United States v. Malcolm*, 475 F.2d 420 (9th Cir. 1973).

38

For discussions of how the *Babbidge* Rule was viewed by military commentators, *see* Tifford, *Babbidge: A Time for A Change*, 25 **JAG J.** 133 (1971); Holliday, *Pretrial Mental Examinations Under Military Law: A Reexamination*, 16 **A.F.L. Rev.** 14 (1974); Lederer, *Rights Warnings in the Armed Services*, 72 **Mil. L. Rev.** 1, 21-23 (1976).

39

18 U.S.C.M.A. 400, 40 C.M.R. 112 (1969).

40

Id. at 401-2, 40 C.M.R. at 113-14.

41

Id.

42

Id. at 403-4, 40 C.M.R. at 115-16. By that time, the Court of Military Appeals had decided *United States v. Tempia*, 16 U.S.C.M.A. 629, 37 C.M.R. 249 (1967), which required counsel warnings in addition to non-counsel warnings under Article 31(b), UCMJ.

43

Id.

44

See also, United States v. Schell, 18 U.S.C.M.A. 410, 40 C.M.R. 122 (1969) (reaffirming both *Babbidge* and *Wilson*).

45

18 U.S.C.M.A. 403-4, 40 C.M.R. at 115-16.

46

In United States v. Ross, 19 U.S.C.M.A. 51 41 C.M.R. 51 (1969), the court held that failure to notify defense counsel before psychological tests were administered at a sanity board, though unwise since the accused had already retained counsel, was not reversible error.

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19 U.S.C.M.A. 338, 41 C.M.R. 338 (1970).

48

Id. at 339, 41 C.M.R. at 339.

49

Id. at 340, 41 C.M.R. at 340.

50

In United States v. Ross, 19 C.M.A. 51, 41 C.M.R. 51 (1969), the court held that psychological test results used by a sanity board psychiatrist as a basis for his psychiatric opinion did not require Article 31 warnings since the actual statements made in response to the test questions were not disclosed. The court did not address whether the test results themselves were "fruits of the poisonous tree."

51

22 U.S.C.M.A. 424, 47 C.M.R. 402 (1973).

52

Apparently, defense counsel in the early cases used this tactic to avoid the harsh *Wimberley* rule. To further compound the matter, Army Technical Manual 8-240, *Psychiatry in Military Law*, paragraph 4-4f (1968) [hereinafter cited as the former TM 8-240], required that the accused be warned of his Article 31 rights at the sanity board. This requirement, which remained in effect until it

was deleted in 1981, failed to recognize that an accused could not voluntarily waive his rights in the true sense since he was being forced to submit to the sanity board upon pain of forfeiting the insanity defense. The drafters of MRE 302 wisely chose to make the privilege apply regardless of whether the accused was warned of his rights. Numerous civilian commentators have addressed the issue of whether a *Miranda*-type warning should be given at compelled mental examinations. See, e.g., Read, *Can a Psychiatric Miranda Work? A California Perspective*, 14 *Rutgers L.J.* 431 (1983); Note, *Miranda on the Couch: An Approach to Problems of Self-Incrimination, Right to Counsel, and Miranda Warnings on Pre-Trial Psychiatric Examinations of Criminal Defendants*, 11 *Colum. J. L. & Soc. Prob.* 403 (1975). TM 8-240, which was changed in 1981, now states at paragraph 4-4f:

In light of the privilege protecting statements made by an accused during a sanity evaluation...it is generally not necessary to advise the accused of his or her rights under Article 31, UCMJ, and the Fifth Amendment, before examining or interviewing him or her. If doubt exists in a particular case, the medical officer should contact the staff judge advocate to the convening authority for assistance.

For a further discussion of whether a "psychiatric *Miranda*" should apply in the military, see *infra* text accompanying notes 215-32.

53

The judge's order specified that:

- a. No information secured during the examination or board proceedings was to be publicized in advance of presentation in court or termination of the trial.
- b. No person examining the accused was to disclose to the trial counsel the substance of any disclosure made by the accused during the examination.

c. Any report of the examination was not to be related to anyone outside technical medical channels without the approval of the court, and the report was to be submitted to the court upon its completion.

22 U.S.C.M.A. at 426, 47 C.M.R. at 404.

54

Id.

55

The text of RCM 706 is at note 72.

56

3 M.J. 230 (C.M.A. 1977).

57

As stated at note 45, *supra*, counsel and doctors in the early cases took varying approaches to rights warnings at sanity boards. By ordering that the accused be given Article 31 warnings, the court did nothing more than specifically enforce the former TM 8-240.

58

The Court of Military Appeals stated at note 3 of the opinion that it had previously held in *United States v. Wilson*, 18 U.S.C.M.A. 400, 40 C.M.R. 112 (1969), that the accused had no right to counsel during a court-ordered psychiatric examination. The court also recognized that three federal circuit courts had held the same. *United States v. Cohen*, 530 F. 2d 43 (5th Cir. 1976); *United States v. Trapnell*, 495 F.2d 22 (2d Cir. 1974), *cert. denied*, 419 U.S. 851 (1974); *United States v. Baird*, 414 F.2d 700 (2d Cir. 1969) *cert. denied*, 396 U.S. 1005 (1970); *United States v. Albright*, 388 F. 2d 719 (4th Cir. 1968).

59

This part of the judge's order was consistent with the judge's order in *United States v. Johnson*, 22 U.S.C.M.A. 424, 47 C.M.R. 402 (1973).

60

Paragraph 151, MCM, 1969, provided that multiple sanity boards could be ordered. This provision still exists at RCM 706 (c)(4).

61

3 M.J. at 232.

62

Id. at 233.

63

Id. The court did not address whether the statement was admitted on the issue of guilt as opposed to sanity. However, it appears that the question ("Did the appellant indicate in any of the interviews whether he knew it was wrong to kill the victim[?]") was admitted only on the issue of sanity.

64

Id. at 234.

65

United States v. Wimberley, 16 U.S.C.M.A. 3, 36 C.M.R. 159 (1966).

66

United States v. Babbidge, 18 C.M.A. 327, 40 C.M.R. 39 (1969).

67

United States v. Wilson, 18 U.S.C.M.A. 400, 40 C.M.R. 112 (1969).

68

This was not specifically required by the court. However, it can be inferred by the court's approval of the trial judges' orders in United States v. Johnson, 22

U.S.C.M.A. 424, 47 C.M.R. 402 (1973) and United States v. Frederick, 3 M.J. 230 (C.M.A. 1977). _

69

United States v. Babbidge, 18 C.M.A. 327, 40 C.M.R. 39 (1969).

70

United States v. Frederick, 3 M.J. 230 (C.M.A. 1977).

71

Exec. Order No. 12233, 45 Fed. Reg. 58503 (1980).

72

RCM 706, *Inquiry into the mental capacity or mental responsibility of the accused*, provides:

(a) *Initial action.* If it appears to any commander who considers the disposition of charges, or to any investigating officer, trial counsel, defense counsel, military judge, or member that there is reason to believe that the accused lacked mental responsibility for any offense charged or lacks capacity to stand trial, that fact and the basis of the belief or observation shall be transmitted through appropriate channels to the officer authorized to order an inquiry into the mental condition of the accused. The submission may be accompanied by an application for a mental examination under this rule.

(b) *Ordering an inquiry.*

(1) *Before referral.* Before referral of charges, an inquiry into the mental responsibility of the accused may be ordered by the convening authority before whom the charges are pending for disposition.

(2) *After referral.* After referral of charges, an inquiry into the mental capacity or mental responsibility of the accused may be ordered by the military judge. The convening authority may order such inquiry after referral of charges but before beginning of the first session of the court-martial (including any Article 39(a) session) when the military judge is not reasonably available. The military judge may order a mental examination of the accused regardless of any earlier determination by the convening authority.

(c) *Inquiry.*

(1) *By whom conducted.* When a mental examination is ordered under subsection (b) of this rule, the matter shall be referred to a board of one or more persons. Each member of the board shall be either a physician or a clinical psychologist. Normally, at least one member of the board shall be either a psychiatrist or a clinical psychologist. The board shall report as to the mental capacity or mental responsibility, or both, of the accused.

(2) *Matters in inquiry.* When a mental examination is ordered under this rule, the order shall contain the reasons or doubting the mental capacity or mental responsibility, or both, of the accused, or other reasons for requesting the examination. In addition to other requirements, the order shall require the board to make separate and distinct findings as to each of the following questions:

(A) At the time of the alleged criminal conduct, did the accused have a severe mental disease or defect? (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.)

(B) What is the clinical psychiatric diagnosis?

(C) Was the accused, at the time of the alleged criminal misconduct and as a result of such severe mental disease or defect, unable to appreciate the nature and quality or wrongfulness of his conduct?

(D) Does the accused have sufficient mental capacity to understand the nature of the proceedings and to conduct or cooperate intelligently on the defense?

Other appropriate questions may also be included.

(3) *Directions to the board.* In addition to the requirements specified in subsection (c)(2) of this rule, the order to the board shall specify:

(A) That upon completion of the board's investigation, a statement consisting only of the board's ultimate conclusions as to all questions specified in the order shall be submitted to the officer ordering the examination, the accused's commander, the investigating officer, if any, appointed pursuant to Article 32 and to all counsel in the case, the convening authority, and, after referral, to the military judge;

(B) That the full report of the board may be released by the board or other medical personnel for medical purposes, unless otherwise authorized by the convening authority or, after referral of charges, by the military judge, except that a copy of the full report shall be furnished to the defense and, upon request, to the commanding officer of the accused; and

(C) That neither the contents of the full report nor any matters considered by the board during its investigation shall be released by the board or other medical personnel to any person not authorized to receive the full report, except pursuant to an order by the military judge.

(4) *Additional examinations.* Additional examinations may be directed under this rule at any stage of the proceedings as circumstances may require.

(5) *Disclosure to the trial counsel.* No person, other than the defense counsel, accused, or, after referral of charges, the military judge may disclose to the trial counsel any statement made by the accused to the board or any evidence derived from such statement.

74

However, as stated at note 20, *supra*, an accused might be able to "shelter" his communications to his private mental health expert under the attorney-client privilege. *United States v. Alvarez*, 519 F.2d 1036 (3d Cir. 1975). Defense counsel should read *Alvarez* with caution. The court decided that the accused's communication to his private psychiatrist was protected by the attorney-client privilege only because the prosecution subpoenaed the psychiatrist over the objection of the defense counsel, *who did not intend to call the psychiatrist as a defense witness*. Had the defense counsel called the psychiatrist as a witness and attempted to limit the prosecution's cross-examination to the psychiatrist's opinion, the appellate court probably would have ruled that any attorney-client privilege as to specific statements had been waived.

75

As stated at note 6, *supra*, a sanity board may now consist of a clinical psychologist. *See* note 6 *supra*. R.C.M. 706 (c)(2)(B)'s requirement that the sanity board report must contain a clinical *psychiatric* diagnosis appears to be an oversight. The provision should require only a "clinical diagnosis" since a psychologist cannot make a psychiatric diagnosis.

76

The problem of the "lay insanity defense" is discussed at text accompanying notes 303-320.

77

This guilt-sanity dichotomy is discussed at text accompanying notes 192-94.

78

The question of whether introduction by the defense of statements made by the accused to a non-sanity board expert should open the door to statements made to the sanity board is discussed at text accompanying notes 347-51.

79

This issue is discussed at text accompanying note 345-51.

80

MRE 302(c) states that "the military judge, upon motion, *shall* order release to the prosecution of the full report, other than any statements...." *Id.* (emphasis added).

81

The drafter's analysis to MRE 302(c) addresses the problem of having to delay the trial and suggests:

Inasmuch as the revision of [RCM 706] and the creation of Rule 302 were intended primarily to deal with the situation in which the accused denies committing the offense and raises an insanity defense as an alternative defense, the defense may consider that it is appropriate to disclose the entire sanity board report to the trial counsel in a case in which the defense concedes the commission of the offense but is raising as its sole defense the mental state of the accused.

82

The door can be opened through the introduction of either statements or derivative evidence. The drafter's analysis to MRE 302 presents the following caveat: "At present, what constitutes 'opening the door' is unclear. An informed defense counsel must proceed with the greatest of caution being always concerned that what may be an innocent question may be considered to be an 'open sesame.'" MRE 302 analysis.

83

MRE 302 (c) provides that if the the defense opens the door to statements the military judge *may* release statements from the report. Professor Saltzburg

suggests that, though the door may be opened on the defense's cross-examination of the government's witnesses, the trial counsel should not be allowed to push the door open through its examination of government witnesses. *See* Saltzburg at 116.

84

MRE 302(a).

85

Id.

86

Several federal cases addressed whether evidence from a court-ordered examination into the accused's competence to stand trial could be used at trial by the trial counsel to rebut the insanity defense. The majority of federal courts held that such use was permissible. *See, e.g.,* Winn v. United States, 270 F.2d 326 (D.C.Cir. 1959) *cert. denied* 365 U.S. 848 (1961). Other courts held that the judge had "inherent" authority to order an examination into the accused's sanity even in the absence of a specific statute. *See, e.g.,* United States v. Alvarez, 519 F.2d 1036 (3d Cir. 1975); United States v. Malcolm, 475 F.2d 420 (9th Cir. 1973). Congress finally resolved the issue in 1984 by amending § 4241 to specifically provide for a sanity examination and § 4242 to permit a competency examination. This problem never existed in the military since RCM 706 and its predecessor, MCM paragraph 121, have always permitted both types of examination. State statutes similar to RCM 706 are commonly referred to as "dual purpose" statutes. *See* Annotation, *Validity and Construction of Statutes Providing for Psychiatric Examination of Accused to Determine Mental Condition*, 32 A.L.R.2d 434 (1953). Though the recent enactment of §4241 seems to have solved this problem in federal courts, state courts are still struggling with the issue. *See generally*, Annotation, *Power of Court, In Absence of Statute, to Order Psychiatric Examination of Accused for Purpose of Determining Mental Condition at Time of Alleged Offense*, 17 A.L.R. 4th 1274 (1982). However, the Supreme

Court has recently decided in *Buchanan v. Kentucky*, 107 S. Ct. 2906 (1987), that a state court does not violate the fifth or sixth amendment by allowing a court-ordered involuntary hospitalization examination to be used to rebut the defendant's "mental status" defense. The language of the opinion suggests that the Court would permit any type of court-ordered examination to be used to rebut the insanity defense as long as the defense counsel interjects the issue of the accused's mental state into the trial through use of expert testimony.

87

Pub. L. 94-64, § 3(14), 89 Stat. 373 (1975).

88

Pub. L. 98-473, Title II, § 403(a), 98 Stat. 2061 (1984). 18 U.S.C. §4244 was amended as part of the Insanity Defense Reform Act, Pub. L. No. 98-473, 98 Stat. 1976 (1984). The present §4244 addresses hospitalization of convicted persons suffering from mental diseases.

89

FRCP 12.2, *as amended by* Act of Nov 10, 1986. Pub. L. 99-646, § 24, 100 Stat. 3597 (1986).

90

Although FRCP 12.2(c) went into effect in 1975, the privilege in the former §4244 also remained in effect until 1984. Federal cases tried before 1984, but only recently reported, address both FRCP 12.2 (c) and §4244 and treat them as having the same effect. *See, e.g.* *United States v. Crews*, 781 F.2d 826, 834 (10th Cir. 1986).

91

Note that FRCP speaks of "fruits" while MRE 302 addresses "derivative evidence." These two terms are not synonymous. *See infra* text accompanying notes 256-59.

92

FRCP has been amended five times since its enactment in 1975.

93

Exec. Order No. 12233, 45 Fed. Reg. 58503 (1980). This amendment created a lay insanity defense. See Ross, *Rule 302--An Unfair Balance*, **The Army Lawyer**, Mar. 1981 at 5.

94

The House conference committee notes to the 1975 amendment states:

The rule does not preclude use of statements made by defendant during a court-ordered psychiatric examination. The statements may be relevant to the issue of defendant's sanity and admissible on that issue. However, a limiting instruction would not satisfy the rule if a statement is so prejudicial that a limiting instruction would be ineffective. Cf. practice under 18 U.S.C. 4244.

FRCP 12.2 advisory committee's note.

95

ABA, Criminal Justice Mental Health Standards, §§7-1.1-7-10.12. (1986 Supp)[hereinafter cited as ABA Standards]. The Vice Chairman of the ABA Standards for Criminal Justice is Major General Kenneth J. Hodson, United States Army (Retired), former Judge Advocate General of the Army. MG Hodson is also a member of the ABA Advisory Committee for Criminal Justice Mental Health Standards Project.

96

ABA Standard 7-3.9 is entitled "Admissibility of Expert Testimony Concerning a Person's Mental Condition or Behavior" and outlines a recommended scope of expert testimony.

97

ABA Standard 7-3.2.

98

Id. Commentary.

99

United States v. Ross, 19 U.S.C.M.A. 51, 41 C.M.R. 51 (1969).

100

United States v. Wilson, 18 U.S.C.M.A. 400, 40 C.M.R. 112 (1969). *See supra* text accompanying notes 39-46.

101

19 U.S.C.M.A. at 55, 41 C.M.R. at 55. *See also* United States v. Hayes, 19 U.S.C.M.A. 60, 41 C.M.R. 60 (1969)(notice of time of psychiatric examination should be furnished to defense counsel, but failure to notify will be tested for prejudice). *Accord*, Vardas v. Estelle 715 F. 2d 206 (5th Cir. 1983)(right to counsel not violated by failure to notify defense of examination where accused asserted insanity defense.)

102

See supra note 73.

103

See supra note 72.

104

MRE 302(a).

105

18 U.S.C. §4241-4247 (1948), *as amended by* Act of Oct. 12, 1984, Pub. L. 98-473, Title II, §403 (a), 98 Stat. 2057-2065.

106

See supra text accompanying note 89.

107

See cases cited supra note 16.

108

See, e.g., United States v. Wade, 388 U.S. 218 (1967). The military has also adopted the "critical stage" test. *See, e.g.,* United States v. Quick, 3 M.J. 70 (C.M.A. 1977); United States v. McOmber, 1 M.J. 380 (C.M.A. 1976).

109

See cases cited supra note 16. See also, United States v. Olah, 12 M. J. 773 (A.C.M.R. 1981).

110

451 U.S. 454 (1981).

111

Id. at 456.

112

The defense counsel did not discover that the accused had been ordered to undergo a competency examination until after jury selection began in the case. *Id.* at 458 n. 5.

113

Id. at 458. Under Texas law, the jury must resolve, among other things, whether the defendant poses continuing threat to society. Tex. Code Crim. Proc. Ann., Art. 37.071(b)(2)(Vernon Supp. 1980).

114

451 U.S. at 466.

115

Id. at 458.

116

See generally, Report of American Psychiatric Association Task Force on Clinical Aspects of the Violent Individual (1974).

117

451 U.S. at 459.

118

Id. at 473-4. Smith's underlying conviction was not challenged, so only the sentence was vacated and remanded for further proceedings. The fifth amendment issues in *Smith* are discussed *infra* at text accompanying notes 166-78.

119

451 U.S. at 470-471 (citations omitted) (emphasis added).

120

This part of *Smith*'s holding generated considerable commentary. *See, e.g.*, Slobogin, *Estelle v. Smith: The Constitutional Contours of the Forensic Evaluation*, 31 **Emory L.J.** 71 (1982); White, *The Psychiatric Examination and the Fifth Amendment Privilege in Capital Cases*, 74 **J. Crim. L. & Criminology** 943 (1983); Note, *The Fifth Amendment and Compelled Psychiatric Examinations: Implications of Estelle v. Smith*, 50 **Geo. Wash. L. Rev.** 275 (1982); Note, *Miranda Warnings--Are the Required Before Presentence Investigations After Estelle v. Smith*, 4 **Whitt. L. Rev.** 131 (1982).

121

451 U.S. at 465.

122

The Court stated: "Respondent does not assert...any constitutional right to have counsel actually present during the examination. In fact, the Court of Appeals recognized that an attorney present during the psychiatric interview could contribute little and might seriously disrupt the examination." *Id.* at 470 n. 14 (citations omitted).

123

Id. at 470 n. 14. The Court stated: "We can discern no basis to distinguish between the guilt and penalty phase of respondent's capital murder trial so far as the protection of the Fifth Amendment is concerned." *Id.*

124

See, e.g., Magwood v. Smith, 791 F.2d 1438 (11th Cir. 1986); Cape v. Francis, 741 F.2d 1287 (11th Cir. 1984), *cert. denied*, 474 U.S. 911 (1985).

125

107 S. Ct. 2907 (1987).

126

Id. at 2910 n. 9.

127

Id. at 2912 n. 12.

128

Id. at 2912. The fifth amendment issues in *Buchanan* are discussed *supra* at text accompanying notes 200-208.

129

Id. at 2911 n. 11, 2918.

130

Id. at 2918. -

131

Id. at 2918-9.

132

In *United States v. Ross*, 19 U.S.C.M.A. 51, 41 C.M.R. 51 (1969), the court held that failure to notify defense counsel before psychological tests were administered at a sanity board after the accused had retained counsel was harmless error. *Ross*'s holding is questionable in light of *Smith*. Since RCM 706 permits the convening authority to order the accused to undergo a sanity board and does not require notice to defense counsel before the sanity board convenes, trial counsel should take steps to insure that defense counsel is given prompt notice of the sanity board. *See, e.g.*, MRE 305(e) (when government agent knows accused has retained counsel, the accused's defense counsel must be notified before further questioning).

133

See, e.g., Chernoff & Schaffer, *Defending the Mentally Ill: Ethical Quicksand*, 10 **Am. Crim.L. R.** 505 (1972); Diamond, *The Psychiatrist as Advocate*, 1 *J. Psychiatry & L.* 5 (1973); Diamond & Louisell, *The Psychiatrist as an Expert Witness. Some Ruminations and Speculations*, 63 **Mich. L. Rev.** 1335 (1965); Institute of Society, Ethics, and the Life Sciences, *In the Service of the State: The Psychiatrist as Double Agent*, **Hastings Center Report Special Supplement** (April 1978).

134

See, e.g., Bonnie & Slobogin, *The Role of Mental Health Professions in the Criminal Process: The Case for Informed Speculation*, 66 **Va. L. Rev.** 427 (1980).

135

ABA Standard 7-3.6

136

See, e.g., United States v. Wilson, 18 U.S.C.M.A. 400, 40 C.M.R. 112; United States v. Frederick, 3 M.J. 230 (C.M.A. 1977).

137

740 F.2d 1104 (D.C.Cir. 1984).

138

Id. at 1121. One early military commentator argued that military defense counsel should be present at sanity boards. *See* Tifford, Babbidge: *A Time For a Change*, 25 JAG J. 133, 137-40 (1971). However, it is unlikely that the Supreme Court would ever hold that the presence of counsel at a mental examination is constitutionally required based on the Court's remark in *Smith*:

Respondent does not assert, and the Court of Appeals did not find, any constitutional right to have counsel actually present during the examination. In fact, several the Court of Appeals recognized that "an attorney present during the psychiatric interview could contribute little and might seriously disrupt the examination.

451 U.S. at 470 n. 14. Furthermore, the American Psychiatric Association recommends that counsel not be present unless requested by the examiner. *See Amicus Curiae* Brief for American Psychiatric Association on Appellant's Petition for Rehearing at 30-31, Byers v. United States, No. 78-1451 (D.C. Cir., slip opinion, Dec. 24 1980, *as amended* June 1, 1981).

139

Id. at 1155-7.

140

See supra note 1.

141

740 F.2d at 1155.

142

Id.

143

Id. at 1156.

144

Id. at 1156. The problem faced by the psychotherapist is illustrated by the following passage from the leading textbook on psychiatry:

The psychiatrist will want to take note of certain important pieces of information, but he is best served by keeping note taking to a minimum. It is difficult to take extensive notes and concentrate on the patient. Patients react in varied manner to whether or not the psychiatrist chooses to take notes. For example, the patient may express a view that the doctor does not take notes because the patient is intrinsically uninteresting, thus conveying information compatible with his depressed state. A patient may wonder if the doctor is secretly taping the interview or may attribute the style of not taking notes to the doctor's superhuman ability to remember every word....

1 H. Kaplan & B. Sadock, **Comprehensive Textbook of Psychiatry** 484 (4th Ed. 1985).

145

740 F.2d at 1156. *See also*, Goldberg, *Resistance to Use of Video in Individual Psychotherapy Training*, 140 **Am. J. Psychiatry** 1172 (1983).

146

Id.

147

Id.

148

Id. *See also*, **Who is the Client? The Ethics of Psychological Intervention in the Criminal Justice System** 2-8 (J. Monahan ed. 1980); Slobogin, Estelle v. Smith: *The Constitutional Contours of the Forensic Evaluation*, 31 **Emory L.J.** (1982).

149

740 F.2d at 1156. *See also*, J. Malcolm, **Psychoanalysis: The Impossible Profession** 86-88 (1981); Muslin, *Overview: The Use of Recordings as Evaluation Mechanisms in Psychiatry*, in **Evaluative Methods in Psychiatric Education** 77, 83 (1974); Roesch, Jackson, Sollner, Eaves, Glackman & Webster, *The Fitness to Stand Trial Interview Test: How Four Professions Rate Videotaped Fitness Interviews*, 7 **Int'l J.L. & Psychiatry** 115 (1984). *See generally*, Gelso, *Effects of Recording on Counselors and Clients*, 15 **Couns. Educ. & Super.** 5 (1974).

150

Amicus Curiae Brief for American Psychiatric Association on Appellant's Petition for Rehearing at 30-31, *Byers v. United States*, No. 78-1451 (D.C. Cir., slip opinion, Dec. 24 1980, *as amended* June 1, 1981).

151

Amicus Curiae Brief for American Psychological Association on Appellant's Petition for Rehearing at 26-27, *Byers v. United States*, No. 78-1451 (D.C. Cir., slip opinion, Dec. 24 1980, *as amended* June 1, 1981).

152

18 U.S.C. §4247 (1948), *as amended by* Act of Oct. 12, 1984, Pub. L. 98-473, Title II, §403 (a), 98 Stat. 2065.

153

MRE 106 provides: "When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require that party at that time to introduce any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it."

154

MRE 302(b)(2); MRE 703.

155

MRE 801(d)(1)(B).

156

One statistical study reviewed by the United States Senate during the hearings to revise the federal insanity law after the assassination attempt against President Reagan gives some insight into what makes for an insanity acquittal:

The dominant factor in the court's decision is the finding of the psychiatric report. Contrary to the "battle of the experts" in a few widely publicized trials, the norm is for one set of clinical examinations to be done with the court following the reports

submitted. Basically, what the [court-appointed] clinicians recommend, the court does. The clinicians appear to weigh heavily a finding of psychosis in their conclusions. When a person has a history of mental hospitalizations and a diagnosis of psychosis the defendant is almost always found NGRI by the clinicians and, in turn, by the court. The crime, the number and type of victims, and such other items are not related to insanity acquittal. Generally, what the clinician recommends, the court does.

Limiting the Insanity Defense. Hearings on S. 818, S. 1106, S. 1558, S. 1995, S. 2572, S. 2658, and S. 2669, Before the Subcomm. on Crim. Law of the Comm. of the Judiciary, United States Senate, 97th Cong. 2d Sess. (1982) (prepared statement of Mr. Henry J. Steadman). The common wisdom among military trial attorneys seems to be that the facts of an insanity case are far more important than expert testimony. This study suggests that this may not be the case.

157

See *United States v. Wimberley*, 16 U.S.C.M.A. 3, 36 C.M.R. 159 (1966); *United States v. White*, 19 U.S.C.M.A. 338, 41 C.M.R. 338, 41 C.M.R. 338 (1970). The early version of Army Technical Manual 8-240 required the sanity board psychiatrist to warn an accused of his Article 31 rights. See *supra* note 52.

158

United States v. Frederick, 3 M.J. 230 (C.M.A. 1977). *Frederick's* limited holding was that unwarned statements made at the sanity board were admissible only after the accused specifically opened the door by referring to them. See text accompanying notes 56 to 64, *supra*. On the other hand, the *Babbidge* rule stood for the proposition that medical conclusions based on unwarned statements are admissible after the defense introduces expert medical testimony. See text accompanying notes 29 to 38, *supra*.

159

MRE 302(a) states: "This privilege may be claimed by the accused notwithstanding the fact that the accused may have been warned of the rights provided by Mil. R. Evid. 305 at the examination." In the pre-rules case of *United States v. Duwors*, 6 M.J. 957 (N.M.C.M.R.), *pet. denied*, 7 M.J. 262 (N.M.C.M.R. 1979), the court held that because the accused was warned of his Article 31 rights at the sanity board and chose to waive them, those statements could be used to disprove sanity and to prove the *actus reus*. The *Duwors* holding was strongly criticized by the Court of Military Appeals in *United States v. Parker*, 146, 153 n. 13 (C.M.A. 1983).

160

The current version of this manual deletes the requirement for the sanity board to warn the accused of his Article 31 rights. See note 52 *supra*.

161

See the first two sections of this article. The dearth of litigation and comment

in the military is unusual if one considers that the Court of Military appeals has held that the scope of Article 31 is generally broader than the fifth amendment. *See, e.g.,* United States v. Ruiz, 48 C.M.R. 797 (C.M.A. 1974); United States v. Aronson, 8 C.M.A. 525, 25 C.M.R. 29 (1957).

162

The number of federal cases that have addressed various fifth amendment issues in compelled mental examinations are too numerous to address. A Westlaw® search reveals that there are several hundred cases. The former §4244 alone has been cited in over 450 cases

163

While the vast majority of federal cases have denied fifth amendment challenges to compelled mental examinations, most commentators have been extremely critical of them. Some of the more thoughtful articles, cited in chronological order, are as follows: Note, *Pre-Trial Mental Examinations and Commitment: Some Procedural Problems in the District of Columbia*, 51 *Geo. L.J.* 143 (1962); Comment, *Compulsory Mental Examinations and the Privilege Against Self-Incrimination*, 1964 *Wis. L. Rev.* 671 (1964); Danforth, *Death Knell for Pre-Trial Mental Examinations? Privilege Against Self-Incrimination*, 19 *Rutgers L. Rev.* 448 (1965); Note, *Mental Examinations of Defendants who Plead Insanity: Problems of Self-Incrimination*, 40 *Temple L. Q.* 366 (1967); Marcus, *Pre-Trial Psychiatric Examination: A Conflict with the Privilege Against Self-Incrimination*, 5 *Crim. L. Bull.* 497 (1969); Comment, *Changing Standards for Compulsory Mental Examinations*, 1969 *Wis. L. Rev.* 270 (1969); Note, *Requiring a Criminal Defendant to Submit to a Government Psychiatric Examination: An Invasion of the Privilege Against Self-Incrimination*, 83 *Harv. L. Rev.* 648 (1970); Note, *Pretrial Psychiatric Examinations and the Privilege Against Self-Incrimination*, 1971 *U. Ill. L.F.* 232 (1971); Note, *Psychiatry v. Law in the Pre-Trial Mental Examination: The Bifurcated Trial and other*

Alternatives, 40 **Fordham L. Rev.** 827 (1972); Nunez, *Mental Examinations of Criminal Defendants in Federal Court*, 9 **San Diego L. Rev.** 838 (1972); Lefelt, *Pretrial Mental Examinations: Compelled Cooperation and the Fifth Amendment*, 10 **Am. Crim. L. Rev.** 838 (1972); Berry, *Self-Incrimination and the Compulsory Mental Examination: A Proposal*, 15 **Ariz. L. Rev.** 919 (1973); Aronson, *Should the Privilege Against Self-Incrimination Apply to Compelled Psychiatric Examinations?* 26 **Stan L. Rev.** 55 (1973); Note, *Miranda on the Couch: An Approach to Problems of Self-Incrimination, Right to Counsel, and Miranda Warnings on Pre-Trial Psychiatric Examinations of Criminal Defendants*, 11 **Colum. J. L. & Soc. Prob.** 403 (1975); Note, *Protecting the Confidentiality of Pretrial Psychiatric Disclosures: A Survey of Standards*, 51 **N.Y.U.L Rev.** 409 (1976); Pizzi, *Competency to Stand Trial in Federal Courts: Conceptual and Constitutional Problems*, 45 **U. Chi. L. Rev.** 21 (1977); Note, *The Privilege Against Self-Incrimination in Pre-Trial Examinations: Oregon's Compromise*, 14 **Williamette L.J.** 313 (1978); *Fifth Amendment Protection in Criminal Psychiatric Evaluations*, 5 **Mental Disab. L. Rep.** 267 (1981); White, *The Psychiatric Examination and the Fifth Amendment Privilege in Capital Cases*, 74 **Crim. L. & Criminology** 943 (1983); Read, *Can a "Psychiatric Miranda" Work? A California Perspective*, 14 **Rutgers L. J.** 431 (1983).

164

As will be seen later in this article, the admissibility of unwarned statements or medical opinions depends on when and to what extent the defense has opened the door by asserting the insanity defense. *See infra* section VI D of this article. The of the cases that have held that admission of such evidence is proper are: *Buchanan v. Kentucky*, 107 S.Ct. 2906 (1987); *Schneider v. Lynaugh*, 835 F.2d 570 (5th Cir. 1988); *Williams v. Lynaugh*, 809 F.2d 1063 (5th Cir. 1987); *United States v. Stockwell*, 743 F. 2d 123 (2d Cir. 1984); *United States v. Byers*, 740 F. 2d 1104 (D.C. Cir. 1984); *United States v. Garcia*, 739 F. 2d. 440 (9th Cir. 1984); *Vardas v. Estelle*, 715 F. 2d 206 (5th Cir. 1983); *Noggle v. Marshall*, 706 F. 2d 1408 (6th Cir. 1983);

United States v. Dysart, 705 F. 2d 1247 (10th Cir. 1983); Booker v. Wainwright, 703 F. 2d 1251 (11th Cir. 1983); United States v. Bondurant, 689 F.2d 1246 (5th Cir. 1982); United States v. Madrid, 673 F. 2d 114 (10th Cir. 1982), *cert. denied*, 459 U.S. 843 (1982); United States v. Leonard, 609 F. 2d 1163 (5th Cir. 1980); United States v. Reason, 549 F.2d 309 (4th Cir. 1977); United States v. Reifsteck, 535 F. 2d 1030 (8th Cir. 1976); United States v. Cohen, 530 F. 2d 43 (5th Cir.), *cert. denied*, 429 U.S. 855 (1976); Karstetter v. Cardwell, 526 F. 2d 1144 (9th Cir. 1975); United States v. Trapnell, 495 F.2d 22 (4th Cir. 1974); United States v. Bohle, 445 F. 2d 54 (7th Cir. 1971), *overruled on other grounds in* United States v. Lawson, 653 F. 2d 299 (7th Cir. 1971); United States v. Handy, 454 F. 2d 885 (9th Cir. 1971), *cert. denied*, 409 U.S. 846 (1972); United States v. Weiser, 428 F. 2d 932 (2d Cir. 1969), *cert. denied*, 402 U.S. 949 (1971); United States v. Baird, 414 F.2d 700 (2d Cir. 1969), *cert. denied*, 369 U.S. 1005 (1970); United States v. Albright, 388 F. 2d 719 (4th Cir. 1968); Alexander v. United States, 380 F.2d. 33 (8th Cir. 1967); Pope v. United States, 372 F. 2d 710 (8th Cir. 1967)(*en banc*), *vacated and remanded on other grounds*, 392 U.S. 651(1968), *cert. denied*, 401 U.S. 949 (1971). The case often cited as the minority view that neither opinions nor conclusions derived from an unwarned compelled mental examination are admissible is United States v. Alvarez, 519 F. 2d 1036 (3d Cir. 1975). However, a careful reading of that case reveals the court held that evidence derived from an unwarned compelled mental examination under the former 18 U.S.C. § 4244 to determine the accused's *competency* to stand trial is inadmissible to rebut the insanity defense. Based on the opinion's *dicta*, the court would have probably admitted the same evidence if it were obtained at a *sanity* examination under the present 18 U.S.C. § 4242 and the accused opened the door at trial.

165

451 U.S. 454 (1981).

166

The sixth amendment issues in *Smith* are discussed in section VI A of this article.

167

451 U.S. at 458-59 n. 5.

168

Id. at 459. Before trial, the trial judge granted a defense motion to preclude the prosecutor from calling any witnesses of which the defense had not received notice. Notwithstanding this ruling and the fact that the state psychiatrist was not on the witness list, the judge allowed the psychiatrist to testify.

169

Id. at 47-74. The underlying conviction was not challenged.

170

See, e.g. United States v. Cohen, 530 F.2d 43 (5th Cir.) *cert. denied*, 429 U.S. 855 (1976); Battle v. Cameron, 260 F. Supp. (D.D.C. 1966).

171

451 U.S. at 467.

172

Id. at 469.

173

Id. at 462-63 (citations and quotations omitted). In a footnote to this statement, the Court cited the former § 4244 and FRCP 12.2(c), thus rejecting the "guilt vs. sanity" dichotomy that some courts believed existed in those statutes. Several other courts had begun to doubt that this distinction really existed in those statutes. For example, in United States v. Parker, 15 M.J. 146 (C.M.A. 1983), Chief Judge Everett remarked: "Conceptually, the dichotomy [the former §4244] seems to make between 'guilt' and 'sanity' is false, since Federal criminal law--as in

military law--sanity relates to guilt or innocence and there is no verdict of 'guilty but insane.'" *Id.* at 154 n. 5. *Accord*, *United States v. Madrid*, 673 F.2d 1114, 1120 n.12 (10th Cir.1982)

174

The Court made repeated references to the fact that the case was unlike those in which the accused asserted the insanity defense.

175

Id. at 465.

176

See, e.g., Slobogin, *Estelle v. Smith: The Constitutional Contours of the Forensic Evaluation*, 31 **Emory L.J.** 71 (1983); White, *The Psychiatric Examination and the Fifth Amendment in Capital Cases*, 74 **J. Crim. L. & Criminology** 943 (1983); Note, *The Fifth Amendment and Compelled Psychiatric Examinations: Implications of Estelle v. Smith*, 50 **Geo. Wash. L. Rev.** 275 (1983).

177

See, e.g., *Buchanan v. Kentucky*, 107 S.Ct. 2907 (1987); *Schneider v. Lynaugh*, 835 F.2d 570 (5th Cir. 1988); *Williams v. Lynaugh*, 809 F.2d 1063 (5th Cir. 1987); *Booker v. Wainwright*, 703 F.2d 1251 (11th Cir. 1983).

178

Id. *See also* cases cited *supra* at note 176.

179

MRE 3029(a) states that: "[t]he accused has a privilege to prevent any statement...and derivative evidence...from being received...*on the issue of guilt or innocence* or during sentencing proceedings." *Id.* (emphasis added).

180

See supra note 87.

181

See supra note 25.

182

FRCP 12.2(c) advisory committee's notes to 1983 amendment.

184

740 F. 2d 1104 (D.C. Cir. 1984)(*en banc*)(plurality opinion). *Evers* is significant for several reasons. The opinion was decided by the District of Columbia Circuit Court of Appeals, which is recognized as the leading court in the area of mental health law as evidenced by such landmark cases as *Durham v. United States*, 214 F. 2d 862 (D.C. Cir. 1954), and *United States v. Brawner*, 471 F. 2d 969 (D.C. Cir. 1972) (*en banc*). The plurality opinion was written by Judge (now Justice) Scalia, and the dissent was written by Chief Judge Bazelon, who is a noted judicial authority on the insanity defense. The seventy-two page opinion is law review-like and contains a thirty-eight page dissent written by Judge Bazelon. Extensive *amici* briefs were submitted to the court by the American Psychological Association and the American Psychiatric Association. *Evers* traces the near forty year history of fifth and sixth amendment issues in compelled mental examinations. It was one of the few cases cited in *Buchanan v. Kentucky*, 107 S.Ct. 2906 (1987), the Supreme Court's recent opinion addressing compelled mental examinations.

185

See supra text accompanying notes 56 to 64.

186

740 F.2d at 1409.

187

Another issue before the court was whether the accused's trial defense counsel failed to preserve fifth and sixth amendment issues at trial. The fifteen page concurring opinion extensively analyzes this issue and opines that the objections were waived. MRE 302(e) states the military's position: "The privilege in this rule may be claimed by the accused only under the procedure set forth in Mil. R. Evid. 304 for an objection or a motion to suppress." No military case has specifically addressed MRE 302(e).

188

The sixth amendment issues in *Byers* are discussed *supra* at text accompanying notes 137-49.

189

Id. at 1111. The first case to rely on the "waiver" theory was *Pope v. United States*, 372 F. 2d 710 (8th Cir. 1967)(*en banc*), *vacated and remanded on other grounds*, 392 U.S. 651 (1969). *Pope's* reasoning was incorporated in the *Babbidge* court's "qualified waiver" theory (*see* note 32, *supra*), which was also cited by the drafters of MRE 302 as the basis of the rule. MRE 302 analysis. Thus, the military is one of the jurisdictions that subscribes to the "waiver" theory.

190

740 F. 2d at 1112. *See, e.g.*, *United States v. Handy*, 454 F. 2d 885 (9th Cir. 1971), *cert. denied*, 409 U.S. 846 (1972).

191

740 F. 2d at 1112. *See, e.g.*, *United States v. Baird*, 414 F.2d 700 (2d Cir. 1969), *cert. denied*, 396 U.S. 1005 (1970).

192

740 F. 2d at 4112. *See, e.g.*, United States v. Whitlock, 663 F. 2d 1094 (D.C. Cir. 1980); United States v. Bohle, 445 F. 2d 54 (7th Cir. 1971), *overruled on other grounds in* United States v. Lawson, 653 F.2d 299 (7th Cir. 1981); United States v. Albright, 388 F. 2d 719 (4th Cir. 1968). The *Babbidge* case also addressed the "guilt vs. sanity" theory, but decided to rely on the "waiver" theory. *See supra* note 34.

193

740 F. 2d at 1112. The Supreme Court has long held that "real" evidence is "nontestimonial" and therefore not protected by the fifth amendment. United States v. Dionisio, 410 U.S. 1 (1973)(voice exemplar); Gilbert v. California, 388 U.S. 263 (1969)(handwriting exemplar); United States v. Wade, 388 U.S. 218 (1967)(lineup); Schmerber v. California, 384 U.S. 757 (1966)(blood sample). However, in *Estelle v. Smith* the Supreme Court rejected the "real vs. testimonial" dichotomy in the context of psychiatric examinations by stating: "The fact that the respondent's statements [to a government psychiatrist] were uttered in the context of a psychiatric examination does not automatically remove them from the reach of the Fifth Amendment." 451 U.S. at 465.

194

740 F. 2d at 1112. *See supra* note 173.

195

740 F. 2d at 1113. *See also* Culombe v. Connecticut, 367 U.S. 568, 602 (1961)(waiver must be free and unconstrained). The *Babbidge* court recognized that the accused does not waive his Article 31 rights in the true sense. Instead, the court referred to it as a "qualified waiver." *See* text accompanying note 32, *supra*. The drafters of MRE 302 chose to label it as an "implied partial waiver." MRE 302 analysis.

196

740 F. 2d at H13.

197

Id. at 1113 (citations omitted).

198

See supra note 33.

199

107 S.Ct. at 2918.

200

107 S.Ct. 2907 (1987). *See supra* text accompany notes 125-31.

201

107 S.Ct. at 2910 n. 9.

202

Id. at 2912.

203

Id. at n. 15.

204

Id. at 2918.

205

Id. at 2917.

206

See supra note 32.

207

Of the many federal opinions the Court could have cited, one of the two it cited was *Pope v. United States*, 372 F.2d 710, 720 (8th Cir. 1967) (*en banc*) *vacated and remanded on other grounds*, 392 U.S. 651 (1968). 107 S. Ct. at 2918. Eighteen years earlier the *Babbidge* court cited the same passage from *Pope*. *See supra* note 33. Thus, *Buchanan* and *Babbidge* (the foundation of MRE 302) have the same roots. Not surprisingly, Justice Blackmun, who authored *Buchanan*, was also the author of *Pope*.

208

MRE 302 analysis.

209

Id. The drafters recognized this problem.

210

UCMJ art. 31 (a) (emphasis added).

211

See supra text accompanying notes 179-83.

212

UCMJ art. 31(b) (emphasis added).

213

UCMJ art. 31(d) (emphasis added).

214

See Judge Ferguson's dissent in *United States v. Babbidge*, 18 U.S.C.M.A. at 342-48, 40 C.M.R. at 45-8.

215

See, e.g., United States v. Frederick, 3 M.J. 230 (C.M.A.).

216

For an overview of the flexibility of state statutory schemes for compelled mental examinations, *see* Annotation, *Validity and Construction of Statutes Providing for Psychiatric Examination of Accused to Determine Mental Condition*, 32 A.L.R. 2d 434 (1953).

217

This question was posed by the drafters' analysis to MRE 302.

218

MRE 302(a) states: "This privilege may be claimed by the accused notwithstanding the fact that the accused may have been warned of the rights provided by Mil. R. Evid. 305 at the examination." The drafters answered their own question: "Subject to Rule 302(b), Rule 302(a) makes statements made by an accused at a [RCM 706] examination inadmissible even if Article 31(b) and counsel warnings have been given. This is intended to resolve problems arising from the literal interpretation of Article 31 discussed above." MRE 302(a) analysis.

219

See supra note 52.

220

American Psychiatric Association, **The Principles of Medical Ethics with Annotations Especially Applicable to Psychiatry** (1981).

221

American Psychological Association, *Ethical Principles of Psychologists* 5, 36 Am. Psychologists 633, 636 (1981). *See also*, American Psychological

Association, **Standards for Providers of Psychological Services** 2.2.2, 2.3.5, (1981); American Psychological Association, *Specialty Guidelines for the Delivery of Services by Clinical Psychologists* 2.2.2, 2.3.5, 36 Am. Psychologist 640, 645-647 (1981); American Psychological Association, *Specialty Guidelines for the Delivery of Services by Counseling Psychologists* 2.2.2, 2.3.5, 36 Am. Psychologist 652, 657, 659 (1981).

222

ABA Standard 7-3.6.

223

Specifically, in describing the nature and purpose of the interview, a psychiatrist should explain that he is not the defendant's doctor and that the examination is not being conducted for therapeutic purposes. The psychiatrist should also state of whose behalf or at whose request--whether the prosecution or the court--he is examining the defendant. In addition, we think the defendant should be told the psychiatrist may be called to testify for the prosecution at trial and that in such testimony the psychiatrist may relate statements made by the defendant during the psychiatric examination.

Amicus Curiae Brief for the American Psychiatric Association on Appellant's Petition for Rehearing at 6-7, *Byers v. United States*, No. 78-1451 (D.C. Cir., slip opinion, Dec. 24, 1980, *as amended* June 1, 1981).

224

Amicus Curiae Brief for the American Psychological Association on Appellant's Petition for Rehearing at 29, *Byers v. United States*, No. 78-1451 (D.C. Cir., slip opinion, Dec. 24, 1980, *as amended* June 1, 1981).

225

The Supreme Court stated in *dicta* in *Buchanan* that defense counsel are presumed to know the ramifications of opening the door to psychiatric testimony. 107 S.Ct. at 2919. Accordingly, military defense counsel should be extremely careful to fully explain to their clients the consequences of submitting to a sanity board and asserting the insanity defense through expert testimony.

226

See Read, *Can a "Psychiatric Miranda" Work? A California Perspective*, 14 Rutgers L.J. 431 (1983)[hereinafter cited as Read]. The late Dr. (M.D.) Read was an adjunct professor of law, School of Law, the University of San Diego, and an assistant clinical professor of psychiatry, School of Medicine, University of California at San Diego. Dr. Read was also a member of the Task Force for the ABA Criminal Justice Mental Health Standards and assisted in drafting the various ABA Standards cited in this article.

227

Read at 449-50. A propose adaptation for military practice is at pages 57-58.

228

United States v. Johnson, 22 U.S.C.M.A. 424, 428, 47 C.M.R. 402, 406 (1973).

229

RCM 706 is reprinted at note 72.

230

MRE 302 is reprinted at text accompanying note 73.

231

See supra note 10.

232

MRE 302 analysis.

233

See supra note 80.

234

This example is borrowed from Dr. Martin Blinder's treatise entitled **Psychiatry in the Everyday Practice of Law** 131 (1981). Dr. Blinder is an internationally known forensic psychiatrist, professor of law, and author. He is probably most well known as the chief psychiatrist in the trial of *People of the State of California v. Dan White*, a trial which helped begin the debate on reforming the insanity defense:

Public indignation of the insanity defense laws has been piqued by exposure to several sensational trials in which the insanity defense has been employed. Among these was the so-called "Twinkie Defense" of Dan White, former city supervisor of the City of San Francisco, who went on trial for fatally shooting Mayor George Moscone and Supervisor Harvey Milk, in the heat of a dispute. Through a creative manipulation of the "diminished capacity" defense, White's attorney presented a group of "expert" witnesses, such as Dr. Martin Blinder, a psychiatrist who testified in White's behalf, who told the jury that White had been

depressed before the crime and had been eating junk food, which lead to further depression and more junk food, and the sugar made White violent. (Excerpts from articles by Carol Gallo, Criminal Justice Report, October 1981, The Insanity Defense). Whites efforts were successful in persuading the jury to accept this defense.

Limiting the Insanity Defense. Hearings on S. 818, S. 1106, S. 1558, S. 1995, S. 2572, S. 2658, and S. 2669 Before the Subcomm. on Crim. Law of the Comm. of the Judiciary, United States Senate, 97th Cong., 2d Sess. (1982) (prepared statement of Sen. Hatch) (citations and parentheses in original).

Dr. Blinder has testified in numerous courts-martial. In April 1987, Dr. Blinder testified as a defense witness in a military case which involved facts very similar to the above hypothetical case from his treatise. Dr. Blinder testified on direct examination that the accused's disposal of the murder weapon--a knife--did *not* indicate an appreciation of wrongfulness. On cross-examination, the trial counsel showed him the passage from his own treatise in which he had stated that such actions were *conclusive* of an appreciation of wrongfulness. Dr. Blinder, apparently taken by surprise, remarked: "These are the kinds of nonclinical facts that the trier has to listen to and give weight, and I don't think that I should tell [the jury] what they should make of that." *United States v. Tarver* (A.C.M.R. 8701179, r. 1537). The jury convicted the accused of murder and sentenced him to life imprisonment. *Id.*

235

MRE 302 analysis.

236

Id.

237

Seltzburg at 115.

238

19 M.J. 512 (A.F.C.M.R. 1940).

239

Id. at 515-6.

240

Id. at 515.

241

The court disagreed with the drafters' and Professor Saltzburg's suggestion that derivative evidence should be broadly construed.

242

United States v. Bledsoe, 19 M.J. 641 (A.F.C.M.R. 1984).

243

Id. at 643-5.

244

Id. See generally, Department of the Army Pamphlet 27-22, Military Criminal Law Evidence, para. 29-4 (No. 1, July 15, 1987)(discussing standards for admissibility of confession after illegally obtained prior confession).

245

The other issue addressed in *Bledsoe* was whether the trial counsel permissibly "preempted" the insanity defense by putting on his government experts on its case in chief. See *infra* text accompanying notes 279-85.

246

18 U.S.C. § 4242(a) (1984) states that after the defense files notice of its

intent to assert the insanity defense, the court "upon motion of the attorney for the Government, shall order that a psychiatric or psychological examination of the defendant be conducted, and that a psychiatric or psychological report be filed with the court...." *Id.* § 4274 (c)'s provision that the conclusions of the report be disclosed to the government is similar to RCM 706.

247

743 F.2d 123 (1984).

248

406 U.S. 441 (1972).

249

743 F.2d at 124, 126.

250

The situation of a defendant who raises an insanity defense, however, is not entirely analogous to that of an immunized witness who is later prosecuted. The evidence obtained from a defendant in a government psychiatric examination is admissible against the defendant, albeit only on the issue of sanity, while the testimony immunized under 18 U.S.C. § 6002 cannot be used in any manner in a prosecution of the defendant. Since there is nothing presumptively improper in the government's use of the results of a psychiatric examination at trial, it would be illogical to conclude that the conducting of such an examination gives a defendant an automatic right to a hearing in which the government must demonstrate that it does not intend to misuse the information it has obtained.

Id. at 127.

251

Nevertheless, we believe prosecutors would be well advised to avoid direct monitoring of the psychiatric examination, particularly in light of the recent amendment to Rule 12.2(c). It is not difficult to conceive of circumstances, not present here, where the government's conduct of the trial might raise a significant question as to whether it had improperly used information obtained in the psychiatric examination to develop evidence going beyond the issue of insanity. In such circumstances, the extent of the government's access to the defendant's statements would certainly be a factor in determining whether a *Kastigar*-type hearing is necessary....

Id.

252

See infra text accompanying note 173.

253

FRCP 12.2(c) is reprinted in its entirety at text accompanying note 89.

254

MRE 302(a).

255

United States v. Gardner, 22 M.J. 28 (C.M.A. 1986)(object of immunity from use and derivative use of compelled testimony is to leave the witness and government in substantially the same position as if the witness had claimed his privilege). *See generally*, *United States v. Whiteside*, 5 M.J. 294 (C.M.A. 1978); *United States v. Rivera*, 1 M.J. 107 (C.M.A. 1975); *United States v. Lucas*, 19 M.J. 773 (A.F.C.M.R. 1984); *United States v. Daley*, 3 M.J. 541 (A.C.M.R. 1977).

256

The drafters of MRE 302 specifically stated: "This should be treated as a question of testimonial immunity for the purpose of determining the applicability of the exclusionary rule in the area." MRE 302 analysis.

257

See, e.g., United States v. Parker, 15 M.J. 146, 154 n5 (C.M.A. 1983)(concurring opinion by Chief Judge Everett); United States v. Byers, 740 F.2d 1104, 1112 (D.C. Cir. 1984) (plurality opinion by Judge Scalia).

258

MRE 302(b)-

259

RCM 701(b)(2).

260

FRCP 12.2(a).

261

ABA Standard 7-6.3.

262

The full text of RCM 706 is at note 72.

263

The full text of MRE 302 is at text accompanying note 73.

264

Id.

265

The full text of FRCP 12.2(c) is at text accompanying note 89.

266

Battie v. Estelle, 655 F.2d 692, 702 (5th Cir. 1981); *Booker v. Wainwright*, 703 F.2d 1251, 1256 (11th Cir.), *cert. denied* 464 U.S. 922 (1983); *Witt v. Wainwright*, 714 F.2d 1069, 1075-76 (11th Cir. 1983).

267

See supra text accompany notes 125-132.

268

107 S.Ct. at 2917-18.

269

835 F.2d 570 (5th Cir. 1988).

270

Id. at 577.

271

See supra text accompanying notes 111-124, 165-83.

272

Rule 302: Countering the Defense of Insanity, **The Army Lawyer**,
Feb. 1985 at 38,39.

273

14 M.J. 653 (A.C.M.R. 1982).

274

Id. at 658.

275

The drafters' analysis states: "[RCM 706] and Rule 302 are inapplicable to proceedings not involving criminal consequences. *Id.* Professor Saltzburg has the same opinion: "The privilege of Rule 302 is limited by the fact that it does not protect statements by the accused at mental examinations other than a compelled R.C.M. 706 examination." Saltzburg at 115. Thus, the government could use otherwise privileged statements for noncriminal proceedings such as competency hearings and administrative separation procedures.

276

MRE 302(b).

277

The full text of RCM 706 is at note 72.

278

MRE 302(b).

279

19 M.J. 641 (A.F.C.M.R. 1984).

280

Id. at 643.

281

Id.

282

Id.

283

Id. at 643-44. The opinion does not specifically state to what extent the expert testified other than the evidence was "extensive."

284

Id. at 645 (citations omitted).

285

Id.

286

741 F.2d 1287 (11th Cir. 1984), *reh'g denied en banc* 760 F.2d 281 (11th Cir. 1985).

287

Id. at 1292.

288

Id. at 1292-93.

289

Id. 1296-98.

290

Id. at 1297.

291

Id.

292

MRE 302(b)(2).

293

Saltzburg at 115.

294

See supra text accompanying notes 281-87.

295

The court characterized the experts' testimony as "extensive." 19 M.J. at 644.

296

FRCP 12.2(c). The full text of FRCP 12.2(c) is at text accompanying note 89.

297

ABA Standard 7-3.2. The full text of this Standard is at text accompanying note 97.

298

In this regard, the ABA Standard is similar to the court's reasoning in *Bledsoe*. See *supra* text accompanying notes 281-287.

299

ABA Standard 7-3.2 commentary.

300

107 S. Ct. at 2917, 2918, 2919 n.21.

301

MRE 302 analysis.

302

For a discussion of the rule as it was originally written, see Yustas, *Mental Evaluations of an Accused Under the Military Rules of Evidence: An Excellent Balance*, **The Army Lawyer**, May 1980 at 24.

303

Exec. Order No. 12223, 45 Fed. Reg. 58503 (1980). Change No. 4, Manual for Courts-Martial, United States, 1969 (Rev. Ed.).

304

For a discussion of how the change to MRE 302 allegedly upset the "fair balance" mentioned in note 304, *supra*, see Ross, *Rule 302--An Unfair*

Balance, The Army Lawyer, Mar. 1981 at 5.

305

See supra text accompanying notes 277-79.

306

14 M.J. at 657-58.

307

Id.

308

Id.

309

Id. at 659.

310

See supra text accompanying notes 125-31, 200-05.

311

107 S. Ct. at 2911 n. 11.

312

See supra text accompanying notes 110-24, 165-82.

313

451 U.S. at 462 (*quoting* *In re Gault*, 387 U.S. 1, 49 (1967))

314

See supra text accompanying notes 173, 192, 194.

315

FRCP 12.2(c) advisory committee's notes to 1983 amendment.

316

See supra note 33.

317

835 F. 2d 570 (5th Cir. 1988).

318

Id. at 576.

319

MRE 302(b)(1). The full text of MRE 302 is at text accompanying note 73.

320

MRE 302 analysis.

321

Saltzburg at 115.

322

MRE 302 analysis.

323

Saltzburg at 115.

324

See supra text accompanying notes 263-302.

325

Saltzburg at 115.

326

This example is derived from the plain wording of MRE 302(b)(1).

327

MRE 302(b) analysis.

328

Saltzburg at 115.

329

MRE 614(b).

330

RCM 706(c)(4). *See also* United States v. Frederick, 3 M.J. 230, 232 (C.M.A. 1977); Lozinski v. Wetherill, 21 U.S.C.M.A. 52, 44 C.M.R. 106 (1971); United States v. Erb, 12 U.S.C.M.A. 524, 31 C.M.R. 110 (1961)(all three cases permitting multiple sanity boards).

331

MRE 302(b)(1).

332

3 M.J. 230, 232 (C.M.A. 1977). *See supra* text accompanying notes 56-64.

333

The court held that "the defense counsel consented to the admissibility of the evidence by his own use of the statements." 3 M.J. at 234.

334

See supra text accompanying notes 137-49, 184-99.

335

See supra note 199.

336

MRE 302 analysis.

337

See supra text accompanying note 26.

338

15 M.J. 146 (C.M.A. 1983).

339

The opinion is not clear on this point, but this can be inferred from the fact that the defense counsel objected to the sanity board's testimony.

340

15 M.J. at 147.

341

The appellate issue of which the court granted review was:

WHETHER THE MILITARY JUDGE'S RULING PERMITTING THE PROSECUTION TO ELICIT FROM THE GOVERNMENT PSYCHIATRISTS THEIR RELATION OF APPELLANT'S NARRATIVE OF THE SUBSTANTIVE EVENTS GIVING RISE TO THE CHARGES AGAINST HIM, OBTAINED DURING THE COURSE OF THEIR *BABBIDGE*-COMPELLED BOARD INTERVIEW, ERRONEOUSLY AND PREJUDICIALLY BURDENED APPELLANT'S SIMULTANEOUS RIGHT TO PRESENT AN

INSANITY DEFENSE AND CONCURRENTLY REFRAIN FROM
INCRIMINATING HIMSELF AT TRIAL.

Id. at 147-48. The court granted review of this issue notwithstanding the fact that the accused had been read his rights and waived them *Id.* at 152-53.

342

See supra Parts I and II of this article.

343

The court stated: "This was not raised specifically in the defense-framed issue which addresses only the legality of the compelled examination that the insanity plea has prompted; however, we believe that it was fairly encompassed within that issue." 15 M.J. at 151 n. 5.

344

Id. at 152-53.

345

Id. at 154 (concurring opinion by Chief Judge Everett).

346

See supra note 33.

347

The full text of ERCP 12.2(c) is at text accompanying note 89.

348

The full text of ABA Standard 7-3.2 is at text accompanying note 97.

349

This example is taken from a recent court-martial in which the author was the trial counsel.

350

740 F.2d 1104 (D.C. Cir. 1984).

351

107 S.Ct. 2906 (1987).

352

RCM 706 (a)

353

RCM 706(b).

354

RCM 706 (c)(3)(B).

355

United States v. Ross, 19 U.S.C.M.A. 51, 41 C.M.R. 51 (1969); United States v. Hayes, 19 U.S.C.M.A. 60, 41 C.M.R. 60 (1969).

356

See, e.g., Vardas v. Estelle, 715 F.2d 206 (5th Cir. 1983).

357

See supra text accompanying notes 133-56.

358

See supra pages 32-33.

359

See supra text accompanying notes 215-28.

360

This is based on a proposed form in article by the late Dr. Randolph A. Read. *See supra* notes 226-7.

361

Sanity board expert usually review the entire court-martial packet. *See* TM 8-240, paragraph 4-4.

362

Experts should be careful not to make any express or implied promises tot he accused.

363

The expert may want to further inquire to what extent the accused was informed by his defense counsel of the sanity board procedures and MRE 302.

364

The consequences of refusing to submit to a sanity board will most likely be that the accused is precluded from asserting the insanity defense through expert testimony. MRE 302 (d). *See also*, Saltzburg at 116-7 (discussing further implications of refusing to submit to a sanity board).

365

If the board is being recorded, the accused should be informed that his defense counsel will provided a copy of the recording.

366

See supra text accompanying notes 259-300.

367

See supra note 173.

368

See supra text accompanying notes 349-51.

369

See supra text accompanying notes 346-48.

370

Ross, *Rule 302--An Unfair Balance*, **The Army Lawyer**, Mar. 1981 at

5.