THE ROLE OF THE DEPOSITION IN MILITARY JUSTICE

By Robinson O. Everett*

I. INTRODUCTION

An attorney receiving his first introduction to courts-martial is often surprised by the role allotted to the deposition. Instead of being used in military justice chiefly for discovery or as a basis for possible later impeachment of a witness, the deposition is frequently itself offered in evidence—sometimes by the defense but more often by the prosecution.

Many exigencies peculiar to the Armed Services undoubtedly led Congress to authorize in Article 49[1] of the Uniform Code of Military Justice—and in previous parallel legislation—a use of depositions unparalleled elsewhere in American criminal law administration. "For instance, when the Armed Services are operating in foreign countries where there is no American subpoena power, it might be impossible to compel a foreign civilian witness to come to the place where the trial is held, and yet he may be quite willing to give a deposition. Furthermore, military life is marked by transfers of personnel—the military community being much more transient than most groups of civilians. To retain military personnel in one spot so that they will be available for a forthcoming trial, or to bring them back from a locale to which they have been transferred, might involve considerable disruption of military operations. Likewise, in combat areas there is often considerable risk that a witness may be dead before trial date, in which event, were civilian rules to be followed, his testimony would be lost."[2]

Because of such "necessities of the services", the Court of Military Appeals has upheld the fundamental legality of military depositions,[3] but at the same time has emphasized in regard thereto

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1 10 USC § 849 (1952 ed., Supp. V).

2 Everett, Military Justice in the Armed Forces of the United States 221–2 (1956).

3 U.S. v. Sutton, 3 USCMA 220, 11 CMR 220 (1953); U.S. v. Parrish, 7 USCMA 337, 22 CMR 127 (1956).

"that for the most part they are tools for the prosecution which cut deeply into the privileges of an accused, and we have, therefore, demanded strict compliance with the procedural requirements before permitting their use."[4] It is the purpose of this paper to explore some aspects of this "strict compliance", and to determine whether, under the Court's interpretation thereof, much basis remains for the oft-expressed fear that prosecution use of depositions in a court-martial deprives an accused of his right to confront and cross-examine the witnesses against him and to have the full benefit of counsel.

A. *Oral versus Written*

Contrary to previous Navy and Coast Guard practice,[5] the Uniform Code specifically authorizes the taking of either "oral or written" depositions. The former are taken by counsel on oral examination of the deponent; the latter on the basis of written interrogatories and cross-interrogatories submitted to a witness to be answered by him under oath. *United States v. Sutton*[6] concerned the legality of the written deposition.

One of Sutton's appointed assistant defense counsel, to whom written interrogatories had been submitted, indicated in writing on the deposition form that he did not care to tender any cross-interrogatories; apparently he made no objection whatsoever either to the taking of the deposition or to the taking of a written, rather than an oral deposition. At the trial the accused had a different attorney, who objected to admission of the deposition on the ground that it violated the right of confrontation guaranteed by the Sixth Amendment.

Judges Latimer and Brosman rejected the defense contention, but Chief Judge Quinn embraced it enthusiastically. At first glance the Chief Judge's dissent there might be taken to mean that, under his view, neither a written or oral deposition can be admissible over defense objection, and that an accused always is entitled to require that any witness testify personally in the courtroom. Obviously, from the accused's standpoint, maximum protection is provided under these circumstances; any trial lawyer will verify that some witnesses testify quite differently—and more conservatively—when they are in court and in the presence of the person against whom their testimony is being offered. Moreover, as the Uniform Code itself recognizes,[7] the demeanor of a witness

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[4] U.S. v. Valli, 7 USCMA 60, 64, 21 CMR 186, 190 (1956).

[5] See U.S. v. Sutton, *supra* note 3; U.S. v. Gomes, 3 USCMA 232, 11 CMR 232 (1953).

[6] *Supra* note 3.

[7] Compare Article 66(c) UCMJ.

can be all-important in the evaluation of his credibility; yet it cannot be reflected in the cold pages of a deposition.

Upon more detailed analysis of Chief Judge Quinn's opinion, it seems, however, that, although he recognizes the undeniable advantages of a witness' presence before the court-martial, his chief concern is with the preservation of the accused's right of cross-examination. Indeed, he accedes to Judge Latimer's conclusion—which, in turn, draws heavy support from Dean Wigmore[8] —that cross-examination is the essence of confrontation. Under this approach the witness' presence could, in some instances, be dispensed with if he had previously been subjected to effective cross-examination—just as testimony offered at a former trial[9] or at a pretrial Article 32 investigation[10] is sometimes admissible in evidence because the defense's right to cross-examination has been preserved.

Whether Chief Judge Quinn would consider the presence of the accused himself at the taking of a deposition to be a prerequisite for effective cross-examination is not made clear in his *Sutton* dissent. Certainly there is nothing therein which would be irreconciliable with a view that effective cross-examination could be achieved by a qualified lawyer without the presence of the accused, if there had been ample opportunity for communication between them before the taking of the deposition.

After Judge Ferguson had joined the Court of Military Appeals, an unsuccessful attempt was made in *United States v. Parrish*[11] to have the Court overrule the *Sutton* decision. The depositions in question had been taken on written interrogatories, and Colonel Parrish's counsel—one of them a civilian attorney—had drafted extensive cross-interrogatories. Apparently no request was made that oral depositions be taken. Due to the nature of some of the answers given to the cross-interrogatories—answers which they contended were evasive—the defense counsel requested the law officer for a continuance to allow submission of further cross-interrogatories, and denial of this continuance was one ground for their objection to reception of the depositions in evidence.

In upholding the admission of the depositions, the Court's opinion remarked concerning the "determined bid" to have *Sutton* overruled:[12]

[8] Wigmore, Evidence, § 1396 (1940 3d ed.); U.S. v. Miller, 7 USCMA 23, 21 CMR 149 (1956).
[9] Par. 145*b*, MCM, 1951; U.S. v. Niolu, 4 USCMA 18, 15 CMR 18 (1954).
[10] U.S. v. Eggers, 3 USCMA 191, 11 CMR 191 (1953).
[11] *Supra* note 3.
[12] 7 USCMA 337, 342, 22 CMR 127, 132 (1956).

> "The views of the three Judges sitting at the time the Sutton decision was rendered are fully stated in that opinion. Judge Ferguson has chosen to follow the principle announced by the majority and no good purpose would be served by repeating what was there said. Accordingly, this issue is resolved against the accused without further comment."

In the interests of completeness, one should note Judge Ferguson's observation in his concurring opinion in *United States v. Brady*[13] that "A convening authority may 'for good cause' forbid the taking of an oral deposition and provide instead that written interrogations be submitted. Article 49(a), Uniform Code of Military Justice, 10 USC S 849". Neither Judge Ferguson, the Code, nor the Manual explains what is meant by "good cause" in this context. His comment seems, however, to assume that sometimes a written deposition will be taken, by direction of the convening authority, even though one of the parties has given notice that he wishes to take an oral deposition. Nonetheless, Judge Ferguson can hardly be said to have ruled that a convening authority is completely free to reject a defense request that a proposed deposition be taken on oral examination instead of on written interrogatories.

Actually the specific problem presented by a timely defense request that a written deposition be forbidden and an oral deposition ordered in its place was not before the Court in either *Sutton* or *Parrish*—where there was no objection at the time of its taking to the written deposition *as such.* It is clear that in any such situation Chief Judge Quinn would hold that the convening authority was under a compulsion to forbid the written deposition in order to protect the accused's right to effective cross-examination. And, as has been noted, Judge Ferguson could take the same position without squarely overruling the holdings of *Sutton* and *Parrish.* Or else he could reason that a request for taking an oral deposition must be granted, unless there is "good cause" to insist on written interrogatories. In this event the existence of "good cause" would presumably involve a legal issue to be considered during appellate review of the case. Relevant considerations might include amenability of the witness to subpoena and availability of certified counsel to represent the parties for the taking of the oral deposition.

Another possible approach would involve consideration of whether in the particular case there was some special desirability of an oral, instead of a written, deposition. Under this approach the burden would rest on the defense counsel to show some special

[13] 8 USCMA 456, 461, 24 CMR 266, 271 (1957).

reason why the oral deposition should be taken, rather than on the Government to sustain the use of a written deposition.

The recent decision of a Board of Review bears on this problem.[14] There the accused had been charged with sodomy, proof of which hinged on a prosecution witness who resided far from the place of trial. When the Government proposed to take the written deposition of this witness, the accused's civilian defense counsel requested either that the witness be subpoenaed to appear before the court-martial or, alternatively, that an oral deposition be taken from the witness. This request was not granted, and apparently was not even brought to the convening authority's attention in its original form. Because of an extraordinary conglomeration of defects and irregularities, the Board held that the deposition was inadmissible in any event, but it did state specifically that the defense request for the taking of a deposition on oral examination had been reasonable and should have been granted. Implicitly the decision recognizes that, under some circumstances, error exists in denying a defense request for oral, instead of written, depositions.

Neither Article 49(a) nor the Manual provides specific standards for choice between uses of oral and written depositions. Nonetheless, this omission was probably not intended to give either to the party desiring the deposition or to the convening authority a completely unfettered power of selection. Certainly the possibility exists that denial of a defense request for an oral deposition will, in some circumstances lead to reversible error. In fact, this possibility becomes almost a certainty since Chief Judge Quinn has emphasized his view that it is unconstitutional in any event to admit written depositions in evidence against an accused over objection and Judge Ferguson has consistently demonstrated great solicitude for the rights of accused persons.

As matters now stand, it seems likely that, except as to purely formal matters, defense counsel will increasingly request the convening authorities to order the taking of oral depositions. Rather than risk reversal of a conviction, quite a few convening authorities will undoubtedly either accede to the defense request, or will have the witness subpoenaed to testify before the court-martial. In the long run there may occur a substantial diminution, or even the virtual abolition, of the written deposition in courts-martial—the very result so fervently advocated by Chief Judge Quinn in the *Sutton* case.

[14] NCM 56-01270 (SF), Turman, 25 CMR 710 (1957).

B. *Subpoena versus Deposition*

In several cases a defense counsel has requested that subpoenas be issued for certain witnesses and the denial thereof has later been considered on review by the Court of Military Appeals. When viewed in proper perspective, these cases have considerable relevance to the role of the deposition.

If the defense counsel had had his way in *United States v. DeAngelis,*[15] the courtroom would have teemed with witnesses—Italian nationals and American civilians and military personnel. In rejecting the accused's contention on appeal that he had been denied compulsory process, the Court emphasized that the compulsory process need not be invoked unless the testimony of the defense witness would be "material and necessary". The Court in this connection quoted from a passage of the 1949 Manual for Courts-Martial[16]—under which the accused was tried—to the general effect that a subpoena need not be issued "where a deposition would fully answer the purpose and protect the rights of the parties," or unless "a deposition will, for any reason, not properly answer the purpose." At a later point in its opinion, the Court observed concerning the defense request for the presence of certain American witnesses: "Each witness was shown to be over one hundred miles from the place of trial. Consequently, if the accused *in fact* desired their presence as witnesses, his failure to establish the materiality of their testimony, to submit a request for obtaining their testimony by deposition, or to show that depositions would not answer the purpose, precludes any claim of error at this stage of the case."[17] Clearly the Court seems to be saying that a defense counsel who wishes a witness subpoenaed bears the burden of showing that the witness' testimony cannot as well be taken by deposition. Especially when oral depositions are to be used, this burden would be a heavy one.

Paragraph 115*a* of the 1951 Manual is less explicit than the corresponding section of its 1949 predecessor with respect to the issuance of a subpoena where a deposition would "answer the purpose"; in fact, it contents itself with the reference "See Article 49*d* concerning the conditions under which a deposition, to be admissible, may be taken." However, later in the same Manual paragraph there is a provision to the general effect that a witness need not be subpoenaed at the defense's request if the trial counsel will stipulate to his expected testimony. Presumably, then, the draftsmen of the Manual did not feel that it was all-important for

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[15] 3 USCMA 298, 12 CMR 54 (1953).
[16] Par. 124, MCM, 1949.
[17] 3 USCMA at 303–4, 12 CMR at 59.

the court-martial to observe the demeanor of the witness, instead of being presented merely with his stipulated testimony or his deposition.

However, in *United States v. Thornton*,[18] the Court of Military Appeals took a different view. The accused officer was attempting to negate a charge of larceny by showing an absence of felonious intent, and in support thereof he requested that a civilian witness be subpoenaed. Although it did not appear whether the convening authority personally acted on the request, it was denied by the Acting Staff Judge Advocate. When the request was renewed at the trial, the law officer again denied it, whereupon trial and defense counsel entered into a stipulation of expected testimony.

In holding that the accused was entitled to the direct testimony of the desired witness and that it was prejudicial error to deny him the requested subpoena, the Court remarked:[19]

> "An accused cannot be forced to present the testimony of a material witness on his behalf by way of stipulation or deposition. On the contrary, he is entitled to have the witness testify directly from the witness stand in the courtroom. To insure that right, Congress has provided that he 'shall have equal opportunity [with the prosecution and the court-martial] to obtain witnesses . . . in accordance with such regulations as the President may prescribe.' "

Two weeks later in *United States v. Harvey*,[20] the Court seems to recede somewhat from the rule of the *Thornton* case. Harvey was charged with assault and his defense counsel requested that trial counsel subpoena four civilian witnesses, who would testify concerning the "character and reputation of the chief prosecution witness." The request was denied by the convening authority,— and later at the trial by the law officer, after the prosecution had announced its willingness to stipulate to the expected testimony "subject only to the admissibility of the evidence." However, no stipulation was offered in evidence.

The Court sought to distinguish *Thornton* on several grounds. First, "and most important," the expected testimony of the witness in that case had gone to "the core of the accused's defense," but not so here. Secondly, the acting staff judge advocate had denied Thornton's request for the subpoena, "whereas here, it was the convening authority." Thirdly, defense counsel had not complied with the Manual's formal requirements that he submit a written statement containing (1) a synopsis of expected testimony, (2) "full reasons which necessitate the personal appearance of the

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[18] 8 USCMA 446, 24 CMR 256 (1957); see also CM 394087, Slaughter, 23 CMR 478 (1957).

[19] 8 USCMA at 449, 24 CMR at 259.

[20] 8 USCMA 538, 25 CMR 42 (1957).

witness, and (3) any other matter showing that such expected testimony is necessary to the ends of justice."[21] Fourthly, the accused could not have been prejudiced by failure to subpoena the witnesses for their expected testimony would not have been competent, since the accused presented no evidence of self-defense—the only issue as to which the expected testimony could have any relevancy.

The two final distinctions seem quite valid. However, since the Court did not explain what constitutes the "core" of a defense, it is unclear whether the fourth is simply a reiteration of the first distinction. The second distinction overlooks the fact that in *Thornton* the law officer also ruled on the issuance of the subpoena and, in addition, that there the Court had stated that it would not halt to determine "whether or not the decision was made by the convening authority."

As *Harvey* makes no express retreat from the general principle announced in *Thornton,* a trial counsel or convening authority cannot safely assume that he may reject a defense counsel's written request that a defense witness be subpoenaed and then force the defense counsel to settle for the witness' deposition or a stipulation of his expected testimony. Of course, if the witness' testimony would not be "material and necessary," there may be no need to call him. However, simply on the basis of the defense request—which usually will be worded in a way best calculated by counsel to induce issuance of a subpoena—it may be very difficult to determine correctly whether the requisite materiality does exist. Especially is this so since, even during the Article 32 investigation, the accused's lawyers will often not have unveiled their theory of defense in its entirety[22] and the expected testimony might have some unforeseen relevance to the defense case as presented at the trial. Rather than risk a reversal, the convening authority may well decide to dispense with any deposition and subpoena the witness to attend at the trial.

The Manual speaks of subpoenaing a "material and necessary" witness.[23] Who, however, qualifies as a "necessary" witness? From the trial counsel's standpoint it is clear that the calling of certain witnesses may be necessary if he is to prove all elements of his case beyond a reasonable doubt. On the other hand, since the accused is presumed innocent and bears no burden of proof, he is under no true "necessity" to call any witnesses; no finding of guilt can be directed against him even though he presents no

[21] See par. 115, MCM, 1951.
[22] Everett, *op. cit. supra* note 2, p. 171.
[23] Par. 115*a,* MCM, 1951.

evidence whatsoever. As to certain defenses, the accused must at least present some evidence in order to raise an issue that will merit the attention of the law officer and the court members.[24] Perhaps a witness who could testify as to one of these defenses might sometimes be deemed a "necessary" defense witness. Federal Rule 17 of Criminal Procedure authorizes the issuance of a subpoena upon the request of an indigent defendant whose evidence will be material and without whom "the defendant cannot safely go to trial."[25] Arguably, the Manual's draftsmen were seeking to establish the same criterion for subpoenaing requested defense witnesses. Or else they may only have been seeking to prevent wholesale subpoenaing of witness who would merely give cumulative testimony for an accused.

In instances where a defense request is made for the presence before the court-martial of a "material and necessary" witness, how far must the prosecution go before it can properly insist that the defense counsel resort to depositions to secure the desired testimony? The Manual for Courts-Martial authorizes subpoenaing "at government expense, any civilian who is to be a material witness and who is within any part of the United States, its Territories, and possessions."[26] There is no restriction to prosecution witnesses. Thus, as to any civilian within the United States, the trial counsel should seldom have difficulty in obtaining the defense witness' presence if he makes a good faith effort to that end and if the witness' whereabouts are known.[27] Military witnesses are also readily obtainable with the government's cooperation. However, where the defense desires foreign witnesses the problem is more difficult. Certainly under the *Thornton* approach witness fees and travel expenses should be payable by the Government for foreign defense witnesses to the same extent as for prosecution witnesses. In the event of a treaty or agreement with a foreign nation for securing the attendance of its nationals as witnesses in American courts-martial, the Government would also seem obligated to make the same effort in behalf of the accused to secure the presence of such a person as if he were a prosecution witness.[28] Only thus would the defense counsel receive the "equal opportunity to obtain

[24] Everett, *op. cit.* note 2, p. 193.

[25] This Rule was quoted by the Court in U.S. v. DeAngelis, *supra* note 15, at p. 302.

[26] Par. 115*d*(1), MCM, 1951.

[27] Of course, unless the witness can be located, no one can take his deposition. For a general discussion of subpoenas in courts-martial see Everett, *op. cit.* note 2, at pp. 217–9.

[28] Compare the discussion in U.S. v. Stringer, 5 USCMA 122, 17 CMR 122 (1954) of what is required to show unavailability of a foreign witness.

witnesses and other evidence" assured him by Article 46[29] of the Uniform Code.

Several features of military justice may lead to numerous defense requests to subpoena witnesses. For one thing, unlike a defendant in civilian courts, who, if he loses, will be paying the court costs, an accused convicted by a court-martial labors under no such liability. In State courts, too, the subpoena power is effectively limited by State lines; in courts-martial it is not. Moreover, a very few unscrupulous defense counsel appearing before courts-martial may seek to harass and exhaust the prosecution—and perhaps obtain a voluntary dismissal of charges—by excessive requests for the attendance of witnesses before a court-martial, especially military witnesses whose time cannot readily be spared from their duties.[30]

Even where prosecution witnesses are involved, the *Thornton* decision may result in some limitation on the use of depositions. A brief illustration will clarify this point. Assume that a trial counsel prosecuting an assault case requests authority from the convening authority to take the deposition of a supposed eye witness. In support of his request, and in accord with the procedure required by the Manual,[31] the trial counsel submits a memorandum stating that the witness will probably testify that the accused committed an assault. As soon as he learns of the trial counsel's request, the defense counsel himself submits a request that this witness be subpoenaed as a defense witness, and indicates that the witness will testify that there was no assault and that the accused was simply defending himself.

Obviously, if the witness must ultimately be subpoenaed, there will be little point in expending time and money to take his depositions. Under the assumed facts, how can the convening authority feel safe in rejecting the defense request for a subpoena? The witness' testimony is probably material; otherwise the Government would not have wished to take his deposition in the first place. Even with the assistance of any pretrial statements made by the witness to investigators, the convening authority cannot be sure that, in some respect and as to some issue, the witness' testimony may not ultimately prove favorable to the accused. In that event the failure to subpoena the witness may well mean reversal of any conviction obtained. Under these circumstances, the convening authority may decide to go ahead and subpoena the

[29] 10 USC § 846 (1952 ed., Supp. V).
[30] Compare U.S. v. DeAngelis, *supra* note 15.
[31] Par. 117*g*, MCM, 1951; see also U.S. v. Brady, 8 USCMA 456, 24 CMR 266 (1957).

witness in the first place, rather than take his deposition, or else to dispense entirely with the proposed witness if the defense counsel will voluntarily withdraw his request for a subpoena.

C. *Counsel*

As has been pointed out previously, the use of written depositions may be dangerous if the accused has made a timely request for the taking of an oral deposition. However, if the request is acceded to, the Government may be saddled with a heavy burden. In the first place, the accused must be provided with certified counsel to represent him during the taking of the deposition, if the deposition is to be admissible later in a general court-martial.[32]

Secondly, as *United States v. Brady*[33] made clear, the Government's responsibility is not satisfied merely by providing certified counsel if the charges have already been referred to a court for trial. Instead the accused must be represented at the taking of the deposition by the same counsel appointed to defend him at the trial or by other qualified counsel acceptable to the accused. The Court of Military Appeals noted that anything intimated to the contrary in the Manual for Courts-Martial conflicts with Article 49 of the Code and so is void.

Obviously the transporting of defense counsel hither and yon to take depositions can involve considerable expense to the Government and tie up valuable legal personnel. The alternative of written interrogatories—an alternative which, as heretofore mentioned, was referred to by Judge Ferguson in his *Brady* concurrence—produces a deposition which often is relatively uninformative and the taking of which, over defense protests and despite requests for an oral deposition, may lead down the road of reversible error. Perhaps the only remaining course for the convening authority is to direct the taking of depositions from all prospective witnesses before reference of the charges for trial. Until the charges are referred, the convening authority does have freedom to designate counsel to represent both the accused and the Government in the taking of oral depositions,[34] although even then he probably must allow the accused ample opportunity to communicate with his designated counsel concerning the deponent's probable testimony.

Prior to reference of charges, however, several difficulties may be encountered that would not exist if the deposition were taken

[32] U.S. v. Drain, 4 USCMA 646, 16 CMR 220 (1954).

[33] *Supra* note 31.

[34] Article 49, 10 USC § 849 (1952 ed., Supp. V); U.S. v. Brady, *supra* note 31.

at a later stage of the proceedings. In the first place, the power to subpoena does not seem to exist until the charges are referred —a circumstance which would, of course, relate to seeking a deposition from a civilian witness.[35] Secondly, it is often impossible to anticipate so early in the proceedings all the issues as to which the witness may possess information; and consequently another deposition may have to be obtained from him after the charges are referred. Thirdly, until the charges are referred, it cannot be stated definitely what type of court will try them; the convening authority may find that he has wasted certified counsel in taking depositions that will not ever be used in a general court-martial. Finally, in postponing reference of the charges until extensive depositions have been taken, a convening authority may be criticized for "unnecessary delay in the disposition of any case."[36]

II. EVALUATION

Today it is quite uncertain whether written depositions can be admitted in evidence against an accused who has requested that the witnesses either give oral depositions or be subpoenaed to appear personally before the court-martial. This uncertainty portends that, although written depositions will often be used by the defense to obtain favorable evidence, they will decline in importance as "tools for the prosecution".

Undoubtedly attacks will continue on the use against accused persons either of written or oral depositions. If such an attack were made in a case where written depositions had been used, it is at least conceivable that some undiscriminating court might simply proclaim that no deposition of any sort could be admitted in evidence over an accused's objection. On the other hand, if such an attack were made in a case where oral depositions had been used, the Government's position would be considerably stronger. With such depositions—and especially in light of the position taken by the Court of Military Appeals in *United States v. Brady*—the accused is well-protected in his right to cross-examine the witnesses against him and to have the effective aid of counsel. To the extent that cross-examination is the core of confrontation, he is also well-protected in his right of confrontation—or, at least, about as much as when former testimony is admitted in evidence against him at a second trial. Actually, the decline of the written deposition may eliminate one temptation for Federal civil courts to interfere with courts-martial.

[35] See Everett, *supra* note 27.

[36] See Article 98, 10 USC § 898 (1952 ed., Supp. V).

As for oral depositions, it must be said in all candor that their utility—at least for the prosecution—may have been greatly diminished by the decisions of the Court of Military Appeals concerning issuance of subpoenas and representation by counsel. Resourceful defense counsel will probably now be much more successful in obtaining the attendance in court of key prosecution or defense witnesses in place of their depositions; and the task of trial counsel and even of court members may become more burdensome. Although the importance of depositions should not be exaggerated, it does seem fair to say that the role of the deposition should now be carefully re-evaluated by those concerned with military justice.