

During the trial some of you may have taken notes, you may take your notes and your copy of any exhibits with you into the deliberation room. However, your notes are not a substitute for evidence admitted in the trial and should not be shown or read to the other members. You may use your notes to refresh your own recollection.

Madame President and Members of the Court, you may find AOAN Sager guilty of an offense only if you are convinced as to guilt by legal and competent evidence beyond any reasonable doubt as to each and every element of that offense. I will now discuss the offenses with you in the order in which they appear on your copy of the charge sheet.

ELEMENTS

**Charge: VIOLATION OF THE UCMJ ARTICLE 120 (Abusive Sexual Contact)**

**In the sole specification of Charge I AOAN Sager has been charged with and plead not guilty to a violation of Article 120 of the Uniform Code of Military Justice, Abusive Sexual Contact. In order to convict him of this offense the United States must have proven by legal and competent evidence beyond any reasonable doubt the following:**

- (1) On 9 March 2013, at or near Yokosuka, Japan, AOAN Sager committed sexual contact upon AOAN [REDACTED], to wit: penetrating AOAN Sager's mouth with AOAN [REDACTED]'s penis; and
- (2) He did so when AOAN [REDACTED] was incapable of consenting to the sexual contact due to impairment by an intoxicant and that condition was known or reasonably should have been known by AOAN Sager.

**Additional Charge: VIOLATION OF THE UCMJ ARTICLE 120 (Abusive Sexual Contact)**

**In the sole specification of the Additional Charge AOAN Sager has been charged with and plead not guilty to a violation of Article 120 of the Uniform Code of Military Justice, Abusive Sexual Contact. In order to convict him of this offense the United States must have proven by legal and competent evidence beyond any reasonable doubt the following:**

- (1) On 9 March 2013, at or near Yokosuka, Japan, AOAN Sager committed sexual contact upon AOAN [REDACTED], to wit: touching the penis of AOAN [REDACTED] with his hand;
- (2) When he knew or reasonably should have known that AOAN [REDACTED] was asleep, unconscious, or otherwise unaware that the sexual contact was occurring.

“Sexual contact” means:

- (A) any touching, or causing another person to touch, either directly or through the clothing, any body part of any person, if done with an intent to arouse or gratify the sexual desire of any person

Touching may be accomplished by any part of the body.

Evidence of consent to the sexual contacts is relevant to whether the prosecution has proven the elements of the offense beyond any reasonable doubt. Stated another way, evidence that AOAN █████ consented to the sexual contacts, either alone or in conjunction with the other evidence in this case, may cause a reasonable doubt as to whether AOAN Sager knew or reasonably should have known that the alleged victim was asleep or otherwise unaware that the sexual contacts were occurring or knew or reasonably should have known that the alleged victim was incapable of consenting to the sexual contacts due to impairment by an intoxicant.

“Incapable” means a complete and total mental impairment and incapacity due to the consumption of alcohol which rendered AOAN █████ completely unable to appraise the nature of the sexual conduct at issue, completely unable to physically communicate unwillingness to engage in the sexual conduct at issue, or otherwise completely unable to communicate competent decisions.

A person is capable of consenting to an act of sexual intercourse unless he is incapable of understanding the act, its motive, and its possible consequences. In deciding whether AOAN █████ consented to the sexual contact (oral stimulation) you should consider all the evidence in this case, including but not limited to: the degree of AOAN █████’s intoxication, consciousness or unconsciousness, or mental alertness; the ability of AOAN █████ to walk or communicate coherently; whether AOAN █████ may have consented to the act of sexual contact (oral stimulation) prior to lapsing into unconsciousness or falling asleep; the fact that AOAN █████ vomited multiple times; and the fact that he testified that he was too intoxicated to speak, move, or open his eyes during the alleged sexual contact.

In determining whether AOAN █████ was capable of consenting to the sexual activity, you should consider all the evidence in this case, including but not limited to: the ability of AOAN █████ to walk, talk, and carry on conversations; the ability of AOAN █████ to pay his own tab throughout the night; the ability of AOAN █████ to engage in complex tasks such as texting his ex-girlfriend; the ability of AOAN █████ to understand the act as it was occurring; and the ability of AOAN █████ to have rational thoughts during the encounter.

“Consent” means a freely given agreement to the conduct at issue by a competent person. An expression of lack of consent through words or conduct means there is no consent. A current or previous dating or social or sexual relationship by itself or the manner of dress of the person involved with the accused in the conduct at issue shall not constitute consent.

Lack of consent may be inferred based on the circumstances. All the surrounding circumstances are to be considered in determining whether a person gave consent, or whether a person did not resist or ceased to resist only because of another person’s actions.

A sleeping, unconscious, or incompetent person cannot consent to a sexual act. If you find that AOAN [REDACTED] was asleep, unconscious, or incompetent, you must find that he could not consent to sexual contact. If you do find that AOAN [REDACTED] was asleep, unconscious, or incompetent, you may not consider mistake of fact as to consent.

**[Knowledge]** I have instructed you that you must be satisfied beyond any reasonable doubt that AOAN Sager knew, or reasonably should have known that AOAN [REDACTED] was incapable of consenting due to an impairment by an intoxicant in Charge 1, and knew, or reasonably should have known that AOAN [REDACTED] was asleep, unconscious, or otherwise unaware in the Additional Charge. This knowledge, like any other fact, may be proved by circumstantial evidence. In deciding this issue you must consider all relevant facts and circumstances.

In determining whether AOAN Sager knew AOAN [REDACTED] was incapable of consenting due to impairment by an intoxicant as alleged in Charge 1, you may consider if AOAN Sager was under the mistaken belief that AOAN [REDACTED] was not incapable of consenting due to a impairment by an intoxicant, then he cannot be found guilty of the offense found in charge I.

The ignorance or mistake, no matter how unreasonable it might have been, is a defense. In deciding whether AOAN Sager was ignorant of the fact or under the mistaken belief that AOAN [REDACTED] was incapable of consenting due to a impairment by an intoxicant, or that AOAN [REDACTED] was asleep, unconscious, or otherwise unaware, you should consider the probability or improbability of the evidence presented on the matter.

You should consider AOAN Sager's age, education, experience, and intoxication level, along with the other evidence on this issue.

The burden is on the prosecution to establish the guilt of AOAN Sager. If you are convinced beyond any reasonable doubt that at the time of the alleged offenses AOAN Sager was not ignorant of the fact or under the mistaken belief AOAN [REDACTED] was incapable of consenting due to impairment by an intoxicant in Charge I, or asleep, unconscious, or otherwise unaware of the sexual contact occurring in the additional charge, then the defense of ignorance or mistake does not exist.

There is evidence in this case that indicates that, at the time of the alleged sexual contact, AOAN Sager may have been under the influence of alcohol. AOAN Sager's state of voluntary intoxication, if any, at the time of the offense is not relevant to mistake of fact as to whether he reasonably should have known that AOAN [REDACTED] was incapable of consenting to sexual contact due to impairment by an intoxicant or asleep. A mistaken belief that AOAN [REDACTED] consented must be that which a reasonably careful, ordinary, prudent, sober adult would have had under the circumstances at the time of the offense. Voluntary intoxication does not permit what would be an unreasonable belief in the mind of a sober person to be considered reasonable because the person is intoxicated.

However, the evidence has raised the issue of voluntary intoxication in relation to this offense with respect to whether AOAN Sager *knew* AOAN [REDACTED] was incapable of consenting. I advised you earlier that one of the elements of the offense of abusive sexual contact is that AOAN Sager knew that AOAN [REDACTED] was incapable of consenting due to impairment by an

intoxicant.. In deciding whether AOAN Sager had such knowledge at the time you should consider the evidence of voluntary intoxication.

The law recognizes that a person's ordinary thought process may be materially affected when he is under the influence of intoxicants. Thus, evidence that AOAN Sager was intoxicated may, either alone, or together with other evidence in the case cause you to have any reasonable doubt that AOAN Sager knew AOAN [REDACTED] was incapable of consenting due to impairment by an intoxicant.

On the other hand, the fact that AOAN Sager may have been intoxicated at the time of the offense does not necessarily indicate that he was unable to know that AOAN [REDACTED] was incapable of consenting due to impairment by an intoxicant, because a person may be drunk yet still be aware at that time of his actions and their probable results.

In deciding whether AOAN Sager knew that AOAN [REDACTED] was incapable of consenting due to impairment by an intoxicant at the time of the offense, you should consider the effect of intoxication, if any, as well as the other evidence in the case.

The burden of proof is on the prosecution to establish the guilt of AOAN Sager. If you are convinced beyond any reasonable doubt that AOAN Sager in fact knew that AOAN [REDACTED] was incapable of consenting due to impairment by an intoxicant, AOAN Sager will not avoid criminal responsibility because of voluntary intoxication.

**[Intent]** I have instructed you that AOAN Sager's intent to gratify the sexual desires of either himself or AOAN [REDACTED] must be proved beyond any reasonable doubt. Direct evidence of intent is often unavailable. AOAN Sager's intent, however, may be proved by circumstantial evidence. In deciding this issue, you must consider all relevant facts and circumstances.

NOTE 8: Mistake of fact as to consent.

The evidence has raised the issue of mistake on the part of AOAN Sager whether AOAN [REDACTED] consented to the sexual contact alleged concerning the offenses of abusive sexual contact, as alleged in the sole specification of Charge I (oral sex).

Mistake of fact as to consent is a defense to abusive sexual contact (oral sex). "Mistake of fact as to consent" means AOAN Sager held, as a result of ignorance or mistake, an incorrect belief that the other person engaging in the sexual contact consented. The ignorance or mistake must have existed in the mind of AOAN Sager and must have been reasonable under all the circumstances. To be reasonable the ignorance or mistake must have been based on information, or lack of it, that would indicate to a reasonable person that the other person consented. Additionally, the ignorance or mistake cannot be based on the negligent failure to discover the true facts. "Negligence" is the absence of due care. "Due care" is what a reasonably careful person would do under the same or similar circumstances.

The prosecution has the burden of proving beyond any reasonable doubt that the mistake of fact as to consent did not exist. If you are convinced beyond any reasonable doubt, at the time of the

charged abusive sexual contact contact, AOAN Sager was not under a mistaken belief that AOAN ██████████ consented the sexual contact alleged, the defense does not exist. Even if you conclude AOAN Sager was under a mistaken belief that AOAN ██████████ consented to the sexual contact (oral sex) alleged, if you are convinced beyond any reasonable doubt that at the time of the charged sexual contact, AOAN Sager's mistake was unreasonable, the defense does not exist.

NOTE 9: Voluntary intoxication.

#### CREDIBILITY OF EVIDENCE

You should bear in mind that only matters properly before the Court as a whole should be considered, and in weighing and evaluating the evidence, you are expected to utilize your own common sense and your knowledge of human nature and the ways of the world. In light of all the circumstances in the case, you should consider the inherent probability or improbability of the evidence. Bear in mind you may properly believe one witness and disbelieve several other witnesses whose testimony is in conflict with the one. The final determination as to the weight or significance of the evidence and the credibility of the witnesses in this case rests solely upon you, the members of the court.

#### COMMENTS AND QUESTIONS OF THE JUDGE

You must disregard any comment or statement made by me during the trial that might seem to indicate an opinion on my part as to the guilty or innocence of AOAN Sager since you, and you alone, have the responsibility to make that determination. As court members, each of you must impartially resolve this ultimate issue in accordance with the law I have given you, the evidence admitted in court, and your own conscience.

#### EVIDENTIARY AND OTHER INSTRUCTIONS

##### **7-3, Circumstantial Evidence**

Evidence may be direct or circumstantial. "Direct evidence" is evidence which tends directly to prove or disprove a fact in issue. If a fact in issue was whether it rained during the evening, testimony by a witness that he/she saw it rain would be direct evidence that it rained.

On the other hand, "circumstantial evidence" is evidence that tends to prove some other fact from which, either alone or together with some other facts or circumstances, you may reasonably

PROPOSED QUESTION BY A MEMBER OF THE COURT  
(ONLY ONE QUESTION PER SHEET)

1. Can we get clarification on  
"in capable of consent"

Young  
PRINT LAST NAME

[Signature]  
SIGNATURE OF MEMBER

..... FOR COUNSEL ONLY .....

TRIAL COUNSEL:  
OBJECTION  NO OBJECTION

DEFENSE COUNSEL:  
OBJECTION  NO OBJECTION

ARTICLE 39A

ARTICLE 39A

PROPOSED QUESTION BY A MEMBER OF THE COURT  
(ONLY ONE QUESTION PER SHEET)

1. Are we solely to consider capability of  
Consent due to intoxication or whether  
or not consent actually occurred?

Young  
PRINT LAST NAME

[Signature]  
SIGNATURE OF MEMBER

..... FOR COUNSEL ONLY .....

TRIAL COUNSEL:  
OBJECTION  NO OBJECTION   
ARTICLE 39A

DEFENSE COUNSEL:  
OBJECTION  NO OBJECTION   
ARTICLE 39A

_____	_____
_____	_____
_____	_____
_____	_____

## FINDINGS INSTRUCTIONS

MJ: Members of the court, at this time I will instruct you on the law you must apply in this case. When you close to deliberate and vote on the findings, each of you must resolve the ultimate question of whether the accused is guilty or not guilty based upon the evidence presented here and the court's instructions. It is my duty to instruct you on the law. It is your duty to determine the facts, apply the law to the facts, and thus determine the guilt or innocence of the accused, bearing in mind, again, that the law presumes the accused to be innocent of the charges against him.

MJ: You have heard an explanation of the facts by counsel for both parties as they view them. Bear in mind that the arguments of counsel are not evidence. Argument is made by counsel in order to assist you in understanding and evaluating the evidence. You must base the determination of the issues in the case on the evidence as you remember it.

MJ: Counsel may have referred to these instructions and, in that regard, if there is any inconsistency between what counsel say and the Court's instructions, you must follow the court's instructions.

MJ: During the trial some of you may have taken notes. You may take your notes with you into the deliberation room. However, your notes are not a substitute for evidence admitted in the trial and should not be shown or read to the other members. You may use your notes to refresh your own recollection.

MJ: You may find the accused guilty of an offense only if you are convinced as to guilt by legal and competent evidence beyond a reasonable doubt as to each and every element of that offense. I will now discuss the offenses with you in the order in which they appear on your copy of the charge sheet.

MJ: In Specification 1 of Charge I, the accused is charged with the offense of abusive sexual contact. In order to find the accused guilty of this offense, you must be convinced by legal and competent evidence beyond a reasonable doubt that:

**ABUSIVE SEXUAL CONTACT (ARTICLE 120)**

(1) That on divers occasions, between on or about June 2011 to 27 June 2012, on the island of Oahu, the accused engaged in sexual contacts, to wit: touching MA3 [REDACTED] genitalia and buttocks through the clothing with his hand, with MA3 [REDACTED];

(2) That the accused did so by causing bodily harm to MA3 [REDACTED], to wit: touching MA3 [REDACTED] genitalia and buttocks through the clothing with his hand.

And,

(3) That the accused did so without the consent of MA3 [REDACTED].

“Divers occasions” means two or more occasions.

“Sexual contact” means the intentional touching, either directly or through the clothing, of the genitalia, anus, groin, breast, inner thigh, or buttocks of another person, or intentionally causing another person to touch, either directly or through the clothing, the genitalia, anus, groin, breast, inner thigh, or buttocks of any person, with an intent to abuse or humiliate any person.

“Bodily harm” means any offensive touching of another, however slight.

The government has alleged the accused committed a sexual contact, to wit: touching MA3 [REDACTED] genitalia and buttocks through the clothing with his hand upon MA3 [REDACTED], and that the same physical acts also constitute the bodily harm required for the charged abusive sexual contact. Under these circumstances, the government also has the burden to prove beyond a reasonable doubt that MA3 [REDACTED] did not consent to the physical acts.

“Consent” means a freely given agreement to the conduct at issue by a competent person. An expression of lack of consent through words or conduct means there is no

consent. Lack of verbal or physical resistance or submission resulting from the use of force, threat of force, or placing another person in fear does not constitute consent. A current or previous dating or social or sexual relationship by itself or the manner of dress of the person involved with the accused in the conduct at issue shall not constitute consent.

Lack of consent may be inferred based on the circumstances. All the surrounding circumstances are to be considered in determining whether a person gave consent, or whether a person did not resist or ceased to resist only because of another person's actions.

The government has the burden to prove beyond a reasonable doubt that consent to the physical acts did not exist. Therefore, to find the accused guilty of the offense of abusive sexual contact, as alleged in Specification 1 of Charge I, you must be convinced beyond a reasonable doubt that MA3 [REDACTED] did not consent to the physical acts.

Evidence concerning consent to the sexual conduct, if any, is relevant and must be considered in determining whether the government has proven that the sexual conduct was done by causing bodily harm beyond a reasonable doubt. Stated another way, evidence the alleged victim consented to the sexual conduct, either alone or in conjunction with the other evidence in this case, may cause you to have a reasonable doubt as to whether the government has proven that the sexual conduct was done by causing bodily harm.

### **Mistake of fact as to consent**

The evidence has raised the issue of mistake of fact as to consent in relation to the offense of Abusive Sexual Contact. There has been testimony tending to show that, at the time of the alleged offense, the accused may have mistakenly believed that the alleged victims may have consented to the alleged sexual conduct.

Mistake of fact as to consent is a defense to this charged offense. "Mistake of fact as to consent" means the accused held, as a result of ignorance or mistake, an incorrect belief that the other person consented to the sexual conduct as alleged. The ignorance or mistake must have existed in the mind of the accused and must have been reasonable under all the circumstances. To be reasonable, the ignorance or mistake must have been based on information, or lack of it, that would indicate to a reasonable person that the other person consented. Additionally, the ignorance or mistake cannot be based on the negligent failure to discover the true facts. "Negligence" is the absence of due care. "Due care" is what a reasonably careful person would do under the same or similar circumstances.

You should consider the inherent probability or improbability of the evidence presented on this matter. You should consider the accused's age, education, and experience, along with the other evidence in this case.

The prosecution has the burden of proving beyond a reasonable doubt that the accused did not reasonably believe that the alleged victims consented to the sexual conduct. If you are convinced beyond a reasonable doubt, at the time of the offense, the accused did not believe that the alleged victim consented to the sexual conduct alleged, the defense does not exist. Furthermore, even if you conclude the accused was under a mistaken belief that the alleged victim consented to the sexual conduct alleged, if you are convinced beyond a reasonable doubt that at the time of the charged offense the accused's mistake was unreasonable, the defense does not exist.

MJ: The court is further advised that the offense of assault consummated by a battery is a lesser-included offense of the offense set forth in Specification 1 of Charge I. When you vote, if you find the accused not guilty of the offense charged, that is abusive sexual contact, then you should consider the lesser-included offense of assault consummated by a battery, in violation of Article 128, UCMJ. In order to find the accused guilty of this lesser offense, you must be convinced by legal and competent evidence beyond a reasonable doubt as follows:

(1) That on divers occasions, between on or about June 2011 to 27 June 2012, on the island of Oahu, the accused did bodily harm to MA3 [REDACTED];

(2) That the accused did so by touching MA3 [REDACTED] genitalia and buttocks through the clothing with his hand; and

(3) That the bodily harm was done with unlawful force or violence.

An "assault" is an attempt or offer with unlawful force or violence to do bodily harm to another. An assault in which bodily harm is inflicted is called a battery. A "battery" is an unlawful and intentional application of force or violence to another. The act must be done without legal justification or excuse and without the lawful consent of the victim. "Bodily harm" means any physical injury to or offensive touching of another person, however slight.

The offense charged, abusive sexual contact, and the lesser included offense of assault consummated by a batter differ in that the offense charged requires as an element that you be convinced beyond a reasonable doubt that the accused committed a sexual contact as I have defined that term for you, whereas the lesser offense of assault consummated by a battery does not include such an element.

Mistake of fact as to consent, as I have defined that term for you, is also a complete defense to the lesser included offense of assault consummated by a battery.

In Specification 2 of Charge I, the accused is also charged with the offense of abusive sexual contact, in violation of Article 120, UCMJ. You should note that my instructions relating to this offense are slightly different than my instructions relating to abusive sexual contact in Charge I. You should use the instructions appropriate to each specification. In order to find the accused guilty of this offense, you must be convinced by legal and competent evidence beyond reasonable doubt:

***ABUSIVE SEXUAL CONTACT (ARTICLE 120)***

(1) That on divers occasions between 28 June 2012 to on or about June 2013, on the island of Oahu, the accused committed sexual contact upon MA3 [REDACTED]; to wit: touching MA3 [REDACTED]'s genitalia and buttocks through the clothing with his hand; and

(2) That the accused did so by causing bodily harm to MA3 [REDACTED]; to wit: touching MA3 [REDACTED] genitalia and buttocks through the clothing with his hand.

And,

(3) That the accused did so without the consent of MA3 [REDACTED]

“Sexual contact” means touching, or causing another person to touch, either directly or through the clothing, the genitalia, anus, groin, breast, inner thigh, or buttocks of any person, with an intent to abuse or humiliate any person.

Touching may be accomplished by any part of the body. “Bodily harm” means any offensive touching of another, however slight.

The government has alleged the accused committed a sexual contact, to wit: touching MA3 [REDACTED] genitalia and buttocks through the clothing with his hand upon MA3 [REDACTED] and that the same physical acts also constitute the bodily harm required for the charged abusive sexual contact. Under these circumstances, the government also has the burden to prove beyond a reasonable doubt that MA3 [REDACTED] did not consent to the physical acts.

“Consent” means a freely given agreement to the conduct at issue by a competent person. An expression of lack of consent through words or conduct means there is no consent. Lack of verbal or physical resistance or submission resulting from the use of force, threat of force, or placing another person in fear does not constitute consent. A current or previous dating or social or sexual relationship by itself or the manner of

dress of the person involved with the accused in the conduct at issue shall not constitute consent.

Lack of consent may be inferred based on the circumstances. All the surrounding circumstances are to be considered in determining whether a person gave consent, or whether a person did not resist or ceased to resist only because of another person's actions.

The government has the burden to prove beyond a reasonable doubt that consent to the physical acts did not exist. Therefore, to find the accused guilty of the offense of abusive sexual contact, as alleged in specification 2 of Charge I, you must be convinced beyond a reasonable doubt that MA3 [REDACTED] did not consent to the physical acts.

Evidence concerning consent to the sexual conduct, if any, is relevant and must be considered in determining whether the government has proven that the sexual conduct was done by causing bodily harm beyond a reasonable doubt. Stated another way, evidence the alleged victim consented to the sexual conduct, either alone or in conjunction with the other evidence in this case, may cause you to have a reasonable doubt as to whether the government has proven that the sexual conduct was done by causing bodily harm.

Mistake of fact as to consent, as I have defined that term for you, is also a complete defense to this specification.

MJ: The court is further advised that the offense of assault consummated by a battery is a lesser-included offense of the offense set forth in Specification 2 of Charge I. When you vote, if you find the accused not guilty of the offense charged, that is abusive sexual contact, then you should consider the lesser-included offense of assault consummated by a battery, in violation of Article 128, UCMJ. In order to find the accused guilty of this lesser offense, you must be convinced by legal and competent evidence beyond a reasonable doubt as follows:

(1) That on divers occasions between 28 June 2012 to on or about June 2013, on the island of Oahu, the accused did bodily harm to MA3 [REDACTED]; to wit: touching MA3 [REDACTED] genitalia and buttocks through the clothing with his hand;

(2) That the accused did so by touching MA3 [REDACTED] genitalia and buttocks through the clothing with his hand; and

(3) That the bodily harm was done with unlawful force or violence.

An "assault" is an attempt or offer with unlawful force or violence to do bodily harm to another. An assault in which bodily harm is inflicted is called a battery. A "battery" is an unlawful and intentional application of force or violence to another. The act must be done without legal justification or excuse and without the lawful consent of the victim. "Bodily harm" means any physical injury to or offensive touching of another person, however slight.

The offense charged, abusive sexual contact, and the lesser included offense of assault consummated by a battery differ in that the offense charged requires as an element that you be convinced beyond a reasonable doubt that the accused committed a sexual contact as I have defined that term for you, whereas the lesser offense of assault consummated by a battery does not include such an element.

Mistake of fact as to consent, as I have defined that term for you, is again a complete defense to this lesser included offense of assault consummated by a battery.

In specification 1 of Charge II, the accused is charged with the offense of violating a lawful general order, in violation of Article 92, UCMJ. In order to find the accused guilty of this offense, you must be convinced by legal and competent evidence beyond reasonable doubt:

**VIOLATING GENERAL ORDER OR REGULATION (ARTICLE 92)**

(1) That there was in existence a certain lawful general order in the following terms: Paragraph 7(a) SECNAVINST 5300.26D, dated 3 January 2006, stating that sexual harassment is prohibited;

(2) That the accused had a duty to obey such order; and

(3) That on divers occasions between on or about January 2012 to on or about January 2013, on the island of Oahu, the accused violated this lawful general order by wrongfully committing sexual harassment.

As a matter of law, the order in this case, as described in the specification, if in fact there was such an order, was a lawful order.

General orders are those orders which are generally applicable to an armed force and which are properly published by a military department.

General orders also include those orders which are generally applicable to the command of the officer issuing them throughout the command or a particular subdivision thereof and which are issued by an officer having general court-martial jurisdiction or a general or flag officer in command or a commander superior to one of these.

You may find the accused guilty of violating a general order only if you are satisfied beyond a reasonable doubt that the order was general.

A general order issued by a commander with authority to do so retains its character as a general order when another officer takes command, until it expires by its own terms or is rescinded by separate action.

Sexual harassment is a form of sex discrimination that involves unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature when:

(1) Submission to such conduct is made either explicitly or implicitly a term or condition of a person's job, pay, or career.

(2) Submission to or rejection of such conduct by a person is used as a basis for career or employment decisions affecting that person.

(3) Such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creates an intimidating, hostile, or offensive work environment. This definition emphasizes that workplace conduct, to be actionable as "abusive work environment" harassment, need not result in concrete psychological harm to the victim, but rather need only be so severe or pervasive that a reasonable person would perceive, and the victim does perceive, the work environment as hostile or offensive. In considering what a reasonable person would perceive, you should consider whether a reasonable person, exposed to the same set of facts and circumstances, would find the behavior offensive. The reasonable person standard considers the complainant's perspective and does not rely upon stereotyped notions of acceptable behavior within that particular work environment. Similarly, any military member who makes deliberate or repeated unwelcome verbal comments, gestures, or physical contact of a sexual nature in the workplace is also engaging in sexual harassment.

#### ***VIOLATING GENERAL ORDER OR REGULATION (ARTICLE 92)***

In Specification 2 of charge II, the accused is also charged with violating a lawful general order in violation of Article 92, UCMJ. In order to find the accused guilty of this offense, you must be convinced by legal and competent evidence beyond reasonable doubt:

(1) That there was in existence a certain lawful general order in the following terms: Paragraph 6 of OPNAVINST 5354.1F, Change 1, dated 20 September 2011, stating that unlawful discrimination is prohibited;

(2) That the accused had a duty to obey such order; and

(3) That on divers occasions between 20 September to on or about June 2013, on the island of Oahu, the accused violated this lawful general order by wrongfully and unlawfully discriminating against personnel on the basis of race, sex, and national origin.

As a matter of law, the order in this case, as described in the specification, if in fact there was such an order, was a lawful order.

General orders are those orders which are generally applicable to an armed force and which are properly published by a military department.

General orders also include those orders which are generally applicable to the command of the officer issuing them throughout the command or a particular subdivision thereof and which are issued by an officer having general court-martial jurisdiction or a general or flag officer in command or a commander superior to one of these.

You may find the accused guilty of violating a general order only if you are satisfied beyond a reasonable doubt that the order was general.

A general order issued by a commander with authority to do so retains its character as a general order when another officer takes command, until it expires by its own terms or is rescinded by separate action.

MJ: **Credibility of witnesses:** You have the duty to determine the credibility, that is the believability, of the witnesses. In performing this duty, you must consider each witness's intelligence, ability to observe and accurately remember, in addition to the witness's sincerity and conduct in court, and prejudices. Consider also the extent to which each witness is either supported or contradicted by other evidence, the relationship each witness may have with either party, and how each witness might be affected by the verdict. In weighing discrepancies by a witness or between witnesses,

you should consider whether they resulted from an innocent mistake or a deliberate lie. Taking all these matters into account, you should then consider the probability of each witness's testimony and the inclination of the witness to tell the truth. The credibility of each witness's testimony should be your guide in evaluating testimony and not the number of witnesses called.

MJ: **Judicial notice:** I have taken judicial notice of the existence of OPNAVINST 5354.1F, Change 1, dated 20 September 2011, and SECNAVINST 5300.26D, dated 3 January 2006. This means that you are now permitted to recognize and consider this information as fact without further proof. You should consider it as evidence with all other evidence in the case. You may accept as conclusive any matter I have judicially noticed, but you are not required to do so.

MJ: **Circumstantial evidence:** Evidence may be direct or circumstantial. Direct evidence is evidence that tends directly to prove or disprove a fact in issue. Circumstantial evidence is evidence that tends directly to prove not a fact in issue, but some other fact or circumstance from which, either alone or together with some other facts or circumstances you may reasonably infer the existence or nonexistence of a fact in issue. Let me give you an example. If a witness testified that he or she saw it rain during the evening, that would be direct evidence. If there was evidence the street was wet in the morning, that would be circumstantial evidence from which you might reasonably infer it rained during the night. There is no general rule for determining or comparing the weight to be given to direct or circumstantial evidence. You should give all the evidence the weight and value you believe it deserves.

MJ: With respect to the specifications alleging abusive sexual contact, I have instructed you that the accused's intent to abuse or humiliate any person must be proved beyond a reasonable doubt. Direct evidence of intent is often unavailable. The accused's intent, however, may be proved by circumstantial evidence. In deciding this issue, you must consider all relevant facts and circumstances.

***OTHER CRIMES, WRONGS, OR ACTS EVIDENCE***

You heard evidence that the accused may have committed offenses of sexual assault.

Evidence that the accused committed each specification of Charge I may have no bearing on your deliberations in relation to the other specification in Charge I unless you first determine by a preponderance of the evidence, that is more likely than not, the offenses alleged in each specification in Charge I occurred. If you determine by a preponderance of the evidence the offenses alleged in each specification occurred even if you are not convinced beyond a reasonable doubt that the accused is guilty of that offense, you may nonetheless then consider the evidence of that offense for its bearing on any matter to which it is relevant in relation to the other specification in Charge I.

You may not, however, convict the accused solely because you believe he committed another offense or solely because you believe the accused has a propensity or predisposition to engage in sexual assault. In other words, you cannot use this evidence to overcome a failure of proof in the government's case, if you perceive any to exist. The accused may be convicted of an alleged offense only if the prosecution has proven each element beyond a reasonable doubt.

Each offense must stand on its own and proof of one offense carries no inference that the accused is guilty of any other offense. In other words, proof of one sexual assault creates no inference that the accused is guilty of any other sexual assault. However, it may demonstrate that the accused has a propensity to commit that type of offense. The prosecution's burden of proof to establish the accused's guilt beyond a reasonable doubt remains as to each and every element of each offense charged. Proof of one charged offense carries with it no inference that the accused is guilty of any other charged offense.

***CHARACTER—GOOD—OF ACCUSED TO SHOW PROBABILITY OF INNOCENCE***

To show the probability of his innocence, the defense has produced evidence of the accused's good military character.

Evidence of the accused's good military character may be sufficient to cause a reasonable doubt as to his guilt.

On the other hand, evidence of the accused's good military character may be outweighed by other evidence tending to show the accused's guilt.

MJ: **Prior inconsistent statement:** You have heard evidence that witnesses may have made a statement prior to trial that may be inconsistent with his or her testimony at this trial. If you believe that an inconsistent statement was made, you may consider the inconsistency in evaluating the credibility of the testimony of this witness. You may not, however, consider the prior statement as evidence of the truth of the matters contained in that prior statement.

MJ: **Accused's silence:** The accused has an absolute right to remain silent. You will not draw any inference adverse to the accused from the fact that he did not testify as a witness. You must disregard the fact that the accused has not testified.

MJ: **Spillover:** Each offense charged must stand on its own and you must keep the evidence of each offense separate. The burden is on the government to prove each element of each offense by legal and competent evidence beyond a reasonable doubt. Proof of one offense carries with it no inference that the accused is guilty of any other offense.

MJ: Members, you are further advised as follows: First, that the accused is presumed to be innocent unless and until his guilt is established by legal and competent evidence beyond a reasonable doubt;

MJ: Second, if there is a reasonable doubt as to the guilt of the accused, that doubt must be resolved in favor of the accused, and he shall be acquitted;

MJ: Third, if there is a reasonable doubt as to the degree of guilt, that doubt must be resolved in the favor of the lowest degree of guilt as to which there is no reasonable doubt;

MJ: The burden of proof to establish the guilt of the accused beyond a reasonable doubt is on the government. The burden never shifts to the accused to establish innocence or to disprove the facts necessary to establish each element of each offense alleged.

MJ: **Reasonable doubt:** Some of you may have served as jurors in civil cases, or as board members in administrative boards, where you were told that it is only necessary to prove that a fact is more likely true than not true. In criminal cases, the government's proof must be more powerful than that, it must be beyond a reasonable doubt.

MJ: By reasonable doubt is intended not a fanciful, speculative, or ingenious doubt or conjecture, but an honest and actual doubt suggested by the material evidence or lack of it in the case. It is a genuine misgiving caused by insufficiency of proof of guilt. Reasonable doubt is a fair and rational doubt based upon reason and common sense and arising from the state of the evidence. Proof beyond a reasonable doubt is proof that leaves you firmly convinced of the accused's guilt. There are very few things in this world that we know with absolute certainty, and in criminal cases, the law does not require proof that overcomes every possible doubt. If, based on your consideration of the evidence, you are firmly convinced that the accused is guilty of the crime charged, you must find him guilty. If, on the other hand, you think there is a real possibility that he is not guilty, you shall give him the benefit of the doubt and find him not guilty.

The rule as to reasonable doubt extends to every element of the offense, although each particular fact advanced by the prosecution that does not amount to an element need not be established beyond a reasonable doubt. However, if on the whole of the evidence, you are satisfied beyond a reasonable doubt of the truth of each and every element of an offense, then you should find the accused guilty of that offense.

MJ: **Credibility of evidence:** You should bear in mind that only matters properly before the court as a whole should be considered, and in weighing and evaluating the evidence, you are expected to utilize your own common sense and your knowledge of human nature and the ways of the world. In light of all the circumstances in the case,

you should consider the inherent probability or improbability of the evidence. Bear in mind you may properly believe one witness and disbelieve several other witnesses whose testimony is in conflict with the one. The final determination as to the weight or significance of the evidence and the credibility of the witnesses in this case rests solely upon you, the members of the court.

MJ: **Comments and questions of the judge:** You must disregard any comment or statement made by me during the trial that might seem to indicate an opinion on my part as to the guilt or innocence of the accused since you, and you alone, have the responsibility to make that determination. As court members, each of you must impartially resolve this ultimate issue in accordance with the law I have given you, the evidence admitted in court, and your own conscience.

MJ: **Procedural Instructions on Findings:** Members the following procedural rules will apply to your deliberation and must be observed. The influence of superiority in rank will not be employed in any manner in an attempt to control the independence of the members in the exercise of their own personal judgment. Your deliberations should properly include a full and free discussion of all the evidence that has been presented. After you have completed your discussion, then voting on your findings must be accomplished by secret written ballot, and all members of the court must vote.

MJ: You vote on the specifications under the charge before you vote on the charge. The order in which the several charges and specifications are to be voted on should be determined by the president subject to objection by a majority of the members.

If you find the accused guilty of any specification under a charge, the finding as to that charge is guilty.

The junior member collects and counts the votes, and the count is checked by the president, who immediately announces the result of the ballot to the members.

The concurrence of at least two thirds of the members is required for any finding of guilty. Since we have 3 members, that means that 2 members must concur in any

finding of guilty. If you have 2 votes of guilty with regard to the offense, then that will result in a finding of guilty for that offense. If fewer than 2 members vote for a finding of guilty, then your ballot resulted in a finding of not guilty.

MJ: **Contested LIO**: If a finding of not guilty is made to an offense, vote next on the lesser included offense. If a finding of guilty is made, you have convicted the accused of that lesser included offense. If you have voted on the lesser included offense and a finding of not guilty is made, you have acquitted the accused of this specification and its lesser included offense.

You may reconsider any finding prior to its being announced in open court. However, after you vote, if any member expresses a desire to reconsider any finding, the president of the court should tell the court that "a reconsideration has been proposed". Do not state (1) whether the finding proposed to be reconsidered is a finding of guilty or not guilty, or (2) which specification and charge is involved. I will then give you specific instructions on how to reconsider a finding.

As soon as the court has reached its findings, and I have examined the findings worksheet, the findings will be announced by the president in open court. The format is set out for you in the findings worksheet, Appellate Exhibit 31. The bailiff will deliver Appellate Exhibit 31 to the president of the court at this time.

MJ: You may use the findings worksheet as an aid in putting your findings in proper form. The first portion of the worksheet will be used if the accused is acquitted of all charges and specifications. The second part will be used if the accused is convicted as charged of all charges and specifications. And the third portion will be used if the accused is convicted of some, but not all, of the offenses.

Once you have completed the portions that are applicable, cross out everything that is not applicable.

MJ: If, during your deliberations, you have any questions concerning the findings worksheet or any other matter, please open the court and I will take those matters up

with you. I would ask that if you do have any such question, that you write it down on one of the question forms provided so that an accurate record of your question can be maintained.

The UCMJ prohibits me or anyone else from entering your deliberations. As a matter of law, you are not permitted to use cell phones, blackberries, or similar devices while in your closed deliberations. You may not consult the Manual for Courts-Martial or any other legal publication.

## ELEMENTS

### **Charge I, specification 1: VIOLATION OF THE UCMJ ARTICLE 120 (Sexual Assault)**

**In the first specification of Charge I, PS3 Welch has been charged with and pled not guilty to a violation of Article 120 of the Uniform Code of Military Justice, Sexual Assault. In order to convict him of this offense the United States must have proven by legal and competent evidence beyond any reasonable doubt the following:**

- (1) On 18 May 2013, at or near Fleet Activities Yokosuka, Japan, PS3 Welch committed a sexual act upon Mrs. [REDACTED] to wit: penetrating her vulva with his penis; and
- (2) He did so when by causing bodily harm to Mrs. [REDACTED], to wit: penetrating her vulva with his penis without her consent.

### **Charge I, specification 2: VIOLATION OF THE UCMJ ARTICLE 120 (Sexual Assault)**

**In the second specification of Charge I, PS3 Welch has been charged with and pled not guilty to a violation of Article 120 of the Uniform Code of Military Justice, Sexual Assault. In order to convict him of this offense the United States must have proven by legal and competent evidence beyond any reasonable doubt the following:**

- (1) On 18 May 2013, at or near Fleet Activities Yokosuka, Japan, PS3 Welch committed a sexual act upon Mrs. [REDACTED] to wit: penetrating her vulva with his fingers; and
- (2) He did so when by causing bodily harm to Mrs. [REDACTED] to wit: penetrating her vulva with his fingers without her consent, with an intent to gratify his sexual desire.

### **Definitions and other Instructions:**

“Sexual act” means:

- (a) Contact between the penis and the vulva, and for purposes of this subparagraph contact involving the penis occurs upon penetration, however slight; or
- (b) The penetration, however slight, of the vulva by any part of the body, with an intent to gratify the sexual desire of any person.

The “vulva” is the external genital organs of the female, including the entrance of the vagina and the labia majora and labia minora. “Labia” is the Latin and medically correct term for “lips.”

“Bodily harm” means any offensive touching of another, however slight, including any nonconsensual sexual act or nonconsensual sexual contact.

### **Evidence of Consent**

Evidence of consent to the sexual contact is relevant to whether the prosecution has proven the elements of the offense beyond a reasonable doubt. Stated another way, evidence that K.A consented to the sexual acts, either alone or in conjunction with the other evidence in this case,

may cause a reasonable doubt as to whether there was bodily harm caused by PS3 Welch in both specifications of Charge I.

“Consent” means a freely given agreement to the conduct at issue by a competent person. An expression of lack of consent through words or conduct means there is no consent. Lack of verbal or physical resistance or submission resulting from the use of force, threat of force, or placing another person in fear does not constitute consent. A current or previous dating or social or sexual relationship by itself or the manner of dress of the person involved with the accused in the conduct at issue shall not constitute consent.

Lack of consent may be inferred based on the circumstances. All the surrounding circumstances are to be considered in determining whether a person gave consent, or whether a person did not resist or ceased to resist only because of another person’s actions.

### **INCAPACITATION INSTRUCTION**

You have heard evidence that K.A. consumed a large amount of alcohol on the night in question, was able to say to PS3 Welch “no, I want Everett,” was able to extend her arms, but she was not able to move her legs. You also heard K.A.’s testimony that she was able to appraise the nature of the activity, form coherent thoughts about her feelings, and articulate words indicating a lack of consent. You have also seen and heard evidence of K.A.’s inability to walk, talk, or carry on conversations. You have heard that she had to be carried to the taxi, and you have been presented photographs of her being carried by PS3 Welch in the elevator to their apartment. You have also heard evidence that she had the ability to kiss PS3 Welch, but believed him to be her husband. You heard testimony that she could not remember who removed her clothes, but that she was able to crawl to the floor and use the restroom. You also heard testimony that the following morning, she woke up in a different room in different shorts, without memory of how she got there.

The government has not advanced a theory of rape due to K.A.’s incapacity to consent. Rather, they have articulated that PS3 Welch committed sexual acts upon her without her consent.

“Incapable” means a complete and total mental impairment and incapacity due to the consumption of alcohol, which would have appeared to a reasonable person to have rendered K.A. completely unable to appraise the nature of the sexual conduct at issue, completely unable to physically communicate unwillingness to engage in the sexual conduct at issue, or otherwise completely unable to communicate competent decisions.

### **NOTE 9: VOLUNTARY INTOXICATION**

The evidence has raised the issue of voluntary intoxication in relation to the offenses of sexual assault with respect to the second specification of Charge I. I advised you earlier that to find PS3 Welch guilty of the offense of sexual assault, specification 2 of Charge I, digital penetration, you must find beyond a reasonable doubt that that PS3 Welch had the specific intent to arouse or gratify the sexual desire of any person . .

In deciding whether PS3 Welch had such a specific intent at the time you should consider the evidence of voluntary intoxication.

The law recognizes that a person's ordinary thought process may be materially affected when he is under the influence of intoxicants. Thus, evidence that PS3 Welch was intoxicated may, either alone, or together with other evidence in the case, cause you to have a reasonable doubt that PS3 Welch had the specific intent to arouse or gratify the sexual desire of any person.

On the other hand, the fact that a person may have been intoxicated at the time of the offense does not necessarily indicate that he was unable to have the specific intent to arouse or gratify the sexual desire of any person because a person may be drunk yet still be aware at that time of his actions and their probable results.

In deciding whether PS3 Welch had the specific intent to arouse or gratify the sexual desire of any person at the time of the offense, you should consider the effect of intoxication, if any, as well as the other evidence in the case. In determining the possible effect on the accused of his prior use, if any, of intoxicants, you should consider the testimony regarding PS3 Welch's level of intoxication.

The burden of proof is on the prosecution to establish the guilt of the PS3 Welch. If you are convinced beyond a reasonable doubt that PS3 Welch in fact had the specific intent to arouse or gratify the sexual desire of any person for specification 2 of Charge I, PS3 Welch will not avoid criminal responsibility because of voluntary intoxication.

## Instructions

U.S. v. [REDACTED]

Members of the court, when you close to deliberate and vote on the findings, each of you must resolve the ultimate question of whether the accused is guilty or not guilty based upon the evidence presented here in court and upon the instructions which I will give you. My duty is to instruct you on the law. Your duty is to determine the facts, apply the law to the facts, and determine the guilt or innocence of the accused. The law presumes the accused to be innocent of the charge against him.

You have heard an exposition of the facts by counsel for both sides as they view them. Bear in mind that the arguments of counsel are not evidence. Argument is made by counsel in order to assist you in understanding and evaluating the evidence, but you must base the determination of the issues in the case on the evidence as you remember it and apply the law as I instruct you. Counsel may have referred to these instructions, and in that regard, if there is any inconsistency between what the counsel say and the Court's instructions, you must follow the Court's instructions.

During the trial some of you took notes. You may take your notes with you into the deliberation room. However, your notes are not a substitute for the record of trial. You may use your notes to refresh your own recollection.

You may find the accused guilty of an offense only if you are convinced as to guilt by legal and competent evidence beyond a reasonable doubt as to each and every element of that offense.

I will advise you of the elements of the offense alleged.

In the specification of Charge I, the accused is charged with the offense of Aggravated Sexual Assault, in violation of Article 120, UCMJ. In order to find the accused guilty of this offense, you must be convinced by legal and competent evidence beyond reasonable doubt:

### ***3-45-5. AGGRAVATED SEXUAL ASSAULT (ARTICLE 120)***

(1) That on or about 18 February 2012, in or near Darwin, Australia, the accused engaged in a sexual act, to wit: using his penis to penetrate the vulva of Lieutenant (junior grade) [REDACTED], U.S. Navy; and

(2) That the accused did so when Lieutenant (junior grade) [REDACTED] was substantially incapacitated.

#### d. DEFINITIONS AND OTHER INSTRUCTIONS:

“Sexual act” means contact between the penis and the vulva. Contact occurs upon penetration, however slight.

"Substantially incapacitated" means that level of mental impairment due to consumption of alcohol, drugs, or similar substance; while asleep or unconscious; or for other reasons; which rendered the alleged victim unable to appraise the nature of the sexual conduct at issue, unable to physically communicate unwillingness to engage in the sexual conduct at issue, or otherwise unable to make or communicate competent decisions.

The “vulva” is the external genital organs of the female, including the entrance of the vagina and the labia majora and labia minora. “Labia” is the Latin and medically correct term for “lips.”

The “genital opening” is the entrance to the vagina, which is the canal that connects the genital opening to the uterus.

The court is further advised that the offense of Abusive Sexual Contact is a lesser included offense of the offense set forth in the specification of the charge. When you vote, if you find the accused not guilty of the offense charged, that is Aggravated Sexual Assault, then you should consider the lesser included offense of Abusive Sexual Contact, also in violation of Article 120, UCMJ. In order to find the accused guilty of this lesser offense, you must be convinced by legal and competent evidence beyond reasonable doubt:

#### **3–45–6. ABUSIVE SEXUAL CONTACT (ARTICLE 120)**

##### **Abusive sexual contact:**

(1) That on or about 18 February 2012, in or near Darwin, Australia, the accused engaged in sexual contact, to wit : using his penis to touch the genitalia of Lieutenant (junior grade) [REDACTED]

(2) That the accused did so when Lieutenant [REDACTED] was substantially incapacitated.

“Sexual contact” means the intentional touching, either directly or through the clothing, of the genitalia, anus, groin, breast, inner thigh, or buttocks of another person, or intentionally causing another person to touch, either directly or through the clothing, the genitalia, anus, groin, breast, inner thigh, or buttocks of any person, with an intent to abuse, humiliate, or degrade any person or to arouse or gratify the sexual desire of any person.

"Substantially incapacitated" means that level of mental impairment due to consumption of alcohol, drugs, or similar substance; while asleep or unconscious; or for other reasons; which rendered the alleged victim unable to appraise the nature of the sexual conduct at issue, unable to physically communicate unwillingness to engage in the sexual conduct at issue, or otherwise unable to make or communicate competent decisions.

The offense charged, Aggravated Sexual Assault, and the lesser included offense of Abusive Sexual Contact differ in that the offense charged requires as one of its elements that you be convinced beyond a reasonable doubt that the accused engaged in a sexual act as I have defined that term, whereas the lesser offense of Abusive Sexual Contact requires as one of its elements that you be convinced beyond a reasonable doubt that the accused engaged in a sexual contact, as I have defined that term.

You are advised another lesser included offense of the offense alleged in the specification of Charge 1 is the offense of Wrongful Sexual Contact also in violation of Article 120. When you vote, if you find the accused not guilty of the prior lesser included offense, then you should consider the second lesser-included offense of Wrongful Sexual Contact, also in violation of Article 120, UCMJ. In order to find the accused guilty of this lesser offense, you must be convinced by legal and competent evidence beyond reasonable doubt:

**3-45-11. WRONGFUL SEXUAL CONTACT (ARTICLE 120)**

(1) That on or about 18 February 2012, in or near Darwin, Australia, the accused engaged in sexual contact, to wit: using his penis to touch the genitalia of Lieutenant (junior grade) [REDACTED];

(2) That such sexual contact was without the permission of Lieutenant [REDACTED] and,

(3) That such sexual contact was wrongful.

**d. DEFINITIONS AND OTHER INSTRUCTIONS:**

"Wrongful" means without legal justification or lawful authorization.

"Sexual contact" means the intentional touching, either directly or through the clothing, of the genitalia, anus, groin, breast, inner thigh, or buttocks of another person, with an intent to abuse, humiliate, or degrade any person or to arouse or gratify the sexual desire of any person.

“Without permission” means without consent. “Consent” means words or overt acts indicating a freely given agreement to the sexual conduct by a competent person. An expression of lack of consent through words or conduct means there is no consent. Lack of verbal or physical resistance or submission resulting from the accused’s use of force, threat of force, or placing another person in fear does not constitute consent. A current or previous dating relationship by itself or the manner of dress of the person involved with the accused in the sexual conduct at issue shall not constitute consent. A person cannot consent to sexual activity if that person is substantially incapable of appraising the nature of the sexual conduct at issue due to mental impairment or unconsciousness resulting from consumption of alcohol, drugs, a similar substance, or otherwise.

The prosecution has the burden to prove lack of consent beyond a reasonable doubt. Therefore, to find the accused guilty of the offense of wrongful sexual contact, as alleged in the specification of the charge, you must be convinced beyond a reasonable doubt that, at the time of the sexual contacts alleged, Lieutenant ██████ did not consent.

This lesser included offense differs from the lesser included offense I just discussed with you previously in that the previous lesser included offense of Abusive Sexual Contact requires as an essential elements that you be convinced beyond a reasonable doubt that Lieutenant ██████ was substantially incapacitated at the time of the alleged offense, whereas this lesser offense of Wrongful Sexual Contact does not include such an element. Wrongful Sexual Contact, on the other hand, requires that you find two elements not included in Abusive Sexual Contact, namely that the sexual contact was without the permission of Lieutenant ██████ and that the sexual contact was wrongful, as I have defined those terms for you.

### **Consent**

Consent is a defense to Charge I-and all of ~~the~~its lesser included offenses. “Consent” means words or overt acts indicating a freely given agreement to the sexual conduct by a competent person. An expression of lack of consent through words or conduct means there is no consent. Lack of verbal or physical resistance or submission resulting from the accused's use of force, threat of force, or placing another person in fear does not constitute consent. A current or previous dating relationship by itself or the manner of dress of the person involved with the accused in the sexual conduct at issue shall not constitute consent. A person cannot consent to sexual activity if that person is substantially incapable of appraising the nature of the sexual conduct at issue due to mental impairment or unconsciousness resulting from consumption of alcohol, drugs, a similar substance, or otherwise.

The prosecution has the burden to prove beyond a reasonable doubt that consent did not exist. Therefore, to find the accused guilty of an offense, you must be convinced beyond a reasonable doubt that, at the time of the alleged offenses, Lieutenant [REDACTED] did not consent.

### **Mistake of Fact as a Defense**

The evidence has also raised the issue of mistake on the part of the accused as to whether Lieutenant [REDACTED] consented to the sexual contacts alleged in the specification of Charge I.

Mistake of fact as to consent is a defense to Charge I and all the lesser included offenses. "Mistake of fact as to consent" means the accused held, as a result of ignorance or mistake, an incorrect belief that the other person engaging in the sexual conduct consented. The ignorance or mistake must have existed in the mind of the accused and must have been reasonable under all the circumstances. To be reasonable the ignorance or mistake must have been based on information, or lack of it, that would indicate to a reasonable person that the other person consented. Additionally, the ignorance or mistake cannot be based on the negligent failure to discover the true facts. "Negligence" is the absence of due care. "Due care" is what a reasonably careful person would do under the same or similar circumstances.

The prosecution has the burden of proving beyond a reasonable doubt that the mistake of fact as to consent did not exist. If you are convinced beyond a reasonable doubt, at the time of the charged abusive sexual contacts, the accused was not under a mistaken belief that the alleged victim consented to the sexual contacts, the defense does not exist. Even if you conclude the accused was under a mistaken belief that the alleged victim consented to the sexual contacts, if you are convinced beyond a reasonable doubt that at the time of the charged abusive sexual contacts, the accused's mistake was unreasonable, the defense does not exist.

In specifications 1 and 2 of Charge II, the accused is charged with the offense of Adultery, in violation of Article 134, UCMJ. In order to find the accused guilty of this offense, you must be convinced by legal and competent evidence beyond reasonable doubt:

#### **3-62-1. ADULTERY (ARTICLE 134)**

- (1) That on or about 18 February 2012, the accused wrongfully had sexual intercourse with Lieutenant (junior grade) [REDACTED], U.S.N.;
- (2) That, at the time, the accused was married to another; and

(3) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces, for purposes of specification 1, and that, for purposes of specification 2, that the conduct of the accused was of a nature to bring discredit upon the armed forces.

#### d. DEFINITIONS AND OTHER INSTRUCTIONS:

“Conduct prejudicial to good order and discipline” is conduct which causes a reasonably direct and obvious injury to good order and discipline.

“Service discrediting conduct” is conduct which tends to harm the reputation of the service or lower it in public esteem.

“Sexual intercourse” is any penetration, however slight, of the female sex organ by the penis. An ejaculation is not required.

The “female sex organ” includes not only the vagina, which is the canal that connects the uterus to the external opening of the genital canal, but also the external genital organs including the labia majora and the labia minora. “Labia” is the Latin and medically correct term for “lips.”

Not every act of adultery constitutes an offense under the Uniform Code of Military Justice. To constitute an offense, the government must prove beyond a reasonable doubt that the accused’s adultery was directly prejudicial to good order and discipline.

“Conduct prejudicial to good order and discipline” includes adultery that has an obvious and measurably divisive effect on the discipline, morale, or cohesion of a military unit or organization, or that has a clearly detrimental impact on the authority, stature, or esteem of a service member.

“Service discrediting conduct” is conduct which tends to harm the reputation of the service or lower it in public esteem.

Under some circumstances, adultery may not be prejudicial to good order and discipline but, nonetheless, may be service discrediting, as I have explained those terms to you. Likewise, depending on the circumstances, adultery can be prejudicial to good order and discipline but not be service discrediting.

In determining whether the alleged adultery in this case is prejudicial to good order and discipline or of a nature to bring discredit upon the armed forces, you should consider all the facts and circumstances offered on this issue, including, but not limited to:

the accused’s marital status, military rank, grade, or position;

the co-actor's marital status, military rank, grade, or position, or relationship to the armed forces;

the impact, if any, of the adulterous relationship on the ability of the accused or the co-actor to perform their duties in support of the armed forces;

(the impact of the adultery, if any, on the units or organizations of the accused, the co-actor, such as a detrimental effect on unit or organization morale, teamwork, and efficiency);

where the adultery occurred;

who may have known of the adultery;

A marriage exists until it is dissolved in accordance with the laws of a competent state or foreign jurisdiction.

In the sole specification of the additional Charge, the accused is charged with the offense of Conduct Unbecoming an Officer and Gentleman, in violation of Article 133, UCMJ. In order to find the accused guilty of this offense, you must be convinced by legal and competent evidence beyond reasonable doubt:

### ***Conduct Unbecoming (ARTICLE 133)***

(1) That between on or about 1 January 2012 and on or about 18 February 2012, in or near Cebu, Philippines, the accused; wrongfully engaged in physical activity of a romantic nature with Lieutenant (junior grade) [REDACTED];

(2) That, under the circumstances, the accused's conduct was unbecoming an officer and gentleman.

#### **d. DEFINITIONS AND OTHER INSTRUCTIONS:**

“Conduct unbecoming an officer and a gentleman” means behavior in an official capacity which, in dishonoring or disgracing the individual as a commissioned officer, seriously detracts from his character as a gentleman or behavior in an unofficial or private capacity which, in dishonoring or disgracing the individual personally, seriously detracts from his standing as a commissioned officer. “Unbecoming conduct” means misbehavior more serious than slight and of a material and pronounced character. It means conduct morally unfitting and unworthy rather than merely inappropriate or unsuitable misbehavior which is more than opposed to good taste or propriety.

You are further advised, first, that the accused is presumed to be innocent unless and until his guilt is established by legal and competent evidence beyond a reasonable doubt;

Second, if there is a reasonable doubt as to the guilt of the accused, that doubt must be resolved in favor of the accused, and he shall be acquitted;

Third, if there is a reasonable doubt as to the degree of guilt, that doubt must be resolved in the favor of the lowest degree of guilt as to which there is no reasonable doubt;

The burden of proof to establish the guilt of the accused beyond a reasonable doubt is on the government. The burden never shifts to the accused to establish innocence or to disprove the facts necessary to establish each element of each (the) offense alleged.

**Reasonable doubt:** Some of you may have served as jurors in civil cases, or as board members in administrative boards, where you were told that it is only necessary to prove that a fact is more likely true than not true. In criminal cases, the government's proof must be more powerful than that, it must be beyond a reasonable doubt.

By reasonable doubt is intended not a fanciful, speculative, or ingenious doubt or conjecture, but an honest and actual doubt suggested by the material evidence or lack of it in the case. It is a genuine misgiving caused by insufficiency of proof of guilt. Reasonable doubt is a fair and rational doubt based upon reason and common sense and arising from the state of the evidence. Proof beyond a reasonable doubt is proof that leaves you firmly convinced of the accused's guilt. There are very few things in this world that we know with absolute certainty, and in criminal cases, the law does not require proof that overcomes every possible doubt. If, based on your consideration of the evidence, you are firmly convinced that the accused is guilty of the crime charged, you must find him guilty. If, on the other hand, you think there is a real possibility that he is not guilty, you shall give him the benefit of the doubt and find him/her not guilty.

The rule as to reasonable doubt extends to every element of the offense, although each particular fact advanced by the prosecution that does not amount to an element need not be established beyond a reasonable doubt. However, if on the whole of the evidence, you are satisfied beyond a reasonable doubt of the truth of each and every element of an offense, then you should find the accused guilty of that offense.

Bear in mind that only matters properly before the court as a whole should be considered. In weighing and evaluating the evidence you are expected to use your own

counsel is not evidence. Argument is made by counsel in order to assist you in understanding and evaluating the evidence. You must base the determination of the issues in this case on the evidence as you remember it. Counsel may have re--have referred to these instructions and, in that regard, if there is any inconsistency between what counsel say and the court's instructions, you must follow the court's instructions.

During the trial, some of you may have taken notes. You may take your notes into and--into the--into the deliberation room; however, your notes are not a substitute for the evidence admitted in the trial and should not be shown or read to any other member. You may, however, use your notes to refresh your own recollection.

You may find the accused guilty of any of the--of an offense only if you are convinced as to his guilt by legal and competent evidence beyond a reasonable doubt as to each and every element of the offense. I'll--I'll now discuss the offenses with you.

In Specifications 1 and 2 of Charge I, the accused is charged with the offense of sexual assault in violation of Article 120 of the Uniform Code of Military Justice. In order to find the accused guilty of these offenses, you must be convinced by legal and competent evidence beyond a reasonable doubt of the following elements:

For Specification 1:

That on or about 7 September 2013, on the island of Oahu, Hawaii, the accused committed a sexual act upon [REDACTED], to wit: penetrating [REDACTED]' vulva with his penis; and

Two, that the accused did so when he reasonably should have known that [REDACTED] was asleep.

For Specification 2, in order to find the accused guilty of this offense, once again you must be convinced by legal and competent evidence beyond a reasonable doubt of the following elements:

That on or about 7 September 2013, on the island of Oahu, Hawaii, the accused committed a sexual act upon [REDACTED], to wit: penetrating [REDACTED]' vulva with his penis; and

Two, that the accused did so when he reasonably should have known that [REDACTED] was incapable of consenting to the sexual act due to an impairment by an intoxicant, to wit: alcohol, and that condition was known, or reasonably--excuse me, and that condition reasonably should have been known by the accused.

"Sexual act" means contact between the penis and vulva. Contact involving the penis occurs upon penetration, however slight.

The "vulva" is the external genital organs of the female, including the entrance of the vagina, and labia majora and labia minora. "Labia" is the Latin and medically-correct term for lips.

"Consent" means a freely-given agreement to the conduct at issue by a competent person. An expression of lack of consent through words or conduct means that there is no consent. Lack of verbal or physical resistance or submission resulting from the use of force, threat of force, or placing another person in fear does not constitute consent. A current or previous dating or social or sexual relationship, by itself, or the manner of dress of the person involved with the accused in the conduct at issue shall not constitute consent.

The evidence has raised the issue of ignorance on the part of the accused concerning [REDACTED]' condition in relation to--to the offense of sexual assault. I advised you earlier that to find the accused guilty of the offense of sexual assault you must find beyond a reasonable doubt that the accused should reasonably have known that [REDACTED] was asleep or incapable of consenting to the sexual act due to impairment by alcohol.

The accused is not guilty of the offense of sexual assault if: the accused should not have reasonably known that [REDACTED] was asleep or incapable of consenting to the sexual act due to impairment by alcohol; and two, such ignorance on his part should have been reasonable.

To be reasonable, the ignorance must be based on information, or lack of it, which would indicate to a reasonable

person that [REDACTED] was not asleep or incapable of consenting to the sexual conduct due to impairment by alcohol. Additionally, the ignorance cannot be based on a negli--negligent failure to discover the true facts. "Negligence" is the absence of due care. "Due care" is what a reasonably-careful person would do under the same or similar circumstances. You should consider the accused's age and experience, along with other evidence, on this issue.

The burden is on the prosecution to establish the accused's guilt. If you are convinced beyond a reasonable doubt that at the time of the charged offenses the accused reasonably should have known that [REDACTED] was asleep or incapable of consenting to sexual conduct due to impairment by alcohol, the defense of ignorance does not exist. Even if you conclude that the accused was ignorant of the fact that [REDACTED] was asleep or incapable of consenting to the sexual conduct due to impairment by alcohol, if you are convinced beyond a reasonable doubt that at the time of the charged offenses the accused's ignorance was unreasonable, the defense of ignorance does not exist.

There has been some evidence concerning the accused's state of intoxication at the time of the alleged offenses. On the question of whether the accused's ignorance was reasonable, you may not consider the accused's intoxication, if any, because a reasonable ignorance is one that an ordinary, prudent, sober adult would have

under the circumstances of the case. Voluntary intoxication does not permit what would be an unreasonable ignorance in the mind of a sober person to be considered reasonable because the person is intoxicated.

In Charge II, the accused is charged with the offense of adultery in violation of Article 134 of the Uniform Code of Military Justice. In order to find the accused guilty of this offense, once again you must be convinced by legal and competent evidence beyond a reasonable doubt of the following elements:

One, that on or about 7 September 2013, on the island of Oahu, Hawaii, the accused wrongfully had sexual intercourse with

██████████;

Two, that at the time, the accused was married to another or ██████████ was married to another; and

Three, that under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces and of a nature to bring discredit upon the armed forces.

Let me provide you some definitions.

"Conduct prejudicial to good order and discipline" is conduct which causes a reasonably direct and obvious injury to good order and discipline.