

Manual for Courts-Martial

2019 Edition

Supplemental Materials

Table of Supplemental Materials

Discussion: Contained Within Respective Parts of the Manual for Courts-Martial

Appendices:

1. Constitution of the United States—1787
2. Uniform Code of Military Justice
 - 2.1 Non-Binding Disposition Guidance
3. DoD Instruction 5525.07
4. Memorandum of Understanding Between the Departments of Justice and Transportation (Coast Guard) Relating to the Investigations and Prosecution of Crimes Over Which the Two Departments Have Concurrent Jurisdiction
5. Charge Sheet
6. Preliminary Hearing Officer's Report
7. Subpoena
8. Guide for Summary Courts-Martial
9. Record of Trial by Summary Court-Martial
10. Forms for Action (Cases Referred Before 1 January 2019)
11. Forms for Court-Martial Orders (Cases Referred Before 1 January 2019)
12. Maximum Punishment Chart
- 12A. Lesser Included Offenses
13. Waiver/Withdrawal of Appellate Rights in General and Special Courts-Martial Subject to Review by a Court of Criminal Appeals
14. Waiver/Withdrawal of Appellate Rights in General Courts-Martial Subject to Examination in the Office of the Judge Advocate General (Cases Referred Before 1 January 2019)
15. Analysis of Rules for Courts-Martial
16. Analysis of the Military Rules of Evidence
17. Analysis of Punitive Articles
18. Analysis of Nonjudicial Punishment Procedure
19. Historical Executive Orders
20. Punitive Articles Applicable to Sexual Assault Offenses Committed Prior to 1 October 2007
21. Punitive Articles Applicable to Sexual Assault Offenses Committed During the Period 1 October 2007 through 27 June 2012
22. Punitive Articles Applicable to Sexual Assault Offenses Committed During the Period 28 June 2012 through 31 December 2018

PART I.

PREAMBLE

The Discussion following paragraph 4 of Part I of the Manual for Courts-Martial reads as follows:

Discussion

The Department of Defense, in conjunction with the Department of Homeland Security, has published supplementary materials to accompany the Manual for Courts-Martial. These materials consist of a Discussion (accompanying the Preamble, the Rules for Courts-Martial, the Military Rules of Evidence, and the Punitive Articles), an Analysis, and various appendices. With the exception of Appendix 12A (lesser included offenses), which is issued by the President pursuant to Article 79, these supplementary materials do not constitute the official views of the Department of Defense, the Department of Homeland Security, the Department of Justice, the military departments, the United States Court of Appeals for the Armed Forces, or any other authority of the Government of the United States, and they do not constitute rules. *Cf., e.g.,* 5 U.S.C. § 551(4). The supplementary materials do not create rights or responsibilities that are binding on any person, party, or other entity (including any authority of the Government of the United States whether or not included in the definition of “agency” in 5 U.S.C. § 551(1)). Failure to comply with matter set forth in the supplementary materials does not, of itself, constitute error, although these materials may refer to requirements in the rules set forth in the Executive Order or established by other legal authorities (for example, binding judicial precedents applicable to courts-martial) that are based on sources of authority independent of the supplementary materials. *See* Appendix 21 in this Manual.

The 1995 amendment to paragraph 4 of the Preamble eliminated the practice of identifying the Manual for Courts-Martial, United States, by a particular year. Historically the Manual had been published in its entirety sporadically (*e.g.*, 1917, 1921, 1928, 1949, 1951, 1969, and 1984) with amendments to it published piecemeal. It was therefore logical to identify the Manual by the calendar year of publication, with periodic amendments identified as “Changes” to the Manual. Beginning in 1995, however, a new edition of the Manual was published in its entirety and a new naming convention was adopted. *See* Exec. Order No. 12960 of May 12, 1995. Beginning in 1995, the Manual was to be referred to as “Manual for Courts-Martial, United States (19xx edition).” In 2013, the Preamble was amended to identify new Manuals based on their publication date.

Amendments made to the Manual can be researched in the relevant Executive Order as referenced in Appendix 19. Although the Executive Orders were removed from Appendix 19 of the Manual in 2012 to reduce printing requirements, they can be accessed online. *See* Appendix 19.

Part II: RULES FOR COURTS-MARTIAL

The Introduction to the Analysis of the Rules for Courts-Martial (Appendix 15) Reads as Follows:

Introduction

The Manual for Courts-Martial, United States, 2019 implements the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016), as further amended by Section 1081 of the National Defense Authorization Act for Fiscal Year 2018, Pub. Law. No. 115-91, 131 Stat. 1283 (2017). It includes one Executive Order signed by President Donald Trump; Executive Order No. 13825 (1 March 2018). This publication also contains various supplementary materials for the convenience of the user.

History of the Manual for Courts-Martial. The President traditionally has exercised the power to make rules for the government of the military establishment, including rules governing courts-martial. *See* W. Winthrop, *Military Law and Precedents* 27–28 (2d ed. 1920 reprint). Such rules have been promulgated under the President’s authority as commander-in-chief, *see* U.S. Const., Art. II, sec. 2, cl.1., and, at least since 1813, such power also has been provided for in statutes. *See* W. Winthrop, *supra*, at 26–27. Article 36 of the Uniform Code of Military Justice provides such authority. *See also* Articles 18 and 56. *See generally* *Hearings on H.R. 3804 Before the Military Personnel Subcomm. of the House Comm. on Armed Services*, 96th Cong., 1st Sess. 5–6, 14, 17–18, 20–21, 52, 106 (1979). In 1979, Article 36 was amended to clarify the broad scope of the President’s rulemaking authority for courts-martial. Act of November 9, 1979, Pub. L. No. 96–107, Section 801(b), 93 Stat. 810,811. *See generally* *Hearings on H.R. 3804, supra*.

In the nineteenth century the President promulgated, from time to time, regulations for the Army. Those regulations were published in various forms, including “Manuals.” W. Winthrop, *supra*, at 28. Such publications were not limited to court-martial procedures and related matters; however, they were more in the nature of compendiums of military law and regulations. The early manuals for courts-martial were informal guides and were not promulgated by the President. *See* MCM, 1895 at 1, 2; MCM, 1905 at 3; MCM, 1910 at 3; MCM, 1917 at III. *See also* MCM, 1921 at XIX.

The forerunner of the modern *Manual for Courts-Martial* was promulgated by the Secretary of War in 1895. *See* MCM, 1895 at 2. *See also* *Hearings on H.R. 3805, supra*, at 5. (Earlier Manuals were prepared by individual authors. *See e.g.*, A. Murray, *A Manual for Courts-Martial* (3d ed. 1893); H. Coppée, *Field Manual for Courts-Martial* (1863)). Subsequent Manuals through MCM, 1969 (Rev.) have had the same basic format, organization, and subject matter as MCM, 1895, although the contents have been modified and considerably expanded. *See, e.g.*, MCM, 1921 at XIX–XX. The format was been a paragraph format, numbered consecutively and divided into chapters. The subject matter included pretrial, trial, and post-trial procedure. In MCM, 1917, rules of evidence and explanatory materials on the punitive articles were included. *See* MCM, 1917 at XIV. The 1921 Manual for Courts-Martial was the first to be promulgated by the President. *See* MCM, 1921 at XXVI.

Background of this Manual. During the drafting of the Military Rules of Evidence (*see* Analysis, Part III, introduction, *infra*), the drafters identified several portions of MCM, 1969 (Rev.) in which they considered revisions appropriate. Consideration was given to amending MCM, 1969 (Rev.) in specific areas. However, the project to draft the Military Rules of Evidence had demonstrated the value of a more comprehensive examination of existing law. In addition, changing the format of the Manual for Courts-Martial was considered desirable. In this regard it should be noted that, as indicated above, the basic format and organization of the Manual for Courts-Martial had remained the same for over 80 years, although court-martial practice and procedure had changed substantially.

Upon completion of the Military Rules of Evidence in early 1980, the General Counsel, Department of Defense, with the concurrence of the Judge Advocates General, directed that the Manual for Courts-Martial be revised. There were four basic goals for the revision. First, the new Manual was to conform to federal practice to the extent possible, except where the Uniform Code of Military Justice requires otherwise or where specific military requirements render such conformity impracticable. *See* Article 36. Second, current court-martial practice and applicable judicial precedent was to be thoroughly examined and the Manual was to be brought up to date, by modifying such practice and precedent or conforming to it as appropriate. Third, the format of the Manual was to be modified to make it more useful to lawyers (both military and civilian) and nonlawyers. Specifically, a rule as opposed to paragraph format was to be used and prescriptive rules would be separated from nonbinding discussion. Fourth, the procedures in the new Manual

had to be workable across the spectrum of circumstances in which courts-martial are conducted, including combat conditions.

These goals were intended to ensure that the Manual for Courts-Martial continues to fulfill its fundamental purpose as a comprehensive body of law governing the trial of courts-martial and as a guide for lawyers and nonlawyers in the operation and application of such law. It was recognized that no single source could resolve all issues or answer all questions in the criminal process. However, it was determined that the Manual for Courts-Martial should be sufficiently comprehensive, accessible, and understandable so it could be reliably used to dispose of matters in the military justice system properly, without the necessity to consult other sources, as much as reasonably possible.

The Joint Service Committee on Military Justice was tasked with the project. In the summer of 1980, the Navy and Army prepared an initial outline of the new Manual. Drafting was done by the Working Group of the Joint Service Committee on Military Justice.

The Working Group drafted the Manual in fourteen increments. Each increment was circulated by each service to various field offices for comment. Following such comment, each increment was reviewed in the respective offices of the Judge Advocates General, the Director, Judge Advocate Division, Headquarters, USMC, and the Chief Counsel, USCG, and in the Court of Military Appeals. Following such review, the Joint Service Committee met and took action on each increment. After all increments had been reviewed and approved, the Code Committee approved the draft.

Following approval by the Code Committee, the draft was made available for comment by the public. 48 Fed. Reg. 23688 (May 26, 1983). In September and October 1983, the comments were reviewed. The Working Group prepared numerous modifications in the draft based on comments from the public and from within the Department of Defense, and on judicial decisions and other developments since completion of the draft. In October 1983, the Joint Service Committee approved the draft for forwarding to the General Counsel, Department of Defense, for submission to the President after coordination by the Office of Management and Budget.

On November 18, 1983, Congress passed the Military Justice Act of 1983. This act was signed into law by the President on December 6, 1983, Pub. L. No. 98–209, 97 Stat. 1393 (1983). The Working Group had previously drafted proposed modifications to the May 1983 draft which would be necessary to implement the act. These proposed modifications were approved by the Joint Service Committee in November 1983 and were made available to the public for comment in December 1983. 48 Fed. Reg. 54263 (December 1, 1983). These comments were reviewed and modifications made in the draft by the Working Group, and the Joint Service Committee approved these changes in January 1984. The draft of the complete Manual and the proposed executive order were forwarded to the General Counsel, Department of Defense in January 1984. These were reviewed and forwarded to the Office of Management and Budget in January 1984. They were reviewed in the Departments of Justice and Transportation. The Executive Order was finally prepared for submission to the President, and the President signed it on 13 April 1984.

A note on citation form. The drafters generally have followed the *The Bluebook, A Uniform System of Citation* (20th ed. 2016), subject to the following.

This edition of the Manual for Courts-Martial is referred to generally as “this Manual.” The Rules for Courts-Martial are cited, *e.g.*, as R.C.M. 101. The Military Rules of Evidence are cited, *e.g.*, as Mil. R. Evid. 101. Other provisions of this Manual are cited to the applicable part and paragraph, *e.g.*, MCM, Part V, paragraph 1a(1) (2019).

Previous editions of the Manual for Courts-Martial will be referred to as “MCM, (XXXX).”

The Uniform Code of Military Justice, 10 U.S.C. Sections 801–946, will be cited as follows:

Each individual section is denominated in the statute as an “Article” and will be cited to the corresponding Article. *E.g.*, 10 U.S.C. Section 801 will be cited as “Article 1”; 10 U.S.C. Section 802 will be cited as “Article 2”; 10 U.S.C. Section 940 will be cited as “Article 140.” The entire legislation, Articles 1 through 146, will be referred to as “the Code” or “the UCMJ” without citation to the United States Code. When a change from MCM, 2016 is based on the Military Justice Act of 2016 or subsequent legislation, this will be noted in the analysis, with citation to the appropriate section of the act.

Composition of the Manual for Courts-Martial

Executive Order

The Executive Order includes the Manual for Courts-Martial, which consists of the Preamble; Rules for Courts-Martial; Military Rules of Evidence; the Punitive Articles; Nonjudicial Punishment Procedure; and Appendix 12A, Presidentially-Prescribed Lesser Included Offenses. Each rule states binding requirements except when the text of the

rule expressly provides otherwise. Normally, failure to comply with a rule constitutes error. *See* Article 59 concerning the effect of errors.

a. *Supplementary Materials*

As a supplement to the Manual, the Department of Defense, in conjunction with the Department of Homeland Security, has published a Discussion (accompanying the Preamble, the Rules for Courts-Martial, the Military Rules of Evidence, and the Punitive Articles), this Analysis, and various Appendices.

(1) *The Discussion*

The Discussion is intended by the drafters to serve as a treatise. To the extent that the Discussion uses terms such as “must” or “will,” it is solely for the purpose of alerting the user to important legal consequences that may result from binding requirements in the Executive Order, judicial decisions, or other sources of binding law. The Discussion itself, however, does not have the force of law, even though it may describe legal requirements derived from other sources. It is in the nature of treatise, and may be used as secondary authority. The inclusion of both the President’s rules and the drafters’ informal discussion in the basic text of the Manual provides flexibility not available in pre-1984 editions of the Manual, and should eliminate questions as to whether an item is a requirement or only guidance. *See e.g., United States v. Baker*, 14 M.J. 361, 373 (C.M.A. 1973). In this Manual, if matter is included in a rule or paragraph, it is intended that the matter be binding, unless it is clearly expressed as precatory. A rule is binding even if the source of the requirement is a judicial decision or a statute not directly applicable to courts-martial. If the President had adopted a rule based on a judicial decision or a statute, subsequent repeal of the statute or reversal of the judicial decision does not repeal the rule. On the other hand, if the President did not choose to “codify” a principle or requirement derived from a judicial decision or other source of law but the drafters considered it sufficiently significant that the Manual’s users should be aware of it, such matter is addressed in the Discussion. The Discussion is revised from time to time as warranted by changes in applicable law.

(2) *The Analysis*

The Analysis sets forth the nonbinding views of the drafters as to the basis for each rule or paragraph, as well as the intent of the drafters, particularly with respect to the purpose of substantial changes in present law. The Analysis is intended to be a guide in interpretation. Users are reminded, however, that primary reliance should be placed on the plain words of the rules. In addition, it is important to remember that the Analysis solely represents the views of staff personnel who worked on the project, and does not necessarily reflect the views of the President in approving it, or of the officials who formally recommended approval to the President.

The Analysis frequently refers to judicial decisions and statutes from the civilian sector that are not applicable directly to courts-martial. Subsequent modification of such sources of law may provide useful guidance in interpreting rules, and the drafters do not intend that citation of a source in this Analysis should preclude reference to subsequent developments for purposes of interpretation. At the same time, the user is reminded that the amendment of the Manual is the province of the President. Developments in the civilian sector that affect the underlying rationale for a rule do not affect the validity of the rule except to the extent otherwise required as a matter of statutory or constitutional law. The same is true with respect to rules derived from the decisions of military tribunals. Once incorporated into the Executive Order, such matters have an independent source of authority and are not dependent upon continued support from the judiciary. Conversely, to the extent that judicial precedent is set forth only in the Discussion or is otherwise omitted from the Rules or the Discussion, the continuing validity of the precedent will depend on the force of its rationale, the doctrine of *stare decisis*, and similar jurisprudential considerations. Nothing in this Introduction should be interpreted to suggest that the placement of matter in the Discussion (or the Analysis), rather than the rule, is to be taken as disapproval of the precedent or as an invitation for a court to take a different approach; rather, the difficult drafting problem of choosing between a codification and common law approach to the law frequently resulted in noncodification of decisions which had the unanimous support of the drafters. To the extent that future changes are made in the Rules or Discussion, corresponding materials will be included in the Analysis.

The Appendices contain various nonbinding materials to assist users of this Manual. The Appendices also contain excerpts from pertinent statutes. These excerpts are appropriate for judicial notice of law, *see* Mil. R. Evid. 201, but nothing herein precludes a party from proving a change in law through production of an official codification or other appropriate evidence.

The Analysis for The Preamble Section (Part I) reads as Follows:

PART I. PREAMBLE

Introduction.

The preamble is based on paragraphs 1 and 2 of MCM, 1969 (Rev.).

1. Sources of military jurisdiction

This subsection is based on paragraph 1 of MCM, 1969 (Rev.). The provisions of the Constitution which are sources of jurisdiction of military courts or tribunals include: Art I, sec. 8, cl. 1, 9–16, 18; Art. II, sec. 2; Art. IV, sec. 4; and the Fifth Amendment. As to sources in international law, see, *e.g.*, *Ex Parte Quirin*, 317 U.S. 1 (1942); Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, arts. 82–84, 6 U.S.T. 3316, 3382, T.I.A.S. No. 3365, 75 U.N.T.S. 287.

2. Exercise of military jurisdiction

Subsection (a) is based on the first paragraph of paragraph 2 of MCM, 1969 (Rev.).

For additional materials on martial law, see W. Winthrop, *Military Law and Precedent* 817–30 (2d ed. 1920 reprint); *Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866). See also paragraph 3, sec. 1 of MCM, 1910 (concerning the exercise of martial law over military affiliated persons).

For additional materials on military government, see W. Winthrop, *supra* at 798–817; *Madsen v. Kinsella*, 343 U.S. 341 (1952); *Mechanics' and Traders' Bank v. Union Bank*, 89 U.S. (22 Wall.) 276 (1875).

For additional materials on the exercise of military jurisdiction under the law of war, see W. Winthrop, *supra* at 831–46; *Trials of War Criminals Before the Nuremberg Tribunals* (U.S. Gov't Printing Off., 1950–51); *Trials of the Major War Criminals Before the International Military Tribunal* (International Military Tribunal, Nuremberg 1947); *In re Yamashita*, 327 U.S. 1 (1946); *Ex parte Quirin*, *supra*; *Ex parte Milligan*, *supra*; Articles 18 and 21. Subsection (b) is based on the second paragraph of paragraph 2 of MCM, 1969 (Rev.). See also Article 21; DA PAM 27–174, *supra*, at paragraph 1–5 a; W. Winthrop, *supra* at 802–05, 835–36. As to provost courts, see also *Hearings on H.R. 2498 Before a Subcomm. of the House Comm. on Armed Services*, 81st Cong., 1st Sess. 975, 1061 (1949). As to trial of prisoners of war, see Article 2(a)(9) and Article 102, 1949 Geneva Convention Relative to the Treatment of Prisoners of War, *supra*.

3. Purpose of military law

See generally *Chappel v. Wallace*, 462 U.S. 296 (1983); *Parker v. Levy*, 417 U.S. 733 (1974); S. Rep. No. 53, 98th Cong., 1st Sess. 2–3 (1983). For a discussion of the nature and purpose of military law, see R. Everett, *Military Justice in the Armed Forces of the United States* (1956); J. Bishop, *Justice Under Fire* (1974); Hodson, *Military Justice: Abolish or Change?*, 22 Kan. L. Rev. 31 (1975), reprinted in Mil. L. Rev. Bicent. Issue 579 (1976); Hansen, *Judicial Functions for the Commander*, 41 Mil.L.Rev. 1 (1968); *Hearings on H.R. 2498 Before a Subcomm. of the House Comm. on Armed Services*, 81st Cong., 1st Sess. 606, 778–86 (1949); H. Moyer, *Justice and the Military* 5–23 (1972).

4. Structure and application of the Manual for Courts-Martial

Self-explanatory. See also the *Introduction* of the Analysis.

CHAPTER I. GENERAL PROVISIONS

The Analysis for R.C.M. 101 reads as follows:

Analysis

This rule is taken from Rule 101 of the MCM (2016 edition) without amendment.

The Analysis for R.C.M. 102 reads as follows:

Analysis

This rule is taken from Rule 102 of the MCM (2016 edition) without amendment.

The Discussion following paragraph 6 of R.C.M. 103 reads as follows:

Discussion

See R.C.M. 504 concerning who may convene courts-martial.

The Discussion following paragraph 20 of R.C.M. 103 reads as follows:

Discussion

The Uniform Code of Military Justice is set forth at Appendix 2.

The Discussion following paragraph 22 of R.C.M. 103 reads as follows:

Discussion

The definition of “writing” includes letters, words, or numbers set down by handwriting, typewriting, printing, photostating, photographing, magnetic impulse, mechanical or electronic recording, or any other form of data compilation. This section makes it clear that computers and other modern reproduction systems are included in this definition, and consistent with the definition of “writing” in Military Rule of Evidence 1001. The definition is comprehensive, covering all forms of writing or recording of words or word-substitutes.

The Discussion following paragraph 23 of R.C.M. 103 reads as follows:

Discussion

The following provisions are set forth below:

- (1) 1 U.S.C. §§ 1 through 5.
- (2) 10 U.S.C. § 101.
- (3) 10 U.S.C. § 801 (Article 1)

(1) 1 U.S.C. §1 through §5

§1. Words denoting number, gender, and so forth

In determining the meaning of any Act of Congress, unless the context indicates otherwise—

- words importing the singular include and apply to several persons, parties, or things;
- words importing the plural include the singular;
- words importing the masculine gender include the feminine as well;
- words used in the present tense include the future as well as the present;
- the words “insane” and “insane person” shall include every idiot, insane person, and person non compos mentis;
- the words “person” and “whoever” include corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals;
- “officer” includes any person authorized by law to perform the duties of the office;
- “signature” or “subscription” includes a mark when the person making the same intended it as such;
- “oath” includes affirmation, and “sworn” includes affirmed;
- “writing” includes printing and typewriting and reproductions of visual symbols by photographing, multigraphing, mimeographing, manifolding, or otherwise.

§2. “County” as including “parish”, and so forth

The word “county” includes a parish, or any other equivalent subdivision of a State or Territory of the United States.

§3. “Vessel” as including all means of water transportation

The word “vessel” includes every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water.

§4. “Vehicle” as including all means of land transportation

The word “vehicle” includes every description of carriage or other artificial contrivance used, or capable of being used, as a means of transportation on land.

§5. “Company” or “association” as including successors and assigns

The word “company” or “association”, when used in reference to a corporation, shall be deemed to embrace the words “successors and assigns of such company or association”, in like manner as if these last-named words, or words of similar import, were expressed.

(2) 10 U.S.C. § 101

§101. Definitions

- (a) IN GENERAL.—The following definitions apply in this title:
- (1) The term “United States”, in a geographic sense, means the States and the District of Columbia.
 - [(2) Repealed. Pub. L. 109–163, div. A, title X, §1057(a)(1), Jan. 6, 2006, 119 Stat. 3440.]
 - (3) The term “possessions” includes the Virgin Islands, Guam, American Samoa, and the Guano Islands, so long as they remain possessions, but does not include any Commonwealth.
 - (4) The term “armed forces” means the Army, Navy, Air Force, Marine Corps, and Coast Guard.
 - (5) The term “uniformed services” means—
 - (A) the armed forces;
 - (B) the commissioned corps of the National Oceanic and Atmospheric Administration; and
 - (C) the commissioned corps of the Public Health Service.
 - (6) The term “department”, when used with respect to a military department, means the executive part of the department and all field headquarters, forces, reserve components, installations, activities, and functions under the control or supervision of the Secretary of the department. When used with respect to the Department of Defense, such

term means the executive part of the department, including the executive parts of the military departments, and all field headquarters, forces, reserve components, installations, activities, and functions under the control or supervision of the Secretary of Defense, including those of the military departments.

(7) The term “executive part of the department” means the executive part of the Department of Defense, Department of the Army, Department of the Navy, or Department of the Air Force, as the case may be, at the seat of government.

(8) The term “military departments” means the Department of the Army, the Department of the Navy, and the Department of the Air Force.

(9) The term “Secretary concerned” means—

(A) the Secretary of the Army, with respect to matters concerning the Army;

(B) the Secretary of the Navy, with respect to matters concerning the Navy, the Marine Corps, and the Coast Guard when it is operating as a service in the Department of the Navy;

(C) the Secretary of the Air Force, with respect to matters concerning the Air Force; and

(D) the Secretary of Homeland Security, with respect to matters concerning the Coast Guard when it is not operating as a service in the Department of the Navy.

(10) The term “service acquisition executive” means the civilian official within a military department who is designated as the service acquisition executive for purposes of regulations and procedures providing for a service acquisition executive for that military department.

(11) The term “Defense Agency” means an organizational entity of the Department of Defense—

(A) that is established by the Secretary of Defense under section 191 of this title (or under the second sentence of section 125(d) of this title (as in effect before October 1, 1986)) to perform a supply or service activity common to more than one military department (other than such an entity that is designated by the Secretary as a Department of Defense Field Activity); or

(B) that is designated by the Secretary of Defense as a Defense Agency.

(12) The term “Department of Defense Field Activity” means an organizational entity of the Department of Defense—

(A) that is established by the Secretary of Defense under section 191 of this title (or under the second sentence of section 125(d) of this title (as in effect before October 1, 1986)) to perform a supply or service activity common to more than one military department; and

(B) that is designated by the Secretary of Defense as a Department of Defense Field Activity.

(13) The term “contingency operation” means a military operation that—

(A) is designated by the Secretary of Defense as an operation in which members of the armed forces are or may become involved in military actions, operations, or hostilities against an enemy of the United States or against an opposing military force; or

(B) results in the call or order to, or retention on, active duty of members of the uniformed services under section 688, 12301(a), 12302, 12304, 12304a, 12305, or 12406 of this title, chapter 15 of this title, section 712 of title 14, or any other provision of law during a war or during a national emergency declared by the President or Congress.

(14) The term “supplies” includes material, equipment, and stores of all kinds.

(15) The term “pay” includes basic pay, special pay, retainer pay, incentive pay, retired pay, and equivalent pay, but does not include allowances.

(16) The term “congressional defense committees” means—

(A) the Committee on Armed Services and the Committee on Appropriations of the Senate; and

(B) the Committee on Armed Services and the Committee on Appropriations of the House of Representatives.

(17) The term “base closure law” means the following:

(A) Section 2687 of this title.

(B) The Defense Base Closure and Realignment Act of 1990 (part A of title XXIX of Public Law 101–510; 10 U.S.C. 2687 note).

(C) Title II of the Defense Authorization Amendments and Base Closure and Realignment Act (Public Law 100–526; 10 U.S.C. 2687 note).

(18) The term “acquisition workforce” means the persons serving in acquisition positions within the Department of Defense, as designated pursuant to section 1721(a) of this title.

(b) PERSONNEL GENERALLY.—The following definitions relating to military personnel apply in this title:

(1) The term “officer” means a commissioned or warrant officer.

(2) The term “commissioned officer” includes a commissioned warrant officer.

(3) The term “warrant officer” means a person who holds a commission or warrant in a warrant officer grade.

(4) The term “general officer” means an officer of the Army, Air Force, or Marine Corps serving in or having the grade of general, lieutenant general, major general, or brigadier general.

(5) The term “flag officer” means an officer of the Navy or Coast Guard serving in or having the grade of admiral, vice admiral, rear admiral, or rear admiral (lower half).

(6) The term “enlisted member” means a person in an enlisted grade.

(7) The term “grade” means a step or degree, in a graduated scale of office or military rank, that is established and designated as a grade by law or regulation.

(8) The term “rank” means the order of precedence among members of the armed forces.

(9) The term “rating” means the name (such as “boatswain’s mate”) prescribed for members of an armed force in an occupational field. The term “rate” means the name (such as “chief boatswain’s mate”) prescribed for members in the same rating or other category who are in the same grade (such as chief petty officer or seaman apprentice).

(10) The term “original”, with respect to the appointment of a member of the armed forces in a regular or reserve component, refers to that member’s most recent appointment in that component that is neither a promotion nor a demotion.

(11) The term “authorized strength” means the largest number of members authorized to be in an armed force, a component, a branch, a grade, or any other category of the armed forces.

(12) The term “regular”, with respect to an enlistment, appointment, grade, or office, means enlistment, appointment, grade, or office in a regular component of an armed force.

(13) The term “active-duty list” means a single list for the Army, Navy, Air Force, or Marine Corps (required to be maintained under section 620 of this title) which contains the names of all officers of that armed force, other than officers described in section 641 of this title, who are serving on active duty.

(14) The term “medical officer” means an officer of the Medical Corps of the Army, an officer of the Medical Corps of the Navy, or an officer in the Air Force designated as a medical officer.

(15) The term “dental officer” means an officer of the Dental Corps of the Army, an officer of the Dental Corps of the Navy, or an officer of the Air Force designated as a dental officer.

(16) The term “Active Guard and Reserve” means a member of a reserve component who is on active duty pursuant to section 12301(d) of this title or, if a member of the Army National Guard or Air National Guard, is on full-time National Guard duty pursuant to section 502(f) of title 32, and who is performing Active Guard and Reserve duty.

(c) RESERVE COMPONENTS.—The following definitions relating to the reserve components apply in this title:

(1) The term “National Guard” means the Army National Guard and the Air National Guard.

(2) The term “Army National Guard” means that part of the organized militia of the several States and Territories, Puerto Rico, and the District of Columbia, active and inactive, that—

(A) is a land force;

(B) is trained, and has its officers appointed, under the sixteenth clause of section 8, article I, of the Constitution;

(C) is organized, armed, and equipped wholly or partly at Federal expense; and

(D) is federally recognized.

(3) The term “Army National Guard of the United States” means the reserve component of the Army all of whose members are members of the Army National Guard.

(4) The term “Air National Guard” means that part of the organized militia of the several States and Territories, Puerto Rico, and the District of Columbia, active and inactive, that—

- (A) is an air force;
 - (B) is trained, and has its officers appointed, under the sixteenth clause of section 8, article I, of the Constitution;
 - (C) is organized, armed, and equipped wholly or partly at Federal expense; and
 - (D) is federally recognized.
- (5) The term “Air National Guard of the United States” means the reserve component of the Air Force all of whose members are members of the Air National Guard.
- (6) The term “reserve”, with respect to an enlistment, appointment, grade, or office, means enlistment, appointment, grade, or office held as a Reserve of one of the armed forces.
- (7) The term “reserve active-status list” means a single list for the Army, Navy, Air Force, or Marine Corps (required to be maintained under section 14002 of this title) that contains the names of all officers of that armed force except warrant officers (including commissioned warrant officers) who are in an active status in a reserve component of the Army, Navy, Air Force, or Marine Corps and are not on an active-duty list.
- (d) DUTY STATUS.—The following definitions relating to duty status apply in this title:
- (1) The term “active duty” means full-time duty in the active military service of the United States. Such term includes full-time training duty, annual training duty, and attendance, while in the active military service, at a school designated as a service school by law or by the Secretary of the military department concerned. Such term does not include full-time National Guard duty.
 - (2) The term “active duty for a period of more than 30 days” means active duty under a call or order that does not specify a period of 30 days or less.
 - (3) The term “active service” means service on active duty or full-time National Guard duty.
 - (4) The term “active status” means the status of a member of a reserve component who is not in the inactive Army National Guard or inactive Air National Guard, on an inactive status list, or in the Retired Reserve.
 - (5) The term “full-time National Guard duty” means training or other duty, other than inactive duty, performed by a member of the Army National Guard of the United States or the Air National Guard of the United States in the member’s status as a member of the National Guard of a State or territory, the Commonwealth of Puerto Rico, or the District of Columbia under section 316, 502, 503, 504, or 505 of title 32 for which the member is entitled to pay from the United States or for which the member has waived pay from the United States.
 - (6)(A) The term “active Guard and Reserve duty” means active duty performed by a member of a reserve component of the Army, Navy, Air Force, or Marine Corps, or full-time National Guard duty performed by a member of the National Guard pursuant to an order to full-time National Guard duty, for a period of 180 consecutive days or more for the purpose of organizing, administering, recruiting, instructing, or training the reserve components.
 - (B) Such term does not include the following:
 - (i) Duty performed as a member of the Reserve Forces Policy Board provided for under section 10301 of this title.
 - (ii) Duty performed as a property and fiscal officer under section 708 of title 32.
 - (iii) Duty performed for the purpose of interdiction and counter-drug activities for which funds have been provided under section 112 of title 32.
 - (iv) Duty performed as a general or flag officer.
 - (v) Service as a State director of the Selective Service System under section 10(b)(2) of the Military Selective Service Act (50 U.S.C. 3809(b)(2)).
 - (7) The term “inactive-duty training” means—
 - (A) duty prescribed for Reserves by the Secretary concerned under section 206 of title 37 or any other provision of law; and
 - (B) special additional duties authorized for Reserves by an authority designated by the Secretary concerned and performed by them on a voluntary basis in connection with the prescribed training or maintenance activities of the units to which they are assigned.

Such term includes those duties when performed by Reserves in their status as members of the National Guard.
 - (e) FACILITIES AND OPERATIONS.—The following definitions relating to facilities and operations apply in this title:

(1) RANGE.—The term “range”, when used in a geographic sense, means a designated land or water area that is set aside, managed, and used for range activities of the Department of Defense. Such term includes the following:

(A) Firing lines and positions, maneuver areas, firing lanes, test pads, detonation pads, impact areas, electronic scoring sites, buffer zones with restricted access, and exclusionary areas.

(B) Airspace areas designated for military use in accordance with regulations and procedures prescribed by the Administrator of the Federal Aviation Administration.

(2) RANGE ACTIVITIES.—The term “range activities” means—

(A) research, development, testing, and evaluation of military munitions, other ordnance, and weapons systems; and

(B) the training of members of the armed forces in the use and handling of military munitions, other ordnance, and weapons systems.

(3) OPERATIONAL RANGE.—The term “operational range” means a range that is under the jurisdiction, custody, or control of the Secretary of a military department and—

(A) that is used for range activities, or

(B) although not currently being used for range activities, that is still considered by the Secretary to be a range and has not been put to a new use that is incompatible with range activities.

(4) MILITARY MUNITIONS.—(A) The term “military munitions” means all ammunition products and components produced for or used by the armed forces for national defense and security, including ammunition products or components under the control of the Department of Defense, the Coast Guard, the Department of Energy, and the National Guard.

(B) Such term includes the following:

(i) Confined gaseous, liquid, and solid propellants.

(ii) Explosives, pyrotechnics, chemical and riot control agents, smokes, and incendiaries, including bulk explosives and chemical warfare agents.

(iii) Chemical munitions, rockets, guided and ballistic missiles, bombs, warheads, mortar rounds, artillery ammunition, small arms ammunition, grenades, mines, torpedoes, depth charges, cluster munitions and dispensers, and demolition charges.

(iv) Devices and components of any item specified in clauses (i) through (iii).

(C) Such term does not include the following:

(i) Wholly inert items.

(ii) Improvised explosive devices.

(iii) Nuclear weapons, nuclear devices, and nuclear components, other than nonnuclear components of nuclear devices that are managed under the nuclear weapons program of the Department of Energy after all required sanitization operations under the Atomic Energy Act of 1954 (42 U.S.C. 2011 et seq.) have been completed.

(5) UNEXPLODED ORDNANCE.—The term “unexploded ordnance” means military munitions that—

(A) have been primed, fused, armed, or otherwise prepared for action;

(B) have been fired, dropped, launched, projected, or placed in such a manner as to constitute a hazard to operations, installations, personnel, or material; and

(C) remain unexploded, whether by malfunction, design, or any other cause.

(f) RULES OF CONSTRUCTION.—In this title—

(1) “shall” is used in an imperative sense;

(2) “may” is used in a permissive sense;

(3) “no person may * * *” means that no person is required, authorized, or permitted to do the act prescribed;

(4) “includes” means “includes but is not limited to”; and

(5) “spouse” means husband or wife, as the case may be.

(g) REFERENCE TO TITLE 1 DEFINITIONS.—For other definitions applicable to this title, see sections 1 through 5 of title 1.

(3) 10 U.S.C. § 801 (Article 1)

§801. Article 1. Definitions

In this chapter (the Uniform Code of Military Justice):

(1) The term “Judge Advocate General” means, severally, the Judge Advocates General of the Army, Navy, and Air Force and, except when the Coast Guard is operating as a service in the Navy, an official designated to serve as Judge Advocate General of the Coast Guard by the Secretary of Homeland Security.

(2) The Navy, the Marine Corps, and the Coast Guard when it is operating as a service in the Navy, shall be considered as one armed force.

(3) The term “commanding officer” includes only commissioned officers.

(4) The term “officer in charge” means a member of the Navy, the Marine Corps, or the Coast Guard designated as such by appropriate authority.

(5) The term “superior commissioned officer” means a commissioned officer superior in rank or command.

(6) The term “cadet” means a cadet of the United States Military Academy, the United States Air Force Academy, or the United States Coast Guard Academy.

(7) The term “midshipman” means a midshipman of the United States Naval Academy and any other midshipman on active duty in the naval service.

(8) The term “military” refers to any or all of the armed forces.

(9) The term “accuser” means a person who signs and swears to charges, any person who directs that charges nominally be signed and sworn to by another, and any other person who has an interest other than an official interest in the prosecution of the accused.

(10) The term “military judge” means a judge advocate designated under section 826(c) of this title (article 26(c)) who is detailed under section 826(a) or section 830a of this title (article 26(a) or 30a)).

[(11) Repealed. Pub. L. 109–241, title II, §218(a)(1), July 11, 2006, 120 Stat. 526.]

(12) The term “legal officer” means any commissioned officer of the Navy, Marine Corps, or Coast Guard designated to perform legal duties for a command.

(13) The term “judge advocate” means—

(A) an officer of the Judge Advocate General’s Corps of the Army, the Navy, or the Air Force;

(B) an officer of the Marine Corps who is designated as a judge advocate; or

(C) a commissioned officer of the Coast Guard designated for special duty (law).

(14) The term “record”, when used in connection with the proceedings of a court-martial, means—

(A) an official written transcript, written summary, or other writing relating to the proceedings; or

(B) an official audiotape, videotape, or similar material from which sound, or sound and visual images, depicting the proceedings may be reproduced.

(15) The term “classified information” means (A) any information or material that has been determined by an official of the United States pursuant to law, an Executive order, or regulation to require protection against unauthorized disclosure for reasons of national security, and (B) any restricted data, as defined in section 11(y) of the Atomic Energy Act of 1954 (42 U.S.C. 2014(y)).

(16) The term “national security” means the national defense and foreign relations of the United States.

The Analysis for R.C.M. 103 reads as follows:

Analysis

This rule is taken from Rule 103 of the MCM (2016 edition) with the following amendments:

2018 Amendment:

R.C.M. 103(1), (2), and (3) are renumbered as R.C.M. 103(2), (3), and (4); R.C.M. 103(16) through (18) are renumbered as R.C.M. 103(17) through (19); R.C.M. 103(19) through (21) are renumbered R.C.M. 103(21) through (23). The definition of “UCMJ” is moved from R.C.M. 103(4) to R.C.M. 103(20).

R.C.M. 103(1) is amended and clarifies the reference to “appellate military judge” means a judge of a Court of Criminal Appeals.

R.C.M. 103(8)(D) is amended and implements Article 16, as amended by Section 5161 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016), as further amended by Section 1081(c)(1)(C) of the National Defense Authorization Act for Fiscal Year 2018, Pub. Law. No. 115-91, 131 Stat. 1283 (2017), which authorizes a convening authority to refer charges to a special court-martial consisting of a military judge alone under such limitations as the President may prescribe by regulation.

R.C.M. 103(11) is amended and updates a description of the federal law definition of “explosive.”

R.C.M. 103(15) is amended and implements Article 1, as amended by Section 5101 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016), as further amended by Sections 1081(a)(21) and 1081(c)(1)(A) of the National Defense Authorization Act for Fiscal Year 2018, Pub. Law. No. 115-91, 131 Stat. 1283 (2017), which amends the definition of “military judge.”

R.C.M. 103(16) is amended and implements Articles 19, 26a, and 30a, as amended by Sections 5163, 5185, and 5202 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016), which authorizes the use of military magistrates; Article 30a was amended by Section 531(b) of the National Defense Authorization Act for Fiscal Year 2018, Pub. Law. No. 115-91, 131 Stat. 1283 (2017).

R.C.M. 103(17) is amended and clarifies the definition of “party” to include acting on behalf of a party in pre-referral and post-referral proceedings under these rules.

R.C.M. 103(22) is amended and aligns the definitions of “writings” and “recordings” with Mil. R. Evid. 1001.

The Discussion accompanying R.C.M. 103(23) is amended and reflects current statutory provisions.

The Discussion following R.C.M. 104(b)(1)(B) reads as follows:

Discussion

This rule applies when the counsel in question has been detailed, assigned, or authorized to represent the client as a defense or special victims’ counsel. Nothing in this rule prohibits supervisors from taking appropriate action for violations of ethical, procedural, or other rules, or for conduct outside the scope of representation.

“Special Victims’ Counsel,” as used in this rule, includes Victims’ Legal Counsel within the Navy and Marine Corps.

The Discussion following R.C.M. 104(b)(2)(B) reads as follows:

Discussion

See paragraph 87 of Part IV concerning prosecuting violations of Article 37 under Article 131f.

The Analysis R.C.M. 104 reads as follows:

Analysis

This rule is taken from Rule 104 of the MCM (2016 edition), as amended by Exec. Order No. 13825, 83 Fed. Reg. 9889 (March 1, 2018), with the following amendment:

The Discussion accompanying R.C.M. 104(b)(2)(B) is amended to reflect the reorganization of the punitive articles in the Military Justice Act of 2016. *See* Articles 79-134, as amended by Sections 5401-5452 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016), as further amended by Section 1081(c) of the National Defense Authorization Act for Fiscal Year 2018, Pub. Law. No. 115-91, 131 Stat. 1283 (2017).

The Discussion following R.C.M. 105(b) reads as follows:

Discussion

See R.C.M. 103(18) for a definition of “staff judge advocate.”

The Analysis for R.C.M. 105 reads as follows:

Analysis

This rule is taken from Rule 105 of the MCM (2016 edition) without substantive amendment.

The Discussion following R.C.M. 106 reads as follows:

Discussion

See R.C.M. 1102(b)(2)(C)(ii) for the effect of such delivery on the execution of a court-martial sentence.

The Analysis for R.C.M. 106 reads as follows:

Analysis

This rule is taken from Rule 106 of the MCM (2016 edition) with the following amendment: the Discussion accompanying R.C.M. 106 is amended to correct a cross-reference.

The Discussion following R.C.M. 107 reads as follows:

Discussion

See Article 4 for the procedures to be followed. *See also* Article 75(c).

The Analysis for R.C.M. 107 reads as follows:

Analysis

This rule is taken from Rule 107 of the MCM (2016 edition) without substantive amendment.

The Analysis for R.C.M. 108 reads as follows:

Analysis

This rule is taken from Rule 108 of the MCM (2016 edition) without amendment.

The Discussion following R.C.M. 109(c)(2) reads as follows:

Discussion

The term “unfitness” should be construed broadly, including, for example, matters relating to the incompetence, impartiality, and misconduct of the appellate military judge, military judge, or military magistrate. Erroneous

decisions of a judge or magistrate are not subject to investigation under this rule. Challenges to these decisions are more appropriately left to the appellate process.

The Discussion following R.C.M. 109(c)(3) reads as follows:

Discussion

Complaints need not be made in any specific form, but if possible complaints should be made under oath. Complaints may be made by judges, lawyers, a party, court personnel, members of the general public or members of the military community. Reports in the news media relating to the conduct of an appellate military judge, military judge, or military magistrate may also form the basis of a complaint.

An individual designated to receive complaints under this paragraph should have judicial experience. The chief trial judge of a Service may be designated to receive complaints against military judges and military magistrates. Military magistrates who perform other duties may be investigated in their capacity other than as a magistrate through the process established by the Judge Advocate General concerned in accordance with R.C.M. 109(a).

The Discussion following R.C.M. 109(c)(4) reads as follows:

Discussion

Complaints under this paragraph will be treated with confidentiality. Confidentiality protects the subject appellate military judge, military judge, or military magistrate and the judiciary when a complaint is not substantiated. Confidentiality also encourages the reporting of allegations of judicial misconduct or unfitness and permits complaints to be screened with the full cooperation of others.

Complaints containing allegations of criminality should be referred to the appropriate criminal investigative agency in accordance with Appendix 3 of this Manual.

The Discussion following R.C.M. 109(c)(5)(B) reads as follows:

Discussion

To avoid the type of conflict prohibited in Article 66(i), the Judge Advocate General's designee should not ordinarily be a member of the same Court of Criminal Appeals as the subject of the complaint. If practicable, a former appellate military judge should be designated.

The Discussion following R.C.M. 109(c)(6)(B) reads as follows:

Discussion

Reassignment of appellate military judges, military judges, and military magistrates in accordance with Service regulations is not professional disciplinary action.

The Discussion following R.C.M. 109(c)(7)(B) reads as follows:

Discussion

The Judge Advocate General concerned may appoint an ad hoc or a standing commission.

The Analysis for R.C.M. 109 reads as follows:

Analysis

This rule is taken from Rule 109 of the MCM (2016 edition) with the following amendment:

2018 Amendment: The title of R.C.M. 109 and its accompanying Discussions are amended and reflect Articles 6a and 26a, as added by Sections 5104 and 5185 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016), which adds military magistrates to those judicial personnel included in procedures relating to the investigation and disposition of matters pertaining to the fitness of military judges, and authorizes the Judge Advocate General to certify the qualifications of military magistrates, respectively.

CHAPTER II. JURISDICTION

The Discussion following R.C.M. 201(a)(1) reads as follows:

Discussion

“Jurisdiction” means the power to hear a case and to render a legally competent decision. A court-martial has no power to adjudge civil remedies. For example, a court-martial may not adjudge the payment of damages, collect private debts, order the return of property, or order a criminal forfeiture of seized property. A summary court-martial appointed under 10 U.S.C. §§ 4712 or 9712 to dispose of the effects of a deceased person is not affected by these Rules or this Manual.

The Discussion following R.C.M. 201(a)(2) reads as follows:

Discussion

Except insofar as required by the Constitution, the UCMJ, or the Manual, such as jurisdiction over persons listed under Article 2(a)(10), jurisdiction of courts-martial does not depend on where the offense was committed.

The Discussion following R.C.M. 201(a)(3) reads as follows:

Discussion

In addition to the power to try persons for offenses under the UCMJ, general courts-martial have power to try certain persons for violations of the law of war and for crimes or offenses against the law of the territory occupied as an incident of war or belligerency whenever the local civil authority is superseded in whole or part by the military authority of the occupying power. *See* R.C.M. 201(f)(1)(B). In cases where a person is tried by general court-martial for offenses against the law of an occupied territory, the court-martial normally sits in the country where the offense is committed, and must do so under certain circumstances. *See* Articles 4, 64, and 66, Geneva Convention Relative to the Protection of Civilian Persons in Time of War, August 12, 1949, arts. 4, 64, and 66, 6 U.S.T. 3516, 3559-60 T.I.A.S. No. 3365.

The Discussion following R.C.M. 201(b)(1) reads as follows:

Discussion

See R.C.M. 504; 1302.

The Discussion following R.C.M. 201(b)(2) reads as follows:

Discussion

See R.C.M. 501-504; 1301.

The Discussion following R.C.M. 201(b)(3) reads as follows:

Discussion

See R.C.M. 601.

The Discussion following R.C.M. 201(b)(4) reads as follows:

Discussion

See R.C.M. 202.

The Discussion following R.C.M. 201(b)(5) reads as follows:

Discussion

See R.C.M. 203. The judgment of a court-martial without jurisdiction is void and is entitled to no legal effect. *See* R.C.M. 907(b)(2)(C)(iv). *But see* R.C.M. 810(d) concerning the effect of certain decisions by courts-martial without jurisdiction.

The Discussion following R.C.M. 201(d)(3) reads as follows:

Discussion

In the case of an act or omission which violates the UCMJ and a criminal law of a State, the United States, or both, the determination which agency shall exercise jurisdiction should normally be made through consultation or prior agreement between appropriate military officials (ordinarily the staff judge advocate) and appropriate civilian authorities (United States Attorney, or equivalent). *See also* Memorandum of Understanding Between Departments of Justice and Defense Relating to the Investigation and Prosecution of Crimes Over Which the Two Departments Have Concurrent Jurisdiction at Appendix 3.

Under the Constitution, a person may not be tried for the same misconduct by both a court-martial and another federal court. *See* R.C.M. 907(b)(2)(C). Although it is constitutionally permissible to try a person by court-martial and by a State court for the same act, as a matter of policy a person who is pending trial or has been tried by a State court should not ordinarily be tried by court-martial for the same act. Overseas, international agreements might preclude trial by one state of a person acquitted or finally convicted of a given act by the other state.

Under international law, a friendly foreign nation has jurisdiction to punish offenses committed within its borders by members of a visiting force, unless it expressly or impliedly consents to relinquish its jurisdiction to the visiting sovereign. The procedures and standards for determining which nation will exercise jurisdiction are normally established by treaty. *See, e.g.,* NATO Status of Forces Agreement, June 19, 1951, 4 U.S.T. 1792, T.I.A.S. No. 2846. As a matter of policy, efforts should be made to maximize the exercise of court-martial jurisdiction over persons subject to the UCMJ to the extent possible under applicable agreements.

See R.C.M. 106 concerning delivery of offenders to civilian authorities.

See also R.C.M. 201(g) concerning the jurisdiction of other military tribunals.

The Discussion following R.C.M. 201(e)(7)(B) reads as follows:

Discussion

As to the authority to convene courts-martial, see R.C.M. 504. “Manifest injury” does not mean minor inconvenience or expense. Examples of manifest injury include direct and substantial effect on morale, discipline, or military operations, substantial expense or delay, or loss of essential witnesses.

As to the composition of a court-martial for the trial of an accused who is a member of another armed force, see R.C.M. 503(a)(3) Discussion. Cases involving two or more accused who are members of different armed forces should not be referred to a court-martial for a common trial.

The Discussion following R.C.M. 201(f)(1)(B)(i)(b) reads as follows:

Discussion

R.C.M. 201 (f)(1)(B)(i)(b) is an exercise of the power of military government.

The Discussion following R.C.M. 201 (f)(1)(B)(ii) reads as follows:

Discussion

Certain limitations on the discretion of military tribunals to adjudge punishment under the law of war are prescribed in international conventions. *See, e.g.*, Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, art. 68, 6 U.S.T. 3516, T.I.A.S. No. 3365.

The Discussion following R.C.M. 201(f)(1)(C) reads as follows:

Discussion

See R.C.M. 103(4) for the definition of the term “capital offense.”

The Discussion following R.C.M. 201(f)(2)(D) reads as follows:

Discussion

Only a general court-martial has jurisdiction over penetrative sex offenses under subsections (a) and (b) of Article 120, subsections (a) and (b) of Article 120b, and attempts to commit such penetrative sex offenses under Article 80. *See* UCMJ, Art. 18, as amended by Section 1705(b) of the National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66, 127 Stat. 672 (2013), as further amended by Section 5162 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016).

The Discussion following R.C.M. 201(f)(2)(E)(i)(II) reads as follows:

Discussion

See Department of Defense Instruction 1325.07, Administration of Military Correctional Facilities and Clemency and Parole Authority, for offenses requiring sex offender notification.

The Discussion following R.C.M. 201(g) reads as follows:

Discussion

See Articles 103 and 103b for some instances of concurrent jurisdiction.

The Analysis following R.C.M. 201 reads as follows:

Analysis

This rule is taken from Rule 201 of the MCM (2016 edition) with the following amendments:

2018 Amendment: The Discussion accompanying R.C.M. 201(b)(5) is amended and deletes a reference to R.C.M. 810(d).

R.C.M. 201(c), which addressed contempt, is deleted. See R.C.M. 809 for procedures and standards for contempt proceedings and the exercise of contempt authority by judicial officers under Article 98.

R.C.M. 201(f)(1)(A)(i), R.C.M. 201(f)(1)(D), and the Discussion accompanying R.C.M. 201(g) are amended to reflect the reorganization of the punitive articles in the Military Justice Act of 2016. *See* Articles 79-134, as amended by Sections 5401-5452 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016), as further amended by Section 1081(c) of the National Defense Authorization Act for Fiscal Year 2018, Pub. Law. No. 115-91, 131 Stat. 1283 (2017).

R.C.M. 201(f)(1)(D) and (f)(2)(D) are amended and eliminate redundancies and reflect the dates of applicability set forth in Section 1705(c) of the National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66, 127 Stat. 672, 960 (2013).

The Discussion accompanying R.C.M. 201(f)(2)(D) is amended to update a citation.

R.C.M. 201(f)(2)(B)(ii) is amended and implements Articles 16 and 19, as amended by Sections 5161 and 5163 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016), as further amended by Section 1081(c)(1)(C) of the National Defense Authorization Act for Fiscal Year 2018, Pub. Law. No. 115-91, 131 Stat. 1283 (2017), which eliminate special courts-martial without a military judge and authorize a convening authority to refer charges to a special court-martial consisting of a military judge alone under such limitations as the President may prescribe by regulation.

R.C.M. 201(f)(2)(E) and the accompanying Discussion are new and reflect Article 16, as amended by Section 5161 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016), as further amended by Section 1081(c)(1)(C) of the National Defense Authorization Act for Fiscal Year 2018, Pub. Law. No. 115-91, 131 Stat. 1283 (2017), which authorizes a convening authority to refer charges to a special court-martial consisting of a military judge alone under such limitations as the President may prescribe by regulation.

The Discussion following R.C.M. 202(a) reads as follows:

Discussion

(1) *Authority under the UCMJ.* Article 2 lists classes of persons who are subject to the UCMJ. These include active duty personnel (Article 2(a)(1)); cadets, aviation cadets, and midshipmen (Article 2(a)(2)); certain retired personnel (Article 2(a)(4) and (5)); members of Reserve components not on active duty under some circumstances (Article 2(a)(3) and (6)); persons in the custody of the armed forces serving a sentence imposed by court-martial (Article 2(a)(7)); and, under some circumstances, specified categories of civilians (Article 2(a)(8), (9), (10), (11), and (12); *see* paragraphs (3) and (4) of this discussion). In addition, certain persons whose status as members of the armed forces or as persons otherwise subject to the UCMJ apparently has ended may, nevertheless, be amenable to trial by court-martial. *See* Article 3, 4, and 73. A person need not be subject to the UCMJ to be subject to trial by court-martial under Articles 103, 103b, and 104a. *See* also Article 48 and R.C.M. 809 concerning who may be subject to the contempt powers of a court-martial.

(2) *Active duty personnel.* Court-martial jurisdiction is most commonly exercised over active duty personnel. In

general, a person becomes subject to court-martial jurisdiction upon enlistment in or induction into the armed forces, acceptance of a commission, or entry onto active duty pursuant to orders. Court-martial jurisdiction over active duty personnel ordinarily ends on delivery of a discharge certificate or its equivalent to the person concerned issued pursuant to competent orders. Orders transferring a person to the inactive reserve are the equivalent of a discharge certificate for purposes of jurisdiction.

These are several important qualifications and exceptions to these general guidelines.

(A) Inception of court-martial jurisdiction over active duty personnel.

(i) *Enlistment.* “The voluntary enlistment of any person who has the capacity to understand the significance of enlisting in the armed forces shall be valid for purposes of jurisdiction under [Article 2(a)] and a change of status from civilian to member of the armed forces shall be effective upon taking the oath of enlistment.” Article 2(b). A person who is, at the time of enlistment, insane, intoxicated, or under the age of 17 does not have the capacity to enlist by law. No court-martial jurisdiction over such a person may exist as long as the incapacity continues. If the incapacity ceases to exist, a “constructive enlistment” may result under Article 2(c). See discussion of “constructive enlistment” of this rule. Similarly, if the enlistment was involuntary, court-martial jurisdiction will exist only when the coercion is removed and a “constructive enlistment” under Article 2(c) is established.

Persons age 17 (but not yet 18) may not enlist without parental consent. A parent or guardian may, within 90 days of its inception, terminate the enlistment of a 17-year-old who enlisted without parental consent, if the person has not yet reached the age of 18. 10 U.S.C. § 1170. See also DOD Instruction 1332.14 and Service regulations for specific rules on separation of persons 17 years of age on the basis of a parental request. Absent effective action by a parent or guardian to terminate such an enlistment, court-martial jurisdiction exists over the person. An application by a parent for release does not deprive a court-martial of jurisdiction to try a person for offenses committed before action is completed on such an application.

Even if a person lacked capacity to understand the effect of enlistment or did not enlist voluntarily, a “constructive enlistment” may be established under Article 2(c).

Even if a person never underwent an enlistment or induction proceeding of any kind, court-martial jurisdiction could be established under this provision.

(ii) *Induction.* Court-martial jurisdiction does not extend to a draftee until: the draftee has completed an induction ceremony which was in substantial compliance with the requirements prescribed by statute and regulations; the draftee, by conduct after an apparent induction, has waived objection to substantive defects in it; or a “constructive enlistment” under Article 2(c) exists.

The fact that a person was improperly inducted (for example, because of incorrect classification or erroneous denial of exemption) does not of itself negate court-martial jurisdiction. When a person has made timely and persistent efforts to correct such an error, court-martial jurisdiction may be defeated if improper induction is found, depending on all the circumstances of the case.

(iii) *Call to active duty.* A member of a reserve component may be called or ordered to active duty for a variety of reasons, including training, service in time of war or national emergency, discipline, or as a result of failure to participate satisfactorily in unit activities.

When a person is ordered to active duty for failure to satisfactorily participate in unit activities, the order must substantially comply with procedures prescribed by regulations, to the extent due process requires, for court-martial jurisdiction to exist. Generally, the person must be given notice of the activation and the reasons therefor, and an opportunity to object to the activation. A person waives the right to contest involuntary activation by failure to exercise this right within a reasonable time after notice of the right to do so.

(B) Termination of jurisdiction over active duty personnel. As indicated in this rule, the delivery of a valid discharge certificate or its equivalent ordinarily serves to terminate court-martial jurisdiction.

(i) *Effect of completion of term of service.* Completion of an enlistment or term of service does not by itself terminate court-martial jurisdiction. An original term of enlistment may be adjusted for a variety of reasons, such as making up time lost for unauthorized absence. Even after such adjustments are considered, court-martial jurisdiction normally continues past the time of scheduled separation until a discharge certificate or its equivalent is delivered or until the Government fails to act within a reasonable time after the person objects to continued retention. As indicated in subsection (c) of this rule, Servicemembers may be retained past their scheduled time of separation, over protest, by action with a view to trial while they are still subject to the UCMJ. Thus, if action with a view to trial is initiated before discharge or the effective terminal date of self-executing orders, a person may be retained beyond the date that the period of service would otherwise have expired or the terminal date of such orders.

(ii) *Effect of discharge and reenlistment.* For offenses occurring on or after 23 October 1992, under the 1992 Amendment to Article 3(a), a person who reenlists following a discharge may be tried for offenses committed during the earlier term of service. For offenses occurring prior to 23 October 1992, a person who reenlists following a discharge may be tried for offenses committed during the earlier term of service only if the offense was punishable by confinement for five (5) years or more and could not be tried in the courts of the United States or of a State, a Territory, or the District of Columbia. However, see (iii)(a) of this discussion.

(iii) *Exceptions.* There are several exceptions to the general principle that court-martial jurisdiction terminates on discharge or its equivalent.

(a) A person who was subject to the UCMJ at the time an offense was committed may be tried by court-martial for that offense despite a later discharge or other termination of that status if:

(1) For offenses occurring on or after 23 October 1992, the person is, at the time of the court-martial, subject to the UCMJ, by reentry into the armed forces or otherwise. *See* Article 3(a), as amended by the National Defense Authorization Act for Fiscal Year 1993, Pub. L. No. 102-484, 106 Stat. 2315, 2505 (1992);

(2) For offenses occurring before 23 October 1992,

(A) The offense is one for which a court-martial may adjudge confinement for five (5) or more years;

(B) The person cannot be tried in the courts of the United States or of a State, Territory, or the District of Columbia; and

(C) The person is, at the time of the court-martial, subject to the UCMJ, by reentry into the armed forces or otherwise. *See* Article 3(a) prior to the 1992 amendment.

(b) A person who was subject to the UCMJ at the time the offense was committed is subject to trial by court-martial despite a later discharge if—

(1) The discharge was issued before the end of the accused's term of enlistment for the purpose of reenlisting;

(2) The person remains, at the time of the court-martial, subject to the UCMJ; and

(3) The reenlistment occurred after 26 July 1982.

(c) Persons in the custody of the armed forces serving a sentence imposed by a court-martial remain subject to the UCMJ and court-martial jurisdiction. A prisoner who has received a discharge and who remains in the custody of an armed force may be tried for an offense committed while a member of the armed forces and before the execution of the discharge as well as for offenses committed after it.

(d) A person discharged from the armed forces who is later charged with having fraudulently obtained that discharge is, subject to the statute of limitations, subject to trial by court-martial on that charge, and is after apprehension subject to the UCMJ while in the custody of the armed forces for trial. Upon conviction of that charge such a person is subject to trial by court-martial for any offenses under the UCMJ committed before the fraudulent discharge.

(e) No person who has deserted from the armed forces is relieved from court-martial jurisdiction by a separation from any later period of service.

(f) When a person's discharge or other separation does not interrupt the status as a person belonging to the general category of persons subject to the UCMJ, court-martial jurisdiction over that person does not end. For example, when an officer holding a commission in a Reserve component of an armed force is discharged from that commission while on active duty because of acceptance of a commission in a Regular component of that armed force, without an interval between the periods of service under the two commissions, that officer's military status does not end. There is merely a change in personnel status from temporary to permanent officer, and court-martial jurisdiction over an offense committed before the discharge is not affected.

(3) *Public Health Service and National Oceanic and Atmospheric Administration.* Members of the Public Health Service and the National Oceanic and Atmospheric Administration become subject to the UCMJ when assigned to and serving with the armed forces.

(4) *Limitations on jurisdiction over civilians.* Court-martial jurisdiction over civilians under the UCMJ is limited by the Constitution and other applicable laws, including as construed in judicial decisions. The exercise of jurisdiction under Article 2(a)(11) in peace time has been held unconstitutional by the Supreme Court of the United States. Before initiating court-martial proceedings against a civilian, relevant statutes, decisions, Service regulations, and policy

memoranda should be carefully examined.

(5) *Members of a Reserve Component.* Members of a reserve component in federal service on active duty, as well as those in federal service on inactive-duty training or during any of the periods specified in Article 2(a)(3)(B), are subject to the UCMJ. Moreover, members of a reserve component are amenable to the jurisdiction of courts-martial notwithstanding the termination of a period of such duty. *See* R.C.M. 204.

The Discussion following R.C.M. 202(c)(1) reads as follows:

Discussion

Court-martial jurisdiction exists to try a person as long as that person occupies a status as a person subject to the UCMJ. Articles 103, 103b, and 104a set forth offenses with expanded jurisdictional reach. Thus, a Servicemember is subject to court-martial jurisdiction until lawfully discharged or, when the Servicemember's term of service has expired, the government fails to act within a reasonable time on objection by the Servicemember to continued retention.

Court-martial jurisdiction attaches over a person upon action with a view to trial. Once court-martial jurisdiction attaches, it continues throughout the trial and appellate process, and for purposes of punishment.

If jurisdiction has attached before the effective terminal date of self-executing orders, the person may be held for trial by court-martial beyond the effective terminal date.

The Analysis following R.C.M. 202 reads as follows:

Analysis

This rule is taken from Rule 202 of the MCM (2016 edition) with the following amendments:

2018 Amendment: Paragraph (1) of the Discussion accompanying R.C.M. 202(a) and the Discussion accompanying R.C.M. 202(c) are amended to reflect the reorganization of the punitive articles in the Military Justice Act of 2016. *See* Articles 79-134, as amended by Sections 5401-5452 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016), as further amended by Section 1081(c) of the National Defense Authorization Act for Fiscal Year 2018, Pub. Law. No. 115-91, 131 Stat. 1283 (2017).

Paragraph (5) of the Discussion accompanying R.C.M. 202(a) is amended and reflects Article 2(a)(3), as amended by Section 5102 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016), which revises UCMJ jurisdiction over reservists to cover periods incident to inactive-duty training.

The Discussion following R.C.M. 203 reads as follows:

Discussion

(a) *In general.* Courts-martial have power to try any offense under the UCMJ except when prohibited from so doing by the Constitution. The rule enunciated in *Solorio v. United States*, 483 U.S. 435 (1987), is that jurisdiction of courts-martial depends solely on the accused's status as a person subject to the Uniform Code of Military Justice, and not on the "service-connection" of the offense charged.

(b) *Pleading and proof.* Normally, the inclusion of the accused's rank or grade will be sufficient to plead the service status of the accused. Ordinarily, no allegation of the accused's armed force or unit is necessary for military members on active duty. *See* R.C.M. 307 regarding required specificity of pleadings. For jurisdictional punishment limitations applicable for specific types of courts-martial, *see* R.C.M. 201(f).

The Analysis following R.C.M. 203 reads as follows:

Analysis

This rule is taken from Rule 203 of the MCM (2016 edition) with the following amendment:

2018 Amendment: The Discussion accompanying R.C.M. 203 is amended and adds a reference to R.C.M. 201(f) with respect to the punishment limitations applicable to specific types of courts-martial.

The Discussion following R.C.M. 204(a) reads as follows:

Discussion

Such regulations should describe procedures for ordering a reservist to active duty for disciplinary action, preferral of charges, preliminary hearings, forwarding of charges, referral of charges, designation of convening authorities and commanders authorized to conduct nonjudicial punishment proceedings, and for other appropriate purposes.

See definitions in R.C.M. 103 (Discussion). *See* paragraph 5.e and f., Part V, concerning limitations on nonjudicial punishments imposed on reservists while on inactive-duty training.

Members of the Army National Guard and the Air National Guard are subject to federal court-martial jurisdiction only when the offense concerned is committed while the member is in federal service.

The Discussion following R.C.M. 204(b)(1) reads as follows:

Discussion

An accused ordered to active duty pursuant to Article 2(d) may be retained on active duty after service of the punishment if permitted by other authority. For example, an accused who commits another offense while on active duty ordered pursuant to Article 2(d) may be retained on active duty pursuant to R.C.M. 202(c)(1).

The Discussion following R.C.M. 204(b)(2) reads as follows:

Discussion

A “normal period” of inactive-duty training does not include periods which are scheduled solely for the purpose of conducting court-martial proceedings.

The Discussion following R.C.M. 204(d) reads as follows:

Discussion

A member of a regular or reserve component remains subject to court-martial jurisdiction after leaving active duty for offenses committed prior to such termination of active duty if the member retains military status in a reserve component without having been discharged from all obligations of military service.

See R.C.M. 202(a), Discussion, paragraph(2)(B)(ii) and (iii), regarding the jurisdictional effect of a discharge from military service. A “complete termination” of military status refers to a discharge relieving the Servicemember of any further military service. It does not include a discharge conditioned upon acceptance of further military service.

The Analysis following R.C.M. 204 reads as follows:

Analysis

This rule is taken from Rule 204 of the MCM (2016 edition) with the following amendment:

2018 Amendment: R.C.M. 204(d) is amended and implements Article 2(a)(3), as amended by Section 5102 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016), which revises UCMJ jurisdiction over reservists to cover periods incident to inactive-duty training.

CHAPTER III. INITIATION OF CHARGES; APPREHENSION; PRETRIAL RESTRAINT; RELATED MATTERS

The Discussion following R.C.M. 301(b) reads as follows:

Discussion

Any military authority may receive a report of an offense. Typically such reports are made to law enforcement or investigative personnel, or to appropriate persons in the chain of command. A report may be made by any means, and no particular format is required. When a person who is not a law enforcement official receives a report of an offense, that person should forward the report to the immediate commander of the suspect unless that person believes it would be more appropriate to notify law enforcement or investigative authorities.

If the suspect is unidentified, the military authority who receives the report should refer it to a law enforcement or investigative agency.

Upon receipt of a report, the immediate commander of a suspect should refer to R.C.M. 306 (Initial disposition). *See also* R.C.M. 302 (Apprehension); R.C.M. 303 (Preliminary inquiry into reported offenses); R.C.M. 304, 305 (Pretrial restraint, confinement).

The Analysis following R.C.M. 301 reads as follows:

Analysis

This rule is taken from Rule 301 of the MCM (2016 edition) without substantive amendment.

The Discussion following R.C.M. 302(a)(1) reads as follows:

Discussion

Apprehension is the equivalent of “arrest” in civilian terminology. (In military terminology, “arrest” is a form of restraint. *See* Article 9; R.C.M. 304.) *See* subsection (c) of this rule concerning the bases for apprehension. An apprehension is not required in every case; the fact that an accused was never apprehended does not affect the jurisdiction of a court-martial to try the accused. However, *see* R.C.M. 202(c) concerning attachment of jurisdiction.

An apprehension is different from detention of a person for investigative purposes, although each involves the exercise of government control over the freedom of movement of a person. An apprehension must be based on probable cause, and the custody initiated in an apprehension may continue until proper authority is notified and acts under R.C.M. 304 or 305. An investigative detention may be made on less than probable cause (*see* Mil. R. Evid. 314(f)), and normally involves a relatively short period of custody. Furthermore, an extensive search of the person is not authorized incident to an investigative detention, as it is with an apprehension. *See* Mil. R. Evid. 314(f) and (g). This rule does not affect any seizure of the person less severe than apprehension.

Evidence obtained as the result of an apprehension which is in violation of this rule may be challenged under Mil. R. Evid. 311(d). Evidence obtained as the result of an unlawful civilian arrest may be challenged under Mil. R. Evid. 311(d).

The Discussion following R.C.M. 302(a)(2) reads as follows:

Discussion

R.C.M. 302 does not affect the authority of any official to detain, arrest, or apprehend persons not subject to trial under the UCMJ. The rule does not apply to actions taken by any person in a private capacity.

Several federal agencies have broad powers to apprehend persons for violations of federal laws, including the Uniform Code of Military Justice. For example, agents of the Federal Bureau of Investigation, United States Marshals, and Secret Service may apprehend persons for any offenses committed in their presence and for felonies. 18 U.S.C. §§ 3052, 3053, 3056. Other agencies with apprehension powers include the General Services Administration, 40 U.S.C. § 318, and the Veterans Administration, 38 U.S.C. § 902. The extent to which such agencies become involved in the apprehension of persons subject to trial by courts-martial may depend on the statutory authority of the agency and the agency's formal or informal relationships with the Department of Defense.

The Discussion following R.C.M. 302(b)(1) reads as follows:

Discussion

Whenever enlisted persons, including police and guards, and civilian police and guards apprehend any commissioned or warrant officer, such persons should make an immediate report to the commissioned officer to whom the apprehending person is responsible.

The phrase "persons designated by proper authority to perform military criminal investigative, guard or police duties" includes special agents of the Defense Criminal Investigative Service.

The Discussion following R.C.M. 302(b)(2) reads as follows:

Discussion

Noncommissioned and petty officers not otherwise performing law enforcement duties should not apprehend a commissioned officer unless directed to do so by a commissioned officer or in order to prevent disgrace to the Service or the escape of one who has committed a serious offense.

The Discussion following R.C.M. 302(b)(3) reads as follows:

Discussion

The UCMJ specifically provides that any civil officer with the authority to apprehend offenders under the laws of the United States or of a State, Commonwealth, passion, or the District of Columbia may summarily apprehend a deserter. Article 8. However, this authority does not permit state and local law enforcement officers to apprehend persons for other violations of the UCMJ.

The Discussion following R.C.M. 302(c) reads as follows:

Discussion

"Reasonable grounds" means that there must be the kind of reliable information that a reasonable, prudent person would rely on which makes it more likely than not that something is true. A mere suspicion is not enough but proof which would support a conviction is not necessary. A person who determines probable cause may rely on the reports of others.

The Discussion following R.C.M. 302(d)(3) reads as follows:

Discussion

In addition to any other action required by law or regulation or proper military officials, any person making an apprehension under these rules should maintain custody of the person apprehended and inform as promptly as possible the immediate commander of the person apprehended, or any official higher in the chain of command of the person apprehended if it is impractical to inform the immediate commander.

The Discussion following R.C.M. 302(e)(2)(D)(ii) reads as follows:

Discussion

For example, if law enforcement officials enter a private dwelling pursuant to a valid search warrant or search authorization, they may apprehend persons therein if grounds for an apprehension exist. This subsection is not intended to be an independent grant of authority to execute civilian arrest or search warrants. The authority must derive from an appropriate federal or state procedure. *See, e.g.,* Fed. R. Crim. P. 41 and 28 C.F.R. 60.1.

The Analysis following R.C.M. 302 reads as follows:

Analysis

This rule is taken from Rule 302 of the MCM (2016 edition) with the following amendments:

2018 Amendment: The Discussion accompanying R.C.M. 302(a)(1) is amended and updates cross-references.

R.C.M. 302(e)(2)(A) is amended and updates cross-references to the Military Rules of Evidence.

R.C.M. 302(e)(2)(B) is amended and reflects exigent circumstances under which an apprehension may be made in a private dwelling.

The Discussion following R.C.M. 303 reads as follows:

Discussion

The preliminary inquiry is usually informal. It may be an examination of the charges and an investigative report or other summary of expected evidence. In other cases a more extensive investigation may be necessary. Although the commander may conduct the investigation personally or with members of the command, in serious or complex cases the commander should consider whether to seek the assistance of law enforcement personnel in conducting any inquiry or further investigation. The inquiry should gather all reasonably available evidence bearing on guilt or innocence and any evidence relating to aggravation, extenuation, or mitigation. Investigations, including those performed by a law enforcement agency, fulfill the requirement for a preliminary inquiry under this rule. A commander who receives a report of a sex-related offense involving a member of the Armed Forces in the chain of command of such officer shall refer the report to the military criminal investigative organization with responsibility for investigating that offense of the military department concerned or such other investigative service of the military department concerned as the Secretary concerned may specify.

The Military Rules of Evidence should be consulted when conducting interrogations (*see* Mil. R. Evid. 301-306), searches (*see* Mil. R. Evid. 311-317), and eyewitness identifications (*see* Mil. R. Evid. 321).

If the offense is one for which the Department of Justice has investigative responsibilities, appropriate coordination should be made under the Memorandum of Understanding, *see* Appendix 3, and any implementing regulations.

If it appears that any witness may not be available for later proceedings in the case, this should be brought to the attention of appropriate authorities. *See also* R.C.M. 702 (depositions).

A person who is an accuser (*see* Article 1(9)) is disqualified from convening a general or special court-martial in that case. *See* R.C.M. 504(c)(1). Therefore, when the immediate commander is a general or special court-martial

convening authority, the preliminary inquiry should be conducted by another officer of the command. That officer may be informed that charges may be preferred if the officer determines that preferral is warranted.

The Analysis following R.C.M. 303 reads as follows:

Analysis

This rule is taken from Rule 303 of the MCM (2016 edition) with the following amendment:

2018 Amendment: The Discussion accompanying R.C.M. 303 is amended and reflects Section 1742 of the National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66, 127 Stat. 980 (2013), which mandated that commanders refer reports of sex-related offenses involving members of the armed forces in their chain of command to the appropriate military criminal investigative organization.

The Discussion following R.C.M. 304(a)(4) reads as follows:

Discussion

Conditions on liberty include orders to report periodically to a specified official, orders not to go to a certain place (such as the scene of the alleged offense), and orders not to associate with specified persons (such as the alleged victim or potential witnesses). Conditions on liberty must not hinder pretrial preparation, however. Thus, when such conditions are imposed, they must be sufficiently flexible to permit pretrial preparation.

Restriction in lieu of arrest is a less severe restraint on liberty than is arrest. Arrest includes suspension from performing full military duties and the limits of arrest are normally narrower than those of restriction in lieu of arrest. The actual nature of the restraint imposed, and not the characterization of it by the officer imposing it, will determine whether it is technically an arrest or restriction in lieu of arrest.

Breach of arrest or restriction in lieu of arrest or violation of conditions on liberty are offenses under the UCMJ. *See* paragraphs 12, 13 and 18, Part IV. When such an offense occurs, it may warrant appropriate action such as nonjudicial punishment or court-martial. *See* R.C.M. 306. In addition, such a breach or violation may provide a basis for the imposition of a more severe form of restraint.

R.C.M. 707(a) requires that the accused be brought to trial within 120 days of preferral of charges or imposition of restraint under R.C.M. 304(a)(2)-(4).

The Discussion following R.C.M. 304(b)(1) reads as follows:

Discussion

Civilians may be restrained under these rules only when they are subject to trial by court-martial. *See* R.C.M. 202.

The Discussion following R.C.M. 304(c)(3) reads as follows:

Discussion

The decision whether to impose pretrial restraint, and, if so, what type or types, should be made on a case-by-case basis. The factors listed in the Discussion of R.C.M. 305(h)(2)(B) should be considered. The restraint should not be more rigorous than the circumstances require to ensure the presence of the person restrained or to prevent foreseeable serious criminal misconduct.

Restraint is not required in every case. The absence of pretrial restraint does not affect the jurisdiction of a court-martial. However, *see* R.C.M. 202(c) concerning attachment of jurisdiction. *See* R.C.M. 305 concerning the standards and procedures governing pretrial confinement.

The Discussion following R.C.M. 304(e) reads as follows:

Discussion

See R.C.M. 305(e) concerning additional information which must be given to a person who is confined. If the person ordering the restraint is not the commander of the person restrained, that officer should be notified.

The Discussion following R.C.M. 304(f) reads as follows:

Discussion

Offenses under the UCMJ by a person under restraint may be disposed of in the same manner as any other offenses.

The Discussion following R.C.M. 304(g) reads as follows:

Discussion

Pretrial restraint may be imposed (or reimposed) if charges are to be reinstated or a rehearing or “other” trial is to be ordered.

The Discussion following R.C.M. 304(h) reads as follows:

Discussion

See R.C.M. 306.

The Analysis following R.C.M. 304 reads as follows:

Analysis

This rule is taken from Rule 304 of the MCM (2016 edition) with the following amendment:

2018 Amendment: The Discussion accompanying R.C.M. 304(a)(4) is amended and reflects the reorganization of the punitive articles in the Military Justice Act of 2016. *See* Articles 79-134, as amended by Sections 5401-5452 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016), as further amended by Section 1081(c) of the National Defense Authorization Act for Fiscal Year 2018, Pub. Law. No. 115-91, 131 Stat. 1283 (2017).

The Discussion following R.C.M. 305(a) reads as follows:

Discussion

See Article 12 regarding the limitations on confinement of members of the armed forces of the United States in immediate association with enemy prisoners or other foreign nationals detained under the law of war.

The Discussion following R.C.M. 305(b) reads as follows:

Discussion

See R.C.M. 201 and 202 and the discussions therein concerning persons who are subject to trial by courts-martial.

The Discussion following R.C.M. 305(c) reads as follows:

Discussion

No provost marshal, commander of a guard, or master at arms may refuse to receive or keep any confinee committed to his charge by a commissioned officer of the armed forces, when the committing officer furnishes a statement, signed by him, of the offense charged against the confinee. *See* Article 11(a).

The Discussion following R.C.M. 305(d)(3) reads as follows:

Discussion

The person who directs confinement should consider the matters discussed under subparagraph (h)(2)(B) of this rule before ordering confinement. However, the person who initially orders confinement is not required to make a detailed analysis of the necessity for confinement. It is often not possible to review a person's background and character or even the details of an offense before physically detaining the person. For example, until additional information can be secured, it may be necessary to confine a person apprehended in the course of a violent crime.

"When a person subject to this chapter is charged only with an offense that is normally tried by summary court-martial, the person ordinarily shall not be ordered in confinement." Article 10(a)(2).

Confinement should be distinguished from custody. Custody is restraint which is imposed by apprehension and which may be, but is not necessarily, physical. Custody may be imposed by anyone authorized to apprehend (*see* R.C.M. 302(b)), and may continue until a proper authority under R.C.M. 304(b) is notified and takes action. Thus, a person who has been apprehended could be physically restrained, but this would not be pretrial confinement in the sense of this rule until a person authorized to do so under R.C.M. 304(b) directed confinement.

The Discussion following R.C.M. 305(h)(1) reads as follows:

Discussion

This report may be made by any means. Ordinarily, the immediate commander of the confinee should be notified. In unusual cases any commander to whose authority the confinee is subject, such as the commander of the confinement facility, may be notified. In the latter case, the commander so notified must ensure compliance with R.C.M. 305(h)(2).

The Discussion following R.C.M. 305(h)(2)(B)(iv) reads as follows:

Discussion

A person should not be confined as a mere matter of convenience or expedience.

Some of the factors which should be considered under this subsection are:

- (1) The nature and circumstances of the offenses charged or suspected, including extenuating circumstances;
- (2) The weight of the evidence against the confinee;
- (3) The confinee's ties to the locale, including family, off-duty employment, financial resources, and length of residence;
- (4) The confinee's character and mental condition;
- (5) The confinee's service record, including any record of previous misconduct;
- (6) The confinee's record of appearance at or flight from other pretrial investigations, trials, and similar proceedings; and
- (7) The likelihood that the confinee can and will commit further serious criminal misconduct if allowed to remain at liberty.

Although the Military Rules of Evidence are not applicable, the commander should judge the reliability of the information available. Before relying on the reports of others, the commander must have a reasonable belief that the information is believable and has a factual basis. The information may be received orally or in writing. Information need not be received under oath, but an oath may add to its reliability. A commander may examine the confinee's personnel and police records, and may consider the recommendations of others.

Less serious forms of restraint must always be considered before pretrial confinement may be approved. Thus the commander should consider whether the confinee could be safely returned to the confinee's unit, placed on restriction, placed under arrest, or placed under conditions on liberty. *See* R.C.M. 304.

The Discussion following R.C.M. 305(i)(2)(A)(iv) reads as follows:

Discussion

Personal appearance by the victim is not required. A victim's right to be reasonably heard at a 7-day review may also be accomplished telephonically, by video conference, or by written statement. The right to be heard under this rule includes the right to be heard through counsel.

The Discussion following R.C.M. 305(j)(1)(C) reads as follows:

Discussion

Upon a motion for release from pretrial confinement, a victim of an alleged offense committed by the confinee has the right to reasonable, accurate, and timely notice of the motion and any hearing, the right to confer with counsel representing the Government, and the right to be reasonably heard. Inability to reasonably afford the victim these rights shall not delay the proceedings. The right to be heard under this rule includes the right to be heard through counsel. *See* R.C.M. 906(b)(8).

The Discussion following R.C.M. 305(l) reads as follows:

Discussion

See R.C.M. 304(b) concerning who may order confinement.

The Discussion following R.C.M. 305(m)(2) reads as follows:

Discussion

Under this paragraph, the standards for confinement remain the same (although the circumstances giving rise to the exception could bear on the application of those standards). Also, pretrial confinement remains subject to judicial review. The confinee's commander still must determine whether confinement will continue under R.C.M. 305(h)(2)(B). The suspension of R.C.M. 305(h)(2)(A) removes the 72-hour requirement because, in a combat environment, the commander may not be available to comply with it. The commander must make the pretrial confinement decision as soon as reasonably possible, however. (This provision is not suspended under paragraph (2) since the commander of a vessel is always available.)

Operational exceptions to the requirements under R.C.M. 305 (e)(3) and (4) do not constitute exceptions to the notice requirements under Article 31(b).

The Discussion following R.C.M. 305(n) reads as follows:

Discussion

For purposes of this rule, the term "victim of an alleged offense" has the same meaning as the term "victim of an offense under this chapter" in Article 6b.

The Analysis following R.C.M. 305 reads as follows:

Analysis

This rule is taken from Rule 305 of the MCM (2016 edition) with the following amendments:

2018 Amendment: R.C.M. 305 is amended throughout the rule and replaces the term “prisoner” with the term “confinee.”

The Discussion accompanying R.C.M. 305(a) is amended and reflects Article 12, as amended by Section 5122 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016), with respect to confinement of members of the armed forces in immediate association with enemy prisoners and other specified individuals.

R.C.M. 305(k) is amended and updates cross-references applicable to administrative credit against the sentenced adjudged for confinement served as a result of noncompliance with R.C.M. 305(f), (h), (i), or (j).

R.C.M. 305(m)(1) and (2) are amended and update cross-references.

The Discussion accompanying R.C.M. 305(m) is amended and clarifies that operational exceptions permitted to the requirements of certain provisions of R.C.M. 305 do not constitute exceptions to the requirements of Article 31(b).

The Discussion accompanying R.C.M. 305(n) is amended and clarifies the meaning of the term “victim of an alleged offense” as it pertains to this rule.

The Discussion following R.C.M. 306(a) reads as follows:

Discussion

Each commander in the chain of command has independent, yet overlapping discretion to dispose of offenses within the limits of that officer’s authority. Normally, in keeping with the policy in subsection (b) of this rule, the initial disposition decision is made by the official at the lowest echelon with the power to make it. A decision by a commander ordinarily does not bar a different disposition by a superior authority. *See* R.C.M. 401(c); 601(f). Once charges are referred to a court-martial by a convening authority competent to do so, they may be withdrawn from that court-martial only in accordance with R.C.M. 604.

The initial disposition authority for certain sex-related offenses is withheld from all commanders who do not possess at least special court-martial convening authority and who are not in the grade of O-6 or higher. *See* DoD Instruction 6495.02, “Sexual Assault Prevention and Response (SAPR) Program Procedures,” March 28, 2013, as amended. Military Justice Manual, COMDTINST M5810.1 (series) as amended; COMDTNOTE 5811 “Higher Level Review of Cases Involving Certain Sex-Related Offenses,” Sept 4, 2014.

See Appendix 3 with respect to offenses for which coordination with the Department of Justice is required.

The Discussion following R.C.M. 306(b) reads as follows:

Discussion

In deciding how an offense should be disposed of, the commander should review and consider the disposition factors set forth in Appendix 2.1 (Non-binding disposition guidance).

The Discussion following R.C.M. 306(c) reads as follows:

Discussion

Prompt disposition of charges is essential. *See* R.C.M. 707 (speedy trial requirements).

Before determining an appropriate disposition, a commander should ensure that a preliminary inquiry under R.C.M. 303 has been conducted. If charges have not already been preferred, the commander may, if appropriate, prefer them and dispose of them under this rule. But see R.C.M. 601(c) regarding disqualification of an accuser.

If charges have been preferred, the commander should ensure that the accused has been notified in accordance with R.C.M. 308, and that charges are in proper form. *See* R.C.M. 307. Each commander who forwards or disposes of charges may make minor changes therein. *See* R.C.M. 603(a) and (b). If major changes are necessary, the affected charge should be preferred anew. *See* R.C.M. 603(d).

When charges are brought against two or more accused with a view to a joint or common trial, *see* R.C.M. 307(c)(5); 601(e)(3). If it appears that the accused may lack mental capacity to stand trial or may not have been mentally responsible at the times of the offenses, *see* R.C.M. 706; 909; 916(k).

The Discussion following R.C.M. 306(c)(1) reads as follows:

Discussion

A decision to take no action or dismissal of charges at this stage does not bar later disposition of the offenses under R.C.M. 306(c)(2) through (5).

See R.C.M. 401(a) concerning who may dismiss charges, and R.C.M. 401(c)(1) concerning dismissal of charges.

When a decision is made to take no action, the accused should be informed.

The Discussion following R.C.M. 306(c)(2) reads as follows:

Discussion

Other administrative measures, which are subject to regulations of the Secretary concerned, include matters related to efficiency reports, academic reports, and other ratings; rehabilitation and reassignment; career field reclassification; administrative reduction for inefficiency; bar to reenlistment; personnel reliability program reclassification; security classification changes; pecuniary liability for negligence or misconduct; and administrative separation.

The Discussion following R.C.M. 306(c)(4) reads as follows:

Discussion

If charges have not been preferred, they may be preferred. *See* R.C.M. 307 concerning preferral of charges. But *see* R.C.M. 601(c) concerning disqualification of an accuser.

Charges may be disposed of by dismissing them, forwarding them to another commander for disposition, or referring them to a summary, special, or general court-martial. Before charges may be referred to a general court-martial, compliance with R.C.M. 405 and 406 is necessary. Therefore, if appropriate, a preliminary hearing under R.C.M. 405 may be directed. Additional guidance on these matters is found in R.C.M. 401-407.

The Discussion following R.C.M. 306(c)(5) reads as follows:

Discussion

The immediate commander may lack authority to take action which that commander believes is an appropriate disposition. In such cases, the matter should be forwarded to a superior officer with a recommendation as to disposition. *See also* R.C.M. 401(c)(2) concerning forwarding charges. If allegations are forwarded to a higher authority for disposition, because of lack of authority or otherwise, the disposition decision becomes a matter within the discretion of the higher authority.

A matter may be forwarded for other reasons, such as for investigation of allegations and preferral of charges, if warranted (*see* R.C.M. 303, 307), or so that a subordinate can dispose of the matter.

The Analysis following R.C.M. 306 reads as follows:

Analysis

This rule is taken from Rule 306 of the MCM (2016 edition) with the following amendments:

2018 Amendment: The Discussion accompanying R.C.M. 306(a) is amended and reflects that the Initial Disposition Authority for certain sex-related offenses is a commander in the grade of O-6 or above possessing at least special court-martial convening authority.

The Discussion accompanying R.C.M. 306(b) is amended and refers to the non-binding disposition guidance required by Article 33, as amended by Section 5204 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016). *See* Appendix 2.1.

The Discussion accompanying R.C.M. 306(c)(2) is relocated and accompanies R.C.M. 306(c)(1).

R.C.M. 306(e)(1) is amended and reflects the reorganization of the punitive articles in the Military Justice Act of 2016. *See* Articles 79-134, as amended by Sections 5401-5452 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016), as further amended by Section 1081(c) of the National Defense Authorization Act for Fiscal Year 2018, Pub. Law. No. 115-91, 131 Stat. 1283 (2017).

R.C.M. 306(e)(3) is amended and clarifies that, under such regulations as the Secretary may prescribe, if no charges are preferred for an alleged sex-related offense, if the commander learns of any decision by civilian authorities to prosecute or not prosecute the offense in civilian court, the commander shall ensure the victim is notified.

The Discussion following R.C.M. 307(a) reads as follows:

Discussion

No person may be ordered to prefer charges to which that person is unable to make truthfully the required oath. *See* Article 30(a) and R.C.M. 307 (b). A person who has been the accuser or nominal accuser (*see* Article 1(9)) may not also serve as the convening authority of a general or special court-martial to which the charges are later referred. *See* Articles 22(b) and 23(b); R.C.M. 601; *but see* R.C.M. 1302(b) (summary court-martial convening authority is not disqualified by being the accuser). A person authorized to dispose of offenses (*see* R.C.M. 306(a); 401-404 and 407) should not be ordered to prefer charges when this would disqualify that person from exercising that person's authority or would improperly restrict that person's discretion to act on the case. *See* R.C.M. 104 and 504(c).

Charges may be preferred against a person subject to trial by court-martial at any time but should be preferred without unnecessary delay. *See* the statute of limitations prescribed by Article 43. Preferral of charges should not be unnecessarily delayed. When a good reason exists—as when a person is permitted to continue a course of conduct so that a ringleader or other conspirators may also be discovered or when a suspected counterfeiter goes uncharged until guilty knowledge becomes apparent—a reasonable delay is permissible. However, *see* R.C.M. 707 concerning speedy trial requirements

The Discussion following R.C.M. 307(b)(2)(B) reads as follows:

Discussion

See Article 136 for authority to administer oaths. The following form may be used to administer the oath:

“You (swear) (affirm) that you are a person subject to the Uniform Code of Military Justice, that you have personal knowledge of or have investigated the matters set forth in the foregoing charge(s) and specification(s), and that the same are true to the best of your knowledge and belief. (So help you God.)”

The accuser's belief may be based upon reports of others in whole or in part.

The Discussion following R.C.M. 307(c)(1) reads as follows:

Discussion

See Appendix 5 for a sample of a Charge Sheet (DD Form 458).

The Discussion following R.C.M. 307(c)(2) reads as follows:

Discussion

The particular subdivision of an article of the UCMJ (for example, Article 118(1)) should not be included in the charge. When there are numerous infractions of the same article, there will be only one charge, but several specifications thereunder. There may also be several charges, but each must allege a violation of a different article of the UCMJ. For violations of the law of war, see (D) of this Discussion.

(A) *Numbering charges.* If there is only one charge, it is not numbered. When there is more than one charge, each charge is numbered by a Roman numeral.

(B) *Additional charges.* Charges preferred after others have been preferred are labeled “additional charges” and are also numbered with Roman numerals, beginning with “I” if there is more than one additional charge. These ordinarily relate to offenses not known at the time or committed after the original charges were preferred. Additional charges do not require a separate trial if incorporated in the trial of the original charges before arraignment. *See* R.C.M. 601(e)(2).

(C) *Preemption.* An offense specifically defined by Articles 81 through 132 may not be alleged as a violation of Article 134. *See* paragraph 91.c.(5)(a) of Part IV. *But see* R.C.M. 307(d).

(D) *Charges under the law of war.* In the case of a person subject to trial by general court-martial for violations of the law of war (*see* Article 18), the charge should be: “Violation of the Law of War”; or “Violation of _____, _____” referring to the local penal law of the occupied territory. *See* R.C.M. 201(f)(1)(B). *But see* R.C.M. 307(d). Ordinarily persons subject to the UCMJ should be charged with a specific violation of the UCMJ rather than a violation of the law of war.

The Discussion following R.C.M. 307(c)(3) reads as follows:

Discussion

How to draft specifications.

(A) *Sample specifications.* Before drafting a specification, the drafter should read the pertinent provisions of Part IV, where the elements of proof of various offenses and forms for specifications appear.

(B) *Numbering specifications.* If there is only one specification under a charge it is not numbered. When there is more than one specification under any charge, the specifications are numbered in Arabic numerals. The term “additional” is not used in connection with the specifications under an additional charge.

(C) *Name and description of the accused.*

(i) *Name.* The specification should state the accused’s full name: first name, middle name or initial, last name. If the accused is known by more than one name, the name acknowledged by the accused should be used. If there is no such acknowledgment, the name believed to be the true name should be listed first, followed by all known aliases. For example: Seaman John P. Smith, U.S. Navy, alias Lt. Robert R. Brown, U.S. Navy.

(ii) *Military association.* The specification should state the accused’s rank or grade. If the rank or grade of the accused has changed since the date of an alleged offense, and the change is pertinent to the offense charged, the accused should be identified by the present rank or grade followed by rank or grade on the date of the alleged offense. For example: In that Seaman _____ then Seaman Apprentice _____, etc.

(iii) *Social security number or service number.* The social security number or service number of an accused should not be stated in the specification.

(iv) *Basis of personal jurisdiction.*

(a) *Military members on active duty.* Ordinarily, no allegation of the accused’s armed force or unit or

organization is necessary for military members on active duty.

(b) *Persons subject to the UCMJ under Article 2(a), subsections (3) through (12), or subject to trial by court-martial under Articles 3 or 4.* The specification should describe the accused's armed force, unit or organization, position, or status which will indicate the basis of jurisdiction. For example: John Jones, (a person employed by and serving with the U.S. Army in the field in time of war) (a person convicted of having obtained a fraudulent discharge), etc.

(D) *Date and time of offense*

(i) *In general.* The date of the commission of the offense charged should be stated in the specification with sufficient precision to identify the offense and enable the accused to understand what particular act or omission to defend against.

(ii) *Use of "on or about."* In alleging the date of the offense it is proper to allege it as "on or about" a specified day.

(iii) *Hour.* The exact hour of the offense is ordinarily not alleged except in certain absence offenses. When the exact time is alleged, the 24-hour clock should be used. The use of "at or about" is proper.

(iv) *Extended periods.* When the acts specified extend(s) over a considerable period of time it is proper to allege it (or them) as having occurred, for example, "from about 15 June 1983 to about 4 November 1983," or "did on divers occasions between 15 June 1983 and 4 November 1983."

(E) *Place of offense.* The place of the commission of the offense charged should be stated in the specification with sufficient precision to identify the offense and enable the accused to understand the particular act or omission to defend against. In alleging the place of the offense, it is proper to allege it as "at or near" a certain place if the exact place is uncertain.

(F) *Subject-matter jurisdiction allegations.* Pleading the accused's rank or grade along with the proper elements of the offense normally will be sufficient to establish subject-matter jurisdiction.

(G) *Description of offense.*

(i) *Elements.* The elements of the offense must be expressly alleged. If a specific intent, knowledge, or state of mind is an element of the offense, it must be alleged. To state an offense under Article 134, practitioners must expressly allege the terminal element. All offenses under Article 134 require proof of a single terminal element, but the terminal element is charged and proven differently for offenses charged under Clause (1) and (2) of Article 134, in contrast to those charged under Clause (3). For elements of offenses charged under Article 134, Clause (1), (2), or (3), see paragraph 91.b. in Part IV of this Manual.

(ii) *Words indicating criminality.* If the alleged act is not itself an offense but is made an offense either by applicable statute (including Articles 133 and 134), or regulation or custom having the effect of law, then words indicating criminality such as "wrongfully," "unlawfully," or "without authority" (depending upon the nature of the offense) should be used to describe the accused's acts.

(iii) *Specificity.* The specification should be sufficiently specific to inform the accused of the conduct charged, to enable the accused to prepare a defense, and to protect the accused against double jeopardy. Only those facts that make the accused's conduct criminal ordinarily should be alleged. Specific evidence supporting the allegations ordinarily should not be included in the specifications.

(iv) *Duplicity.* One specification should not allege more than one offense, either conjunctively (the accused "lost and destroyed") or alternatively (the accused "lost or destroyed"). However, if two acts or a series of acts constitute one offense, they may be alleged conjunctively. See R.C.M. 906(b)(5).

(v) *Lesser included offenses.* Article 79 contains two provisions concerning notice of lesser included offenses: (1) offenses that are "necessarily included" in the charged offense in accordance with Article 79(b)(1); and (2) offenses designated as lesser included offenses by the President under Article 79(b)(2). See Appendix 12A. Each provision sets forth an independent basis for providing notice of a lesser included offense. Where there is doubt as to whether an offense is a lesser included offense or whether a particular offense should be charged in the alternative, preferral of a separate charge or specification may be warranted. If the accused is convicted of two or more offenses, the trial counsel should consider asking the military judge to determine whether any convictions that were charged in the alternative or as potential lesser included offenses should be dismissed or conditionally dismissed subject to appellate review.

(H) *Other considerations in drafting specifications.*

(i) *Principals.* All principals are charged as if each was the perpetrator. See paragraph 1 of Part IV for a

discussion of principals.

(ii) *Victim*. In the case of an offense against the person or property of a person, the first name, middle initial and last name of such person should be alleged, if known. If the name of the victim is unknown, a general physical description may be used. If this cannot be done, the victim may be described as “a person whose name is unknown.” Military rank or grade should be alleged, and must be alleged if an element of the offense, as in an allegation of disobedience of the command of a superior officer. If the person has no military position, it may otherwise be necessary to allege the status as in an allegation of using provoking words toward a person subject to the UCMJ. *See* paragraph 55 of Part IV.

(iii) *Property*. In describing property generic terms should be used, such as “a watch” or “a knife,” and descriptive details such as make, model, color, and serial number should ordinarily be omitted. In some instances, however, details may be essential to the offense, so they must be alleged. For example: the length of a knife blade may be important when alleging a violation of general regulation prohibiting carrying a knife with a blade that exceeds a certain length.

(iv) *Value*. When the value of property or other amount determines the maximum punishment which may be adjudged for an offense, the value or amount should be alleged, for in such a case increased punishments that are contingent upon value may not be adjudged unless there is an allegation, as well as proof, of a value which will support the punishment. If several articles of different kinds are the subject of the offense, the value of each article should be stated followed by a statement of the aggregate value. Exact value should be stated, if known. For ease of proof an allegation may be “of a value not less than _____.” If only an approximate value is known, it may be alleged as “of a value of about _____.” If the value of an item is unknown but obviously minimal, the term “of some value” may be used. These principles apply to allegations of amounts.

(v) *Documents*. When documents other than regulations or orders must be alleged (for example, bad checks in violation of Article 123a), the document may be set forth verbatim (including photocopies and similar reproductions) or may be described, in which case the description must be sufficient to inform the accused of the offense charged.

(vi) *Orders*.

(a) *General orders*. A specification alleging a violation of a general order or regulation (Article 92(1)) must clearly identify the specific order or regulation allegedly violated. The general order or regulation should be cited by its identifying title or number, section or paragraph, and date. It is not necessary to recite the text of the general order or regulation verbatim.

(b) *Other orders*. If the order allegedly violated is an “other lawful order” (Article 92(2)), it should be set forth verbatim or described in the specification. When the order is oral, see clause (H)(vii) of this discussion.

(c) *Negating exceptions*. If the order contains exceptions, it is not necessary that the specification contain a specific allegation negating the exceptions. However, words of criminality may be required if the alleged act is not necessarily criminal. *See* clause (G)(ii) of this discussion.

(vii) *Oral statements*. When alleging oral statements the phrase “or words to that effect” should be added.

(viii) *Joint offense*. In the case of a joint offense each accused may be charged separately as if each accused acted alone or all may be charged together in a single specification. For example:

(a) If Doe and Roe are joint perpetrators of an offense and it is intended to charge and try both at the same trial, they should be charged in a single specification as follows:

“In that Doe and Roe, acting jointly and pursuant to a common intent, did. . . .”

(b) If it is intended that Roe will be tried alone or that Roe will be tried with Doe at a common trial, Roe may be charged in the same manner as if Roe alone had committed the offense. However, to show in the specification that Doe was a joint actor with Roe, even though Doe is not to be tried with Roe, Roe may be charged as follows: “In that Roe did, in conjunction with Doe,”

(ix) *Matters in aggravation*. Matters in aggravation that do not increase the maximum authorized punishment ordinarily should not be alleged in the specification. Prior convictions need not be alleged in the specification to permit increased punishment.

(x) *Abbreviations*. Commonly used and understood abbreviations may be used, particularly abbreviations for ranks, grades, units and organizations, components, and geographic or political entities, such as the names of states or countries.

The Discussion following R.C.M. 307(c)(4) reads as follows:

Discussion

Unreasonable multiplication of charges should not be confused with multiplicity, a double jeopardy concept. *See* R.C.M. 1003(c)(1)(C). Accordingly, the phrase “multiplicity in sentencing” is confusing and should be avoided. Unreasonable multiplication of charges is addressed in R.C.M. 906(b)(12); multiplicity is addressed in R.C.M. 907(b)(3)(B); and punishment limitations are addressed in R.C.M. 1003(c)(1)(C).

For example, a person should not be charged with both failure to report for a routine scheduled duty (e.g., reveille) and absence without leave if the failure to report occurred during the period for which the accused is charged with absence without leave. There are times, however, when sufficient doubt as to the facts or the law exists to warrant making one transaction the basis for charging two or more offenses. In no case should both an offense and a lesser included offense thereof be separately charged.

See also R.C.M. 601(e)(2) concerning referral of several offenses.

The Discussion following R.C.M. 307(c)(5) reads as follows:

Discussion

See also R.C.M. 601(e)(3) concerning joinder of accused.

A joint offense is one committed by two or more persons acting together with a common intent. Principals may be charged jointly with the commission of the same offense, but an accessory after the fact cannot be charged jointly with the principal whom the accused is alleged to have received, comforted, or assisted. Offenders are properly joined only if there is a common unlawful design or purpose; the mere fact that several persons happen to have committed the same kinds of offenses at the time, although material as tending to show concert of purpose, does not necessarily establish this. The fact that several persons happen to have absented themselves without leave at about the same time will not, in the absence of evidence indicating a joint design, purpose, or plan, justify joining them in one specification, for they may merely have been availing themselves of the same opportunity. In joint offenses the participants may be separately or jointly charged. However, if the participants are members of different armed forces, they must be charged separately because their trials must be separately reviewed. The preparation of joint charges is discussed in R.C.M. 307 (c)(3), Discussion (H)(viii)(a). The advantage of a joint charge is that all accused will be tried at one trial, thereby saving time, labor, and expense. This must be weighed against the possible unfairness to the accused which may result if their defenses are inconsistent or antagonistic. An accused cannot be called as a witness except upon that accused’s own request. If the testimony of an accomplice is necessary, the accomplice should not be tried jointly with those against whom the accomplice is expected to testify. *See also* Mil. R. Evid. 306.

See R.C.M. 603 concerning amending specifications.

See R.C.M. 906(b)(4) and (6) concerning motions to amend specifications and bills of particulars.

The Analysis following R.C.M. 307 reads as follows:

Analysis

This rule is taken from Rule 307 of the MCM (2016 edition) with the following amendments:

2018 Amendment: R.C.M. 307(b) is amended and implements Article 30, as amended by Section 5201 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016).

The Discussion accompanying R.C.M. 307(c)(3) is amended and reflects the reorganization of the punitive articles in the Military Justice Act of 2016 and the addition of Appendix 12A with respect to lesser included offenses. *See* Articles 79-134, as amended by Sections 5401-5452 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016), as further amended by Section 1081(c) of the National Defense Authorization Act for Fiscal Year 2018, Pub. Law. No. 115-91, 131 Stat. 1283 (2017).

R.C.M. 307(c)(4) is amended and deletes the last sentence.

The Discussion accompanying R.C.M. 307(c)(4) is amended to address the differences between multiplicity and unreasonable multiplication of charges, and to alert practitioners that use of the phrase “multiplicity in sentencing,” is confusing and should be avoided. *See United States v. Campbell*, 71 M.J. 19 (C.A.A.F. 2012).

The Discussion following R.C.M. 308(a) reads as follows:

Discussion

When notice is given, a certificate to that effect on the Charge Sheet should be completed. *See* Appendix 4.

However, in cases where charges are immediately referred after preferral, service of referred charges under R.C.M. 602 fulfills the notice requirement of this rule. In those cases, the notice certificate on the Charge Sheet need not be completed and should be lined out.

The Analysis following R.C.M. 308 reads as follows:

Analysis

This rule is taken from Rule 308 of the MCM (2016 edition) without amendment.

The Discussion following R.C.M. 309(a)(3) reads as follows:

Discussion

If charges and specifications are later referred to trial, a military judge detailed under Article 30a to review a matter pre-referral is not, by reason of such review, precluded from presiding over the court-martial.

The Discussion following R.C.M. 309(b)(2) reads as follows:

Discussion

The defense may request that the trial counsel or other counsel for the Government make an application under R.C.M. 309 (b)(1) or (b)(2) of this rule. The military judge may, as a matter of discretion, afford the defense an opportunity to be heard.

The Discussion following R.C.M. 309(b)(3) reads as follows:

Discussion

See Article 46; R.C.M. 703(g)(3)(G); R.C.M. 703A(c)(2).

The Analysis following R.C.M. 309 reads as follows:

Analysis

R.C.M. 309 is new and implements Article 30a, as added by Section 5202 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016), as amended by Section 531(b) of the National Defense Authorization Act for Fiscal Year 2018, Pub. L. No. 155-91, 131 Stat. 1283 (2017), which establishes the matters that may be addressed by a military judge or military magistrate in a pre-referral proceeding.

CHAPTER IV. FORWARDING AND DISPOSITION OF CHARGES

The Discussion following R.C.M. 401(a) reads as follows:

Discussion

See R.C.M. 504 as to who may convene courts-martial and paragraph 2 of Part V as to who may administer nonjudicial punishment. If the power to convene courts-martial and to administer nonjudicial punishment has been withheld, a commander may not dispose of charges under this rule.

Ordinarily charges should be forwarded to the accused's immediate commander for initial consideration as to disposition. Each commander has independent discretion to determine how charges will be disposed of, except to the extent that the commander's authority has been withheld by superior competent authority. *See also* R.C.M. 104. See R.C.M. 603 if major or minor changes to the charges are necessary after referral. If a commander is an accuser (*see* Article 1(9); R.C.M. 307(a)) that commander is ineligible to refer such charges to a general or special court-martial. *See* R.C.M. 601(c). *But see* R.C.M. 1302(b) (accuser may refer charges to a summary court-martial).

The Discussion following R.C.M. 401(b) reads as follows:

Discussion

In determining what level of disposition is appropriate, see R.C.M. 306(b) and (c) and Appendix 2.1 (Non-binding disposition guidance). When charges are brought against two or more accused with a view to a joint or common trial, see R.C.M. 307(c)(5) and 601(e)(3). If it appears that the accused may lack mental capacity to stand trial or may not have been mentally responsible at the times of the offenses, see R.C.M. 706, 909, and 916(k).

As to the rules concerning speedy trial, see R.C.M. 707. *See also* Articles 10, 30, and 131f.

Before determining an appropriate disposition, a commander who receives charges should ensure that: (1) a preliminary inquiry under R.C.M. 303 has been conducted; (2) the accused has been notified in accordance with R.C.M. 308; and (3) the charges are in proper form.

The Discussion following R.C.M. 401(c) reads as follows:

Discussion

A commander may dispose of charges individually or collectively. If charges are referred to a court-martial, ordinarily all known charges should be referred to a single court-martial. *But see* R.C.M. 902A.

See Appendix 3 when the charges may involve matters in which the Department of Justice has an interest.

See the Discussion to R.C.M. 306(b) and Appendix 2.1 (Non-binding disposition guidance).

The Discussion following R.C.M. 401(c)(1) reads as follows:

Discussion

Charges are ordinarily dismissed by lining out and initialing the deleted specifications or otherwise recording that a specification is dismissed. When all charges and specifications are dismissed, the accuser and the accused ordinarily should be informed.

A charge should be dismissed when it fails to state an offense, when it is unsupported by available evidence, or when there are other sound reasons why trial by court-martial is not appropriate. Before dismissing charges because trial would be detrimental to the prosecution of a war or harmful to national security, see R.C.M. 401(d); 407(b).

If the accused has already refused nonjudicial punishment, charges should not be dismissed with a view to offering nonjudicial punishment unless the accused has indicated willingness to accept nonjudicial punishment if again offered. The decision whether to dismiss charges in such circumstances is within the sole discretion of the commander concerned.

Charges may be amended in accordance with R.C.M. 603. It is appropriate to dismiss a charge and prefer another charge anew when, for example, the original charge failed to state an offense, or was so defective that a major amendment was required (*see* R.C.M. 603(d)), or did not adequately reflect the nature or seriousness of the offense.

See R.C.M. 907(b)(2)(C) concerning the effect of dismissing charges after the court-martial has begun.

The Discussion following R.C.M. 401(c)(2)(A) reads as follows:

Discussion

A commander's recommendation is within that commander's sole discretion. No authority may direct a commander to make a specific recommendation as to disposition. However, in making a disposition recommendation, the forwarding commander should review Appendix 2.1 (Non-binding disposition guidance).

When charges are forwarded to a superior commander with a view to trial by general or special court-martial, they should be forwarded by a letter of transmittal or indorsement. To the extent practicable without unduly delaying forwarding the charges, the letter should include or carry as enclosures: a summary of the available evidence relating to each offense; evidence of previous convictions and nonjudicial punishments of the accused; an indication that the accused has been offered and refused nonjudicial punishment, if applicable; and any other matters required by superior authority or deemed appropriate by the forwarding commander. Other matters which may be appropriate include information concerning the accused's background and military service, and a description of any unusual circumstances in the case. The summary of evidence should include available witness statements, documentary evidence, and exhibits. When practicable, copies of signed statements of the witnesses should be forwarded, as should copies of any investigative or laboratory reports. Forwarding charges should not be delayed, however, solely to obtain such statements or reports when it otherwise appears that sufficient evidence to warrant trial is or will be available in time for trial. If because of the bulk of documents or exhibits, it is impracticable to forward them with the letter of transmittal, they should be properly preserved and should be referred to in the letter of transmittal.

When it appears that any witness may not be available for later proceedings in the case or that a deposition may be appropriate, that matter should be brought to the attention of the convening authority promptly and should be noted in the letter of transmittal.

When charges are forwarded with a view to disposition other than trial by general or special court-martial, they should be accompanied by sufficient information to enable the authority receiving them to dispose of them without further investigation.

The Discussion following R.C.M. 401(c)(2)(B) reads as follows:

Discussion

Except when directed to forward charges, a subordinate commander may not be required to take any specific action to dispose of charges. *See* R.C.M. 104. *See also* paragraph 1.d.(2) of Part V. When appropriate, charges may be sent or returned to a subordinate commander for compliance with procedural requirements. *See, e.g.,* R.C.M. 303 (preliminary inquiry); R.C.M. 308 (notification to accused of charges).

The Discussion following R.C.M. 401(d) reads as follows:

Discussion

See R.C.M. 407(b).

The Analysis following R.C.M. 401 reads as follows:

Analysis

This rule is taken from Rule 401 of the MCM (2016 edition) with the following amendments:

2018 Amendment: The Discussions accompanying R.C.M. 401(b) and (c) are amended and refer to the non-binding disposition guidance required by Article 33, as amended by Section 5204 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016). *See* Appendix 2.1.

The Discussion following R.C.M. 402(1) reads as follows:

Discussion

See R.C.M. 401(c)(1) concerning dismissal of charges, the effect of dismissal, and options for further action.

The Discussion following R.C.M. 402(2) reads as follows:

Discussion

See R.C.M. 401(c)(2) for additional guidance concerning forwarding charges. *See* generally R.C.M. 303 (preliminary inquiry); 308 (notification to accused of charges) concerning other duties of the immediate commander when in receipt of charges.

When the immediate commander is authorized to convene courts-martial, *see* R.C.M. 403, 404, or 407, as appropriate.

The Analysis following R.C.M. 402 reads as follows:

Analysis

This rule is taken from Rule 402 of the MCM (2016 edition) without amendment.

The Discussion following R.C.M. 403(a) reads as follows:

Discussion

See Article 24 and R.C.M. 1302(a) concerning who may exercise summary court-martial jurisdiction.

The entry indicating receipt is important because it stops the running of the statute of limitations. *See* Article 43; R.C.M. 907(b)(2)(B). Charges may be preferred and forwarded to an officer exercising summary court-martial jurisdiction over the command to stop the running of the statute of limitations even though the accused is absent without authority.

The Discussion following R.C.M. 403(b)(1) reads as follows:

Discussion

See R.C.M. 401(c) concerning dismissal of charges, the effect of dismissing charges, and options for further action.

The Discussion following R.C.M. 403(b)(2) reads as follows:

Discussion

See R.C.M. 401(c)(2)(B) concerning forwarding charges to a subordinate. When appropriate, charges may be forwarded to a subordinate even if the subordinate previously considered them.

The Discussion following R.C.M. 403(b)(3) reads as follows:

Discussion

See R.C.M. 401(c)(2)(A) for guidance concerning forwarding charges to a superior.

The Discussion following R.C.M. 403(b)(4) reads as follows:

Discussion

See R.C.M. 1302(c) concerning referral of charges to a summary court-martial.

The Discussion following R.C.M. 403(b)(5) reads as follows:

Discussion

A preliminary hearing should be directed when it appears that the charges are of such a serious nature that trial by general court-martial may be warranted. *See* R.C.M. 405. If a preliminary hearing of the subject matter already has been conducted, see R.C.M. 405.

The Analysis following R.C.M. 403 reads as follows:

Analysis

This rule is taken from Rule 403 of the MCM (2016 edition) with the following amendments:

2018 Amendment: The Discussions accompanying R.C.M. 403 are amended and update cross-references.

R.C.M. 403(b)(4) is amended and implements Article 18, as amended by Section 1705(b) of the National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66, 127 Stat. 672 (2013), as further amended by Section 5162 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016), which limits jurisdiction for certain sex-related offenses to general courts-martial.

The Discussion following R.C.M. 404(1) reads as follows:

Discussion

See R.C.M. 401(c) concerning dismissal of charges, the effect of dismissing charges, and options for further action.

The Discussion following R.C.M. 404(2) reads as follows:

Discussion

See R.C.M. 401(c)(2)(B) concerning forwarding charges to a subordinate. When appropriate, charges may be forwarded to a subordinate even if the subordinate previously considered them.

The Discussion following R.C.M. 404(3) reads as follows:

Discussion

See R.C.M. 401(c)(2)(A) for guidance concerning forwarding charges to a superior.

The Discussion following R.C.M. 404(4) reads as follows:

Discussion

See Article 23 and R.C.M. 504(b)(2) concerning who may convene special courts-martial.

See R.C.M. 601 concerning referral of charges to a special court-martial. See R.C.M. 1302(c) concerning referral of charges to a summary court-martial.

See R.C.M. 201(f)(2)(D) and (E) and 1301(c) for limitations on the referral of certain offenses to special and summary courts-martial.

The Discussion following R.C.M. 404(5) reads as follows:

Discussion

A preliminary hearing should be directed when it appears that the charges are of such a serious nature that trial by general court-martial may be warranted. *See* R.C.M. 405. If a preliminary hearing of the subject matter already has been conducted, see R.C.M. 405(b) and 405(e)(2).

The Analysis following R.C.M. 404 reads as follows:

Analysis

This rule is taken from Rule 404 of the MCM (2016 edition) with the following amendment.

2018 Amendment: R.C.M. 404(4) and the accompanying Discussion are amended and reflect Article 18, as amended by Section 1705(b) of the National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66, 127 Stat. 672 (2013), as further amended by Section 5162 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016), which limits jurisdiction for certain sex-related offenses to general courts-martial.

The Discussion following R.C.M. 404A(a)(2)(D) reads as follows:

Discussion

Rule 404A(a) is not intended to limit or discourage counsel for the Government from providing additional materials to the defense.

The Discussion following R.C.M. 404A(d) reads as follows:

Discussion

The purpose of this rule is to provide the accused with the documents used to make the determination to prefer charges and direct a preliminary hearing, and to allow the accused to prepare for the preliminary hearing. This rule is not intended to be a tool for discovery and does not impose the same discovery obligations found in R.C.M. 405 prior to amendments required by Section 1702 of the National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66, 127 Stat. 980 (2013), as amended by Section 531 of the Carl Levin and Howard P. “Buck” McKeon National Defense Authorization Act for Fiscal Year 2015, Pub. L. 113-291, 128 Stat. 3371 (2014), or R.C.M. 701. Additional rules for disclosure of witnesses and other evidence in the preliminary hearing are provided in R.C.M. 405(h).

The Analysis following R.C.M. 404A reads as follows:

Analysis

This rule is taken from Rule 404A of the MCM (2016 edition) with the following amendments:

2018 Amendment: The rule is renamed “Initial disclosures.”

R.C.M. 404A(a) is amended and establishes the Government’s disclosure requirements at preferral of charges and at the direction of a preliminary hearing.

The Discussion accompanying R.C.M. 404A(c) is amended and updates a cross-reference.

The Discussion accompanying R.C.M. 404A(d) is amended and updates a reference.

The Discussion following R.C.M. 405(a) reads as follows:

Discussion

The function of the preliminary hearing is to ascertain and impartially weigh the facts needed for the limited scope and purpose of the preliminary hearing. The preliminary hearing is not intended to perfect a case against the accused and is not intended to serve as a means of discovery or to provide a right of confrontation required at trial. Determinations and recommendations of the preliminary hearing officer are advisory.

Failure to substantially comply with the requirements of Article 32, which failure prejudices the accused, may result in delay in disposition of the case or disapproval of the proceedings. See R.C.M. 905(b)(1) and 906(b)(3) concerning motions for appropriate relief relating to the preliminary hearing.

The accused may waive the preliminary hearing. *See* R.C.M. 405(m). In such case, no preliminary hearing need be held. However, the convening authority authorized to direct the preliminary hearing may direct that it be conducted notwithstanding the waiver.

The Discussion following R.C.M. 405(d)(1)(D) reads as follows:

Discussion

The preliminary hearing officer, if not a judge advocate, should be an officer in the grade of O-4 or higher. The preliminary hearing officer may seek legal advice concerning the preliminary hearing officer’s responsibilities from an impartial source, but may not obtain such advice from counsel for any party or counsel for a victim.

Because this is a preliminary hearing and not a trial, the requirement for the preliminary hearing officer to remain impartial does not preclude the preliminary hearing officer from identifying matters or sources of information that may warrant further inquiry. *See* R.C.M. 405(j)(1). The responsibility for requesting and producing such information, however, rests with the parties.

The Discussion following R.C.M. 405(e)(2) reads as follows:

Discussion

Except as set forth in R.C.M. 405(i), the Military Rules of Evidence do not apply at a preliminary hearing. Except as prohibited elsewhere in this rule, a preliminary hearing officer may consider evidence, including hearsay, which would not be admissible at trial.

The Discussion following R.C.M. 405(g)(3) reads as follows:

Discussion

See Article 6b, UCMJ.

The Discussion following R.C.M. 405(h)(2)(A)(iii) reads as follows:

Discussion

A commanding officer's determination of whether an individual is available, as well as the means by which the individual is available, is a balancing test. The more important the testimony of the witness, the greater the difficulty, expense, delay, or effect on military operations must be to deny production of the witness. Based on operational necessity and mission requirements, the witness' commanding officer may authorize the witness to testify by video teleconference, telephone, or similar means of remote testimony. Factors to be considered in making this determination include the costs of producing the witness; the timing of the request for production of the witness; the potential delay in the proceeding that may be caused by the production of the witness; and the likelihood of significant interference with operational deployment, mission accomplishment, or essential training. Before determining that a witness is unavailable, the witness' commanding officer should give due consideration to the alternative forms of testimony noted above, which generally can be facilitated with minimal impact on command operations.

The Discussion following R.C.M. 405(h)(2)(B)(iii) reads as follows:

Discussion

Factors to be considered in making this determination include the costs of producing the witness; the timing of the request for production of the witness; the potential delay in the proceeding that may be caused by the production of the witness; the willingness of the witness to testify in person; and, for child witnesses, the traumatic effect of providing in-person testimony. Civilian witnesses may not be compelled to provide testimony at a preliminary hearing. Civilian witnesses may be paid for travel and associated expenses to testify at a preliminary hearing. *See generally* Department of Defense Joint Travel Regulations.

The Discussion following R.C.M. 405(h)(3)(B)(iii) reads as follows:

Discussion

A pre-referral investigative subpoena to produce books, papers, documents, data, electronically stored information, or other objects for a preliminary hearing may be issued by counsel for the Government when authorized by the general court-martial convening authority or by a military judge under R.C.M. 309. The preliminary hearing officer has no authority to issue a pre-referral investigative subpoena.

The Discussion following R.C.M. 405(i)(1)(B)(iv) reads as follows:

Discussion

A preliminary hearing officer may not order the production of any privileged matters. *See* R.C.M. 405(h)(3).

The Discussion following R.C.M. 405(i)(2)(C) reads as follows:

Discussion

The preliminary hearing may be abated pending action by the Court of Criminal Appeals.

The Discussion following R.C.M. 405(i)(2)(D) reads as follows:

Discussion

When ordering an exhibit or proceeding sealed in accordance with R.C.M. 1113, the preliminary hearing officer

should consider the purpose for which the exhibit or proceeding is to be sealed and determine if the person or entity whose interests are being protected should be permitted access to the sealed materials. The preliminary hearing officer should include language in the sealing order identifying the purpose for which the exhibit or proceeding is being sealed and, if applicable, provide parameters for examination by or disclosure to those persons or entities whose interests are being protected. See R.C.M. 1113(b)(4)-(5) for definitions of the terms “examination” and “disclosure.”

The Discussion following R.C.M. 405(j)(1) reads as follows:

Discussion

When the preliminary hearing officer finds that evidence offered by either party is not within the scope of the hearing, the preliminary hearing officer shall inform the parties and halt the presentation of that information.

The Discussion following R.C.M. 405(j)(2)(A) reads as follows:

Discussion

The following oath may be given to witnesses:

“Do you (swear) (affirm) that the evidence you give shall be the truth, the whole truth, and nothing but the truth (so help you God)?”

All preliminary hearing officer notes of testimony and recordings of testimony should be preserved until the end of trial.

If during the preliminary hearing any witness subject to the UCMJ is suspected of an offense under the UCMJ, the preliminary hearing officer should comply with the warning requirements of Mil. R. Evid. 305(c), (d), and, if necessary, (e).

Bearing in mind that counsel are responsible for preparing and presenting their cases, the preliminary hearing officer may ask a witness questions relevant to the issues for determination under subsection (a). When questioning a witness, the preliminary hearing officer may not depart from an impartial role and become an advocate for either side.

The Discussion following R.C.M. 405(j)(3) reads as follows:

Discussion

Convening authorities or preliminary hearing officers must conduct a case-by-case, witness-by-witness, and circumstance-by-circumstance analysis of whether restriction or closure is necessary. Examples of overriding interests include: preventing psychological harm or trauma to a child witness or to an alleged victim of a sexual crime, protecting the safety or privacy of a witness or an alleged victim, protecting classified material, and receiving evidence where a witness is incapable of testifying in an open setting.

The Discussion following R.C.M. 405(j)(5) reads as follows:

Discussion

See Article 32(e)-(h), UCMJ.

The Discussion following R.C.M. 405(j)(8) reads as follows:

Discussion

When ordering an exhibit or proceeding sealed in accordance with R.C.M. 1113, the preliminary hearing officer

should consider the purpose for which the exhibit or proceeding is to be sealed and determine if the person or entity whose interests are being protected should be permitted access to the sealed materials. The preliminary hearing officer should include language in the sealing order identifying the purpose for which the exhibit or proceeding is being sealed and, if applicable, provide parameters for examination by or disclosure to those persons or entities whose interests are being protected. See R.C.M. 1113(b)(4)-(5) for definitions of the terms “examination” and “disclosure.”

The Discussion following R.C.M. 405(k)(3) reads as follows:

Discussion

The Military Rules of Evidence and other regulations may require the preliminary hearing officer to seal certain materials. Preliminary hearing officers have the discretion to seal other supplementary information that they determine should be protected from disclosure. Such information may include personally identifiable information, medical information, financial information, and any other information that may cause unnecessary harm to an individual or entity if released. When ordering an exhibit or proceeding sealed in accordance with R.C.M. 1113, the preliminary hearing officer should consider the purpose for which the exhibit or proceeding is to be sealed and determine if the person or entity whose interests are being protected should be permitted access to the sealed materials. The preliminary hearing officer should include language in the sealing order identifying the purpose for which the exhibit or proceeding is being sealed and, if applicable, provide parameters for examination by or disclosure to those persons or entities whose interests are being protected. See R.C.M. 1113(b)(4)-(5) for definitions of the terms “examination” and “disclosure.”

The Discussion following R.C.M. 405(l)(1) reads as follows:

Discussion

As soon as practicable after receipt of supplementary information under R.C.M. 405(k), the charges and the report of preliminary hearing should be forwarded to the general court-martial convening authority. *See* Article 10.

The Discussion following R.C.M. 405(l)(2)(K) reads as follows:

Discussion

The preliminary hearing officer may include any additional matters useful to the convening authority in determining disposition. For guidance concerning disposition of offenses, see Appendix 2.1 (Non-binding disposition guidance). The preliminary hearing officer may recommend that the charges and specifications be amended or that additional charges be preferred. *See* R.C.M. 306 and 401 concerning other possible dispositions.

The Discussion following R.C.M. 405(m) reads as follows:

Discussion

See also R.C.M. 905(b)(1); 906(b)(3).

The convening authority who receives an objection may direct that the preliminary hearing be reopened or take other action, as appropriate.

The Analysis following R.C.M. 405 reads as follows:

Analysis

This rule is taken from Rule 405 of the MCM (2016 edition) with the following amendments:

2018 Amendments: R.C.M. 405 and the accompanying Discussions are amended and reflect Articles 6b, 30a, 32, 33, 46, and 47, as amended or added by Sections 5105, 5202, 5203, 5204, and 5229 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016). Article 6b is further amended by Sections 531(a), 1081(a)(22), and 1081(c)(1)(B) of the National Defense Authorization Act for Fiscal Year 2018, Pub. L. No. 155-91, 131 Stat. 1283 (2017). Article 30a is amended by Section 531(b) of the National Defense Authorization Act for Fiscal Year 2018, Pub. L. No. 155-91, 131 Stat. 1283 (2017).

The Discussions following R.C.M. 405(i)(2)(D), R.C.M. 405(j)(8), and R.C.M. 405(k)(3) are new and reflect that the terms of a sealing order may authorize listed persons or entities to examine or receive disclosure of sealed materials outside of the procedures set forth in R.C.M. 1113(b).

The Discussion following R.C.M. 406(a) reads as follows:

Discussion

A pretrial advice need not be prepared in cases referred to special or summary courts-martial. A convening authority is required to consult with a judge advocate before referring charges to a special court-martial (*see* R.C.M. 406A) and may seek the advice of a lawyer before referring charges to a summary court-martial. When charges have been withdrawn from a general court-martial (*see* R.C.M. 604) or when a mistrial has been declared in a general court-martial (*see* R.C.M. 915), supplementary advice is necessary before the charges may be referred to another general court-martial.

The staff judge advocate may make changes in the charges and specifications in accordance with R.C.M. 603.

For guidance concerning the disposition of charges and specifications, see Appendix 2.1 (Non-binding disposition guidance).

The Discussion following R.C.M. 406(b)(4) reads as follows:

Discussion

The staff judge advocate is personally responsible for the pretrial advice and must make an independent and informed appraisal of the charges and evidence in order to render the advice. While the staff judge advocate may use a preliminary hearing officer's report in preparing pretrial advice, and another person may prepare the advice, the staff judge advocate is, unless disqualified, responsible for it and must sign it personally. Grounds for disqualification in a case include previous action in the case as preliminary hearing officer, military judge, trial counsel, defense counsel, or member.

The advice need not set forth the underlying analysis or rationale for its conclusions. Ordinarily, the charge sheet, forwarding letter, endorsements, and report of preliminary hearing are forwarded with the pretrial advice. In addition, the pretrial advice should include, when appropriate: a brief summary of the evidence; discussion of significant aggravating, extenuating, or mitigating factors; any recommendations for disposition of the case by commanders or others who have forwarded the charges; and any recommendations of the Article 32 preliminary hearing officer. However, there is no legal requirement to include such information, and failure to do so is not error.

Information which is incorrect or so incomplete as to be misleading may result in a determination that the advice is defective, necessitating appropriate relief. *See* R.C.M. 905(b)(1); 906(b)(3).

Defects in the pretrial advice are not jurisdictional and are raised by pretrial motion. *See* R.C.M. 905(b)(1) and its Discussion.

The Analysis following R.C.M. 406 reads as follows:

Analysis

This rule is taken from Rule 406 of the MCM (2016 edition) with the following amendments:

2018 Amendments: R.C.M. 406(a) and (b) and the accompanying Discussions are amended and reflect Article 34, as amended by Section 5205 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act

for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016), which requires a convening authority to consult a judge advocate on relevant legal issues before referring charge(s) and specification(s) to a special court-martial and also prohibits a convening authority from referring charge(s) and specification(s) to a general court-martial unless a staff judge advocate provides written advice stating that the specification alleges an offense under the UCMJ, there is probable cause to believe that the accused committed the offense charges, and a court-martial would have jurisdiction over the accused and the offense. Prior to referring charge(s) and specification(s) to a general court-martial, the staff judge advocate is also required to provide a recommendation as to the disposition that should be made of the charges and specifications by the convening authority in the interest of justice and discipline. *See also* R.C.M. 601(d).

The Discussion accompanying R.C.M. 406(a) is amended and refers to the non-binding disposition guidance required by Article 33, as amended by Section 5204 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016). *See* Appendix 2.1.

The Discussion following R.C.M. 406A(a)(5) reads as follows:

Discussion

For guidance concerning disposition of charges and specifications, see Appendix 2.1 (Non-binding disposition guidance).

The Analysis following R.C.M. 406A reads as follows:

Analysis

R.C.M. 406A is new and implements Article 34(b), as amended by Section 5202 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016), which requires a convening authority to consult a judge advocate on relevant legal issues before referring charge(s) and specification(s) to a special court-martial.

The Discussion accompanying R.C.M. 406A(a) is amended and refers to guidance concerning disposition of charges and specifications required by Article 33, as amended by Section 5204 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016). *See* Appendix 2.1.

The Discussion following R.C.M. 407(a)(1) reads as follows:

Discussion

See R.C.M. 401(c)(1) concerning dismissal of charges and the effect of dismissing charges.

The Discussion following R.C.M. 407(a)(2) reads as follows:

Discussion

See R.C.M. 401(c)(2)(B) concerning forwarding charges to a subordinate.

A subordinate commander may not be required to take any specific action or to dispose of charges. *See* R.C.M. 104. *See also* paragraph 1.d.(2) of Part V. When appropriate, charges may be sent or returned to a subordinate commander for compliance with procedural requirements. *See, e.g.,* R.C.M. 303 (preliminary inquiry); R.C.M. 308 (notification to accused of charges).

The Discussion following R.C.M. 407(a)(3) reads as follows:

Discussion

See R.C.M. 401(c)(2)(A) for guidance concerning forwarding charges to a superior.

The Discussion following R.C.M. 407(a)(4) reads as follows:

Discussion

See R.C.M. 201(f)(2)(D) and (E) and 1301(c) for limitations on the referral of certain offenses to special and summary courts-martial.

The Discussion following R.C.M. 407(a)(5) reads as follows:

Discussion

A preliminary hearing should be directed when it appears that the charges are of such a serious nature that trial by general court-martial may be warranted. *See* R.C.M. 405. If a preliminary hearing of the subject matter has already been conducted, see R.C.M. 405(b).

The Discussion following R.C.M. 407(a)(6) reads as follows:

Discussion

See Article 22 and R.C.M. 504(b)(1) concerning who may exercise general court-martial jurisdiction.

See R.C.M. 601 concerning referral of charges. See R.C.M. 306 and 401 concerning other dispositions.

See Section 1744 (b)-(d) of the National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66, 127 Stat. 980 (2013), as amended by Section 541 of the Carl Levin and Howard P. “Buck” McKeon National Defense Authorization Act for Fiscal Year 2015, Pub. L. 113-291, 128 Stat. 3371 (2014) and Service regulations for possible higher-level review requirements for decisions not to refer charges of certain sex-related offenses for trial by court-martial.

The Discussion following R.C.M. 407(b) reads as follows:

Discussion

In time of war, charges may be forwarded to the Secretary concerned for disposition under Article 43(e). Under Article 43(e), the Secretary may take action suspending the statute of limitations in time of war.

The Analysis following R.C.M. 407 reads as follows:

Analysis

This rule is taken from Rule 407 of the MCM (2016 edition) with the following amendments:

2018 Amendment: R.C.M. 407(a)(4) and the accompanying Discussion are amended and reflect Article 18, as amended by Section 1705(b) of the National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66, 127 Stat. 672 (2013), as further amended by Section 5162 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016), which limits jurisdiction over certain sex-related offenses to general courts-martial.

The Discussion accompanying R.C.M. 407(a)(6) is amended and refers to Sections 1744(b)-(d) of the National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66, 127 Stat. 980 (2013), as amended by the

Section 541 of the Carl Levin and Howard P. “Buck” McKeon National Defense Authorization Act for Fiscal Year 2015, Pub. L. 113-291, 128 Stat. 3371 (2014), which require higher level review with respect to the referral of certain sex-related offenses to courts-martial.

CHAPTER V. COURT-MARTIAL COMPOSITION AND PERSONNEL; CONVENING COURTS-MARTIAL

The Discussion following R.C.M. 501(a)(2)(D) reads as follows:

Discussion

See R.C.M. 903 regarding the right of an enlisted accused to request a panel of at least one-third enlisted members or an all-officer panel.

See R.C.M. 912A regarding the impaneling of members and alternate members.

See R.C.M. 1301(a) concerning composition of summary courts-martial

The Analysis following R.C.M. 501 reads as follows:

Analysis

This rule is taken from Rule 501 of the MCM (2016 edition) with the following amendments:

2018 Amendment: R.C.M. 501(a) and the accompanying Discussion are amended and reflect Articles 16, 25a, and 29, as amended by Sections 5161, 5183, and 5187 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016), as further amended by Section 1081(c)(1)(C) of the National Defense Authorization Act for Fiscal Year 2018, Pub. Law. No. 115-91, 131 Stat. 1283 (2017), which require a set number of members for capital and non-capital general courts-martial and special courts-martial, eliminate special courts-martial without a military judge, establish a special court-martial consisting of a military judge alone with certain limitations on offenses and punishments, and authorize the convening authority to detail alternate members to general and special courts-martial.

The Discussion accompanying R.C.M. 501(c), which addressed court reporters, is deleted.

The Discussion following R.C.M. 502(a)(1)(C) reads as follows:

Discussion

Retired members of any Regular component and members of Reserve components of the armed forces are eligible to serve as members if they are on active duty.

Members of the National Oceanic and Atmospheric Administration and of the Public Health Service are eligible to serve as members when assigned to and serving with an armed force. The Public Health Service includes both commissioned and warrant officers. The National Oceanic and Atmospheric Administration includes only commissioned officers.

The Discussion following R.C.M. 502(a)(2)(B) reads as follows:

Discussion

Members and alternate members should avoid any conduct or communication with the military judge, witnesses, or other trial personnel during the trial which might present an appearance of partiality. Except as provided in these rules, members and alternate members should not discuss any part of a case with anyone until the matter is submitted to them for determination. Members and alternate members should not on their own visit or conduct a view of the scene of the crime and should not investigate or gather evidence of the offense. Members and alternate members should not form an opinion on any matter in connection with a case until that matter has been submitted to them for determination.

The Discussion following R.C.M. 502(c)(2) reads as follows:

Discussion

See R.C.M. 801 for a description of some of the general duties of the military judge and military magistrate.

Military judges assigned as general court-martial judges may perform duties in addition to the primary duty of judge of a general court-martial only when such duties are assigned or approved by the Judge Advocate General, or a designee, of the Department or Service of which the military judge is a member. Similar restrictions on other duties which a military judge in special courts-martial may perform may be prescribed in regulations of the Secretary concerned.

The Discussion following R.C.M. 502(d)(2)(A) reads as follows:

Discussion

When the accused has individual military or civilian defense counsel, the detailed counsel is “associate counsel” unless excused from the case. *See* R.C.M. 506(b)(3).

The Discussion following R.C.M. 502(d)(2)(B)(ii) reads as follows:

Discussion

In making such a determination—particularly in the case of civilian defense counsel who are members only of a foreign bar—the military judge also should inquire into:

- (i) the availability of the counsel at times at which sessions of the court-martial have been scheduled;
- (ii) whether the accused wants the counsel to appear with military defense counsel;
- (iii) the familiarity of the counsel with spoken English;
- (iv) practical alternatives for discipline of the counsel in the event of misconduct;
- (v) whether foreign witnesses are expected to testify with whom the counsel may more readily communicate than might military counsel; and
- (vi) whether ethnic or other similarity between the accused and the counsel may facilitate communication and confidence between the accused and civilian defense counsel.

The Discussion following R.C.M. 502(d)(2)(C)(ii) reads as follows:

Discussion

See Article 27(d). There exists no bright line or *per se* rule to determine the qualifications necessary for capital cases and unlike 18 U.S.C. § 3005 (2012), Article 27(d) requires detailing of at least one defense counsel learned in the law of capital cases to the greatest extent practicable and the Service Judge Advocate General determines whether the defense counsel is so qualified. Although the American Bar Association Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (rev. ed. 2003), and federal civilian law, 18 U.S.C. § 3005 (2012), are instructive on the issue of whether counsel are qualified, neither authority, either individually or collectively, is dispositive of the issue.

The Discussion following R.C.M. 502(d)(3)(D) reads as follows:

Discussion

In the absence of evidence to the contrary, it is presumed that a person who, between referral and trial of a case, has been detailed as counsel for any party to the court-martial to which the case has been referred, has acted in that

capacity. When a person has acted as counsel for a witness or victim, the issue of disqualification to serve as counsel for a party in the case is governed by the applicable rules of professional conduct.

The Discussion following R.C.M. 502(d)(4) reads as follows:

Discussion

(A) *General duties before trial.* Immediately upon receipt of referred charges, trial counsel should cause a copy of the charges to be served upon accused. *See* R.C.M. 602.

Trial counsel should: examine the charge sheet and allied papers for completeness and correctness; correct (and initial) minor errors or obvious mistakes in the charges but may not without authority make any substantial changes (*see* R.C.M. 603); and assure that the information about the accused on the charge sheet and any evidence of previous convictions are accurate.

(B) *Relationship with convening authority.* Trial counsel should: report to the convening authority any substantial irregularity in the convening orders, charges, or allied papers; report an actual or anticipated reduction of the number of members required under R.C.M. 501(a) to the convening authority; and bring to the attention of the convening authority any case in which trial counsel finds trial inadvisable for lack of evidence or other reasons.

(C) *Relationship with the accused and defense counsel.* Trial counsel must communicate with a represented accused only through the accused's defense counsel. *But see* R.C.M. 602. Trial counsel may not attempt to induce an accused to plead guilty or surrender other important rights.

(D) *Victim rights.* The trial counsel should ensure that the Government's responsibilities under Article 6b are fulfilled.

(E) *Preparation for trial.* Trial counsel should: ensure that a suitable room, a reporter (if authorized), and necessary equipment and supplies are provided for the court-martial; obtain copies of the charges and specifications and convening orders for each member and all personnel of the court-martial; give timely notice to the members, other parties, other personnel of the court-martial, and witnesses for the prosecution and (if known) defense of the date, time, place, and uniform of the meetings of the court-martial; ensure that any person having custody of the accused is also informed; comply with applicable disclosure and discovery rules (*see* R.C.M. 404A and 701); prepare to make a prompt, full, and orderly presentation of the evidence at trial; consider the elements of proof of each offense charged, the burden of proof of guilt and the burdens of proof on motions which may be anticipated, and the Military Rules of Evidence; secure for use at trial such legal texts as may be available and necessary to sustain the prosecution's contentions; arrange for the presence of witnesses and evidence in accordance with R.C.M. 703; prepare to make an opening statement of the prosecution's case (*see* R.C.M. 913); prepare to conduct the examination and cross-examination of witnesses; and prepare to make final argument on the findings and, if necessary, on sentencing (*see* R.C.M. 919; 1001(h)).

(F) *Trial.* Trial counsel should bring to the attention of the military judge any substantial irregularity in the proceedings. Trial counsel should not allude to or disclose to the members any evidence not yet admitted or reasonably expected to be admitted in evidence or intimate, transmit, or purport to transmit to the military judge or members the views of the convening authority or others as to the guilt or innocence of the accused, an appropriate sentence, or any other matter within the discretion of the court-martial.

(G) *Post-trial duties.* Trial counsel should promptly provide written notice of the Statement of Trial Results to the convening authority or a designee, the accused's immediate commander, and (if applicable) the officer in charge of the confinement facility (*see* R.C.M. 1101(e)), and supervise the preparation, and distribution of copies of the record as required by these rules and regulations of the Secretary concerned (*see* R.C.M. 1112).

(H) *Assistant trial counsel.* An assistant trial counsel may act in that capacity only under the supervision of the detailed trial counsel. Responsibility for trial of a case may not devolve to an assistant not qualified to serve as trial counsel. Unless the contrary appears, all acts of an assistant trial counsel are presumed to have been done by the direction of the trial counsel. An assistant trial counsel may not act in the absence of trial counsel at trial in a general court-martial unless the assistant has the qualifications required of a trial counsel. *See* R.C.M. 805(c).

The Discussion following R.C.M. 502(d)(5) reads as follows:

Discussion

(A) *Initial advice by military defense counsel.* Defense counsel should promptly explain to the accused the general duties of the defense counsel and inform the accused of the rights to request individual military counsel of the accused's own selection, and of the effect of such a request, and to retain civilian counsel. If the accused wants to request individual military counsel, the defense counsel should immediately inform the convening authority through trial counsel and, if the request is approved, serve as associate counsel if the accused requests and the request is approved. Unless the accused directs otherwise, military counsel will begin preparation of the defense immediately after being detailed without waiting for approval of a request for individual military counsel or retention of civilian counsel. *See R.C.M. 506.*

(B) *General duties of defense counsel.* Defense counsel must: guard the interests of the accused zealously within the bounds of the law without regard to personal opinion as to the guilt of the accused; disclose to the accused any interest defense counsel may have in connection with the case, any disqualification, and any other matter which might influence the accused in the selection of counsel; represent the accused with undivided fidelity and may not disclose the accused's secrets or confidences except as the accused may authorize (*see also* Mil. R. Evid. 502). A defense counsel designated to represent two or more co-accused in a joint or common trial or in allied cases must be particularly alert to conflicting interests of those accused. Defense counsel should bring such matters to the attention of the military judge so that the accused's understanding and choice may be made a matter of record. *See R.C.M. 901(d)(4)(D).*

Defense counsel must explain to the accused: the elections available as to composition of the court-martial and assist the accused to make any request necessary to effect the election (*see R.C.M. 903*); the right to plead guilty or not guilty and the meaning and effect of a plea of guilty; the rights to introduce evidence, to testify or remain silent, and to assert any available defense; and the rights to present evidence during presentencing proceedings and the rights of the accused to testify under oath, make an unsworn statement, and have counsel make a statement on behalf of the accused. These explanations must be made regardless of the intentions of the accused as to testifying and pleading.

Defense counsel should try to obtain complete knowledge of the facts of the case before advising the accused, and should give the accused a candid opinion of the merits of the case.

(C) *Preparation for trial.* Defense counsel may have the assistance of trial counsel in obtaining the presence of witnesses and evidence for the defense. *See R.C.M. 703.*

Defense counsel should consider the elements of proof of the offenses alleged and the pertinent rules of evidence to ensure that evidence that the defense plans to introduce is admissible and to be prepared to object to inadmissible evidence offered by the prosecution.

Defense counsel should: prepare to make an opening statement of the defense case (*see R.C.M. 913(b)*); and prepare to examine and cross-examine witnesses, and to make final argument on the findings and, if necessary, on sentencing (*see R.C.M. 919; 1001(h)*).

(D) *Trial.* Defense counsel should represent and protect the interests of the accused at trial.

(E) *Post-trial duties.*

(i) *Deferment of confinement.* If the accused is sentenced to confinement, the defense counsel must explain to the accused the right to request the convening authority to defer service of the sentence to confinement and assist the accused in making such a request if the accused chooses to make one. *See R.C.M. 1103.*

(ii) *Post-trial motions.* The defense counsel should file post-trial motions for any issue that is reasonably raised, to include corrections of the record and motions to set aside the findings based on legally insufficient evidence.

(iii) *Submission of matters.* If the accused is convicted, the defense counsel may submit to the convening authority matters for consideration in deciding whether to modify the findings or sentence, if authorized. *See R.C.M. 1109-10.* Defense counsel should discuss with the accused the right to submit matters to the convening authority and the powers of the convening authority in taking action on the case. *See R.C.M. 1106.* Defense counsel may also submit a brief of any matters counsel believes should be considered on further review.

(iv) *Appellate advice.* Defense counsel must explain to the accused the rights to appellate review that apply in the case, and advise the accused concerning the exercise of those rights. Defense counsel should explain the review

authority of the Court of Criminal Appeals, advise the accused of the right to be represented by counsel before it, and if applicable, the time period allowed to file an appeal of right. *See* R.C.M. 1202 and 1203. Defense counsel should also explain the possibility of further review by the Court of Appeals for the Armed Forces and the Supreme Court. *See* R.C.M. 1204 and 1205.

If the case may be examined in the office of the Judge Advocate General under Article 65, defense counsel should explain the nature of such review to the accused. *See* R.C.M. 1201(d)(1) and (e).

Defense counsel must explain the consequences of waiver of appellate review, when applicable, and, if the accused elects to waive appellate review, defense counsel will assist in preparing the waiver. *See* R.C.M. 1115. If the accused waives appellate review, or if it is not available, defense counsel should explain that the case will be reviewed by an attorney designated by the Judge Advocate General. *See* R.C.M. 1201.

The accused should be advised of the right to apply to the Judge Advocate General for relief after final review under Article 69 when such review is available, the applicable time period for making such an application, and the opportunity for further review by the Court of Criminal Appeals. *See* R.C.M. 1201

(F) *Associate or assistant defense counsel.* Associate or assistant counsel may act in that capacity only under the supervision and by the general direction of the defense counsel. A detailed defense counsel becomes associate defense counsel when the accused has individual military or civilian counsel and detailed counsel is not excused. Although assistant and associate counsel act under the general supervision of the defense counsel, subject to R.C.M. 805(c), assistant and associate defense counsel may act without such supervision when circumstances require. *See, e.g.,* R.C.M. 805(c). Unless the contrary appears, all acts of an assistant or associate defense counsel are presumed to have been done under the supervision of the defense counsel.

The Discussion following R.C.M. 502(e)(3)(A) reads as follows:

Discussion

The accused also may retain an unofficial interpreter without expense to the United States.

The Discussion following R.C.M. 502(e)(4) reads as follows:

Discussion

See R.C.M. 807 regarding oaths for reporters, interpreters, and escorts.

The Analysis following R.C.M. 502 reads as follows:

Analysis

This rule is taken from Rule 502 of the MCM (2016 edition) with the following amendments:

2018 Amendment: R.C.M. 502(a)(1) is amended and implements Article 25, as amended by Section 5182 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016), which permits a convening authority to detail enlisted members to general and special courts-martial without requiring a request for such members from an enlisted accused.

R.C.M. 502(a)(2) and the accompanying Discussion are amended and reflect Articles 29 and 53, as amended by Sections 5187 and 5236 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016), as further amended by Section 1081(c)(1)(G) of the National Defense Authorization Act for Fiscal Year 2018, Pub. Law. No. 115-91, 131 Stat. 1283 (2017), which authorizes the convening authority to detail alternate members to general and special courts-martial and addresses sentencing for capital offenses.

R.C.M. 502(c) and the accompanying Discussion are amended and reflect Articles 26 and 26a, as amended and added, respectively, by Sections 5184 and 5185 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016), which establish qualifications and minimum tour lengths for trial judges and authorizes the Secretary concerned to establish a military magistrate program.

R.C.M. 502(d)(1) and (2) and the accompanying Discussion are amended and reflect Article 27, as amended by Section 5186 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016), with respect to the qualifications of trial counsel, assistant trial counsel, defense counsel, assistant and associate defense counsel, individual military counsel, civilian defense counsel, and counsel learned in the law applicable to capital cases.

R.C.M. 502(d)(3) and the accompanying Discussion are amended and address disqualification of appellate military judges and counsel for witnesses and victims.

The Discussion accompanying R.C.M. 502(d)(4) is amended and updates cross-references, reflects trial counsel's duties with regard to victims' rights, and reflects the elimination of special courts-martial without a military judge. *See* Articles 6b and 16, as amended by Sections 5105 and 5161 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016). Article 6b is further amended by Sections 531(a), 1081(a)(22), and 1081(c)(1)(B) of the National Defense Authorization Act for Fiscal Year 2018, Pub. Law. No. 115-91, 131 Stat. 1283 (2017). Article 16 is further amended by Section 1081(c)(1)(C) of the National Defense Authorization Act for Fiscal Year 2018, Pub. Law. No. 115-91, 131 Stat. 1283 (2017).

The Discussion accompanying R.C.M. 502(d)(5) is amended and clarifies defense counsel's duties in light of substantial changes to post trial and appellate practice in the Military Justice Act of 2016.

The Discussion following R.C.M. 503(a)(1)(C)(ii) reads as follows:

Discussion

The following persons are subject to challenge under R.C.M. 912(f) and should not be detailed as members: any person who is, in the same case, an accuser, witness, preliminary hearing officer, or counsel for any party or witness; any person who, in the case of a new trial, other trial, or rehearing, was a member of any court-martial which previously heard the case; any person who is junior to the accused, unless this is unavoidable; or any person who is in arrest or confinement.

A military judge may not impanel alternate members unless expressly authorized by the convening authority. *See* Article 29. The procedure to be used by the military judge to impanel members and alternate members is specified in R.C.M. 912A.

The Discussion following R.C.M. 503(a)(2) reads as follows:

Discussion

When an enlisted accused makes a request for either all-officer members or at least one-third enlisted members, the convening authority may need to:

- (1) Detail an additional number of officers or enlisted members to the court-martial and, if appropriate, relieve an appropriate number of officers or enlisted persons previously detailed;
- (2) Withdraw the charges from the court-martial to which they were originally referred and refer them to a court-martial which includes the proper proportion of officers or enlisted members; or
- (3) Advise the court-martial before which the charges are then pending to proceed in the absence of officers or enlisted members if eligible officers or enlisted members cannot be detailed because of physical conditions or military exigencies.

When the accused elects one-third enlisted members, the military judge must ensure there are at least two enlisted members for a special court-martial and at least three enlisted members for a non-capital general court-martial. There must be at least two enlisted members in a general court-martial where the number of members falls to six as a result of excusals after impanelment. *See* Article 29.

If an accused elects for the membership of the court-martial to which that accused's case has been referred be comprised of a military judge and members and the members return a finding of guilty to at least one charge and specification, the accused may, after announcement of findings, elect to have an appropriate sentence determined by either the members or the military judge alone. *See* R.C.M. 1002.

The Discussion following R.C.M. 503(a)(3) reads as follows:

Discussion

Concurrence of the proper commander may be oral and need not be shown by the record of trial.

Members should ordinarily be of the same armed force as the accused. When a court-martial composed of members of different armed forces is selected, at least a majority of the members should be of the same armed force as the accused unless exigent circumstances make it impractical to do so without manifest injury to the Service.

The Analysis following R.C.M. 503 reads as follows:

Analysis

This rule is taken from Rule 503 of the MCM (2016 edition) with the following amendments:

2018 Amendment: R.C.M. 503(a)(1) and (2) and the accompanying Discussions are amended and reflect Articles 25, 25a, and 29, as amended by Sections 5182, 5183, and 5187 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016), regarding detailing of members, excusal of members, and impanelment of alternate members.

R.C.M. 503(a)(4) is new and implements Article 16, as amended by Section 5161 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016), as further amended by Section 1081(c)(1)(C) of the National Defense Authorization Act for Fiscal Year 2018, Pub. Law. No. 115-91, 131 Stat. 1283 (2017), which permits a convening authority to refer charge(s) and specification(s) to a special court-martial consisting of a military judge alone under such limitations as the President may prescribe by regulation.

R.C.M. 503(b)(4) is new and implements Articles 19 and 30a, as amended by Sections 5163 and 5202 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016), and Article 30a is further amended by Section 531(b) of the National Defense Authorization Act for Fiscal Year 2018, Pub. L. No. 115-91, 131 Stat. 1283 (2017), which authorizes military judges to detail military magistrates, if authorized under regulations of the Secretary concerned, to preside over certain pre-referral proceedings and special courts-martial consisting of a military judge alone in specified circumstances.

R.C.M. 503(c)(1) is amended and implements Article 27, as amended by Section 5186 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016), with respect to counsel learned in the law applicable to capital cases.

The Discussion following R.C.M. 504(b)(1) reads as follows:

Discussion

The authority to convene courts-martial is independent of rank and is retained as long as the convening authority remains a commander in one of the designated positions. The rules by which command devolves are found in regulations of the Secretary concerned.

The Discussion following R.C.M. 504(b)(2) reads as follows:

Discussion

See the discussion accompanying R.C.M. 504(b)(1). Persons authorized to convene general courts-martial may also convene special courts-martial.

The Discussion following R.C.M. 504(b)(2)(A) reads as follows:

Discussion

The power of a commander of a separate or detached unit to convene courts-martial, like that of any other commander, may be limited by superior competent authority.

The Discussion following R.C.M. 504(b)(3) reads as follows:

Discussion

See the discussion accompanying R.C.M. 504(b)(1).

The Discussion following R.C.M. 504(c)(1) reads as follows:

Discussion

See also Article 1(9); 307(a); 601(c). *But see* R.C.M. 1302(b) (accuser may convene a summary court-martial).

The Discussion following R.C.M. 504(c)(3) reads as follows:

Discussion

See also R.C.M. 401(c).

The Discussion following R.C.M. 504(d)(2) reads as follows:

Discussion

See also R.C.M. 1302(c).

The Analysis following R.C.M. 504 reads as follows:

Analysis

This rule is taken from Rule 504 of the MCM (2016 edition) with the following amendment:

2018 Amendment: R.C.M. 504(d) is amended and aligns with the 2018 Amendments to R.C.M. 503(a).

The Discussion following R.C.M. 505(a) reads as follows:

Discussion

Changes of the members of the court-martial should be kept to a minimum. If extensive changes are necessary and no session of the court-martial has begun, it may be appropriate to withdraw the charges from one court-martial and refer them to another. *See* R.C.M. 604.

The Discussion following R.C.M. 505(b) reads as follows:

Discussion

When members or counsel have been excused and the excusal is not reduced to writing, the excusal should be announced on the record. A member who has been temporarily excused need not be formally reappointed to the court-

martial.

The Discussion following R.C.M. 505(C)(2)(A)(iv) reads as follows:

Discussion

R.C.M. 912A sets forth the procedures for excusing excess members.

The Discussion following R.C.M. 505(e)(2) reads as follows:

Discussion

A change in the military magistrate after assembly does not require the consent of the parties. *See* R.C.M. 503.

The Analysis following R.C.M. 505 reads as follows:

Analysis

This rule is taken from Rule 505 of the MCM (2016 edition) with the following amendments:

2018 Amendment: R.C.M. 505(a) is amended and aligns with the 2018 Amendments to R.C.M. 503(b)(4) regarding military magistrates.

R.C.M. 505(b) is amended and aligns with the 2018 Amendments to R.C.M. 1202 regarding the certification of the record of trial.

R.C.M. 505(c)(2) is amended and aligns with the 2018 Amendments to R.C.M. 501 and 912A regarding fixed panel sizes in general and special courts-martial and the procedure for excusing excess members at impanelment. The Discussion accompanying R.C.M.505(c)(2) is new.

R.C.M. 505(e) is amended and describes the circumstances in which the military magistrate can be changed before and after assembly of the court-martial. The Discussion accompanying R.C.M. 505(e) is new.

R.C.M. 505(f) is amended and describes the circumstances in which good cause would exist to change the military magistrate.

The Discussion following R.C.M. 506(a)(2) reads as follow:

Discussion

The requirements of Article 27 are satisfied where an accused retains civilian counsel who is determined by the Judge Advocate General to be learned in the law applicable to capital cases in accordance with R.C.M. 502(d)(2)(C). Counsel learned in the law applicable to capital cases may be assigned prior to referral and should be considered for such assignment in a case in which a capital referral appears likely.

See R.C.M. 601(d) and 1004(b)(1) regarding special instructions for referral of capital cases.

The Discussion following R.C.M. 506(b)(3) reads as follows:

Discussion

A request under R.C.M. 506(b)(3) should be considered in light of the general statutory policy that the accused is not entitled to be represented by more than one military counsel. Among the factors that may be considered in the exercise of discretion are the seriousness of the case, retention of civilian defense counsel, complexity of legal or factual issues, and the detail of additional trial counsel.

See R.C.M. 905(b)(6) and 906(b)(2) as to motions concerning denial of a request for individual military counsel or retention of detailed counsel as associate counsel.

The Discussion following R.C.M. 506(e) reads as follows:

Discussion

See also Mil. R. Evid. 615 if the person is a potential witness in the case.

The Analysis following R.C.M. 506 reads as follows:

Analysis

This rule is taken from Rule 506 of the MCM (2016 edition) with the following amendment:

2018 Amendment: R.C.M. 506(a) and the accompanying Discussion are amended and align with the 2018 Amendments to R.C.M. 502(d)(2)(C) regarding the detailing of defense counsel in capital cases.

CHAPTER VI. REFERRAL, SERVICE, AMENDMENT, AND WITHDRAWAL OF CHARGES

The Discussion following R.C.M. 601(a) reads as follows:

Discussion

Referral of charges requires three elements: a convening authority who is authorized to convene the court-martial and is not disqualified (*see* R.C.M. 601(b) and (c)); preferred charges which have been received by the convening authority for disposition (*see* R.C.M. 307 as to preferral of charges and Chapter IV as to disposition); and a court-martial convened by that convening authority or a predecessor (*see* R.C.M. 504).

If trial would be warranted but would be detrimental to the prosecution of a war or inimical to national security, *see* R.C.M. 401(d) and 407(b).

The Discussion following R.C.M. 601(b) reads as follows:

Discussion

See R.C.M. 306(a), 403, 404, 407, and 504.

The convening authority may be of any command, including a command different from that of the accused, but as a practical matter the accused must be subject to the orders of the convening authority or otherwise under the convening authority's control to assure the appearance of the accused at trial. The convening authority's power over the accused may be based upon agreements between the commanders concerned.

The Discussion following R.C.M. 601(c) reads as follows:

Discussion

Convening authorities are not disqualified from referring charges by prior participation in the same case except when they have acted as accuser. For a definition of "accuser," *see* Article 1(9). A convening authority who is disqualified may forward the charges and allied papers for disposition by competent authority superior in rank or command. *See* R.C.M. 401(c) concerning actions which the superior may take.

See R.C.M. 1302 for rules relating to convening summary courts-martial.

The Discussion following R.C.M. 601(d)(1) reads as follows:

Discussion

For a discussion of selection among alternative dispositions, see R.C.M. 306. The convening authority is not obliged to refer all charges which the evidence might support. The convening authority should consider the options and considerations under R.C.M. 306 and Appendix 2.1 (Non-binding disposition guidance) in exercising the discretion to refer charges and specifications to court-martial.

The Discussion following R.C.M. 601(d)(2)(B) reads as follows:

Discussion

Compliance with R.C.M. 405 includes the opportunity for the accused to waive the preliminary hearing. *See* R.C.M. 405.

A specification under a charge may not be referred to a general court-martial unless the advice of the staff judge advocate concludes the specification alleges an offense under the UCMJ, there is probable cause to believe that the accused committed the offense charged, and a court-martial would have jurisdiction over the accused and the offense. *See* Article 34 and R.C.M. 406.

The Discussion following R.C.M. 601(d)(3) reads as follows:

Discussion

See R.C.M. 201(f)(2)(C) concerning limitations on referral of capital offenses to special courts-martial.

See R.C.M. 103(4) for the definition of the term “capital offense.”

See R.C.M. 201(f)(2)(D) and (E) and R.C.M. 1301(c) concerning limitations on the referral of certain cases to special and summary courts-martial.

See R.C.M. 905(b)(1) and (e) for the rule regarding forfeiture for failure to object to a defect under this rule.

The Discussion following R.C.M. 601(e)(1)(C) reads as follows:

Discussion

Referral is ordinarily evidenced by an indorsement on the charge sheet. Although the indorsement should be completed on all copies of the charge sheet, only the original must be signed. The signature may be that of a person acting by the order or direction of the convening authority. In such a case the signature element must reflect the signer’s authority.

If, for any reason, charges are referred to a court-martial different from that to which they were originally referred, the new referral is ordinarily made by a new indorsement attached to the original charge sheet. The previous indorsement should be lined out and initialed by the person signing the new referral. The original indorsement should not be obliterated. *See also* R.C.M. 604.

The failure to include a special instruction that a case is to be tried as a capital case at the time of the referral does not bar the convening authority from later adding the required special instruction, provided that the convening authority has otherwise complied with the applicable notice requirements. If the accused demonstrates specific prejudice from such failure to include the special instruction, a continuance or a recess is an adequate remedy. *See* R.C.M. 1004(b)(1).

For limitations regarding offenses that may be referred to a special court-martial consisting of a military judge alone, see R.C.M. 201(f)(2)(E).

If the only officer present in a command refers the charges to a summary court-martial and serves as the summary court-martial under R.C.M. 1302, the indorsement should be completed with the additional comments, “only officer present in the command.”

The convening authority may instruct that the charges against the accused be tried with certain other charges against the accused. *See* R.C.M. 601(d)(2).

The convening authority may instruct that charges against one accused be referred for joint or common trial with another accused. *See* R.C.M. (e)(3).

Any special instructions must be stated in the referral indorsement.

When the charges have been referred to a court-martial, the indorsed charge sheet and allied papers should be promptly transmitted to the trial counsel.

The Discussion following R.C.M. 601(e)(2) reads as follows:

Discussion

Ordinarily all known charges should be referred to a single court-martial. *But see* R.C.M. 902A.

The Discussion following R.C.M. 601(e)(3) reads as follows:

Discussion

A joint offense is one committed by two or more persons acting together with a common intent. Joint offenses may be referred for joint trial, along with all related offenses against each of the accused. A common trial may be used when the evidence of several offenses committed by several accused separately is essentially the same, even though the offenses were not jointly committed. *See* the Discussion accompanying R.C.M. 307(c)(5). Convening authorities should consider that joint and common trials may be complicated by procedural and evidentiary rules.

The Discussion following R.C.M. 601(g) reads as follows:

Discussion

Parallel convening authorities are those convening authorities that possess the same court-martial jurisdiction authority. Examples of permissible transmittal of charges under this rule include the transmittal from a general court-martial convening authority to another general court-martial convening authority, or from one special court-martial convening authority to another special court-martial convening authority. It would be impracticable for an original convening authority to continue exercising authority over the charges, for example, when a command is being decommissioned or inactivated, or when deploying or redeploying and the accused is remaining behind. If charges have been referred, there is no requirement that the charges be withdrawn or dismissed prior to transfer. *See* R.C.M. 604. In the event that the case has been referred, the receiving convening authority may adopt the original court-martial convening order, including the court-martial panel selected to hear the case as indicated in that convening order. When charges are transmitted under this rule, no recommendation as to disposition may be made

The Analysis following R.C.M. 601 reads as follows:

Analysis

This rule is taken from Rule 601 of the MCM (2016 edition) as amended by Exec. Order No. 13825, 83 Fed. Reg. 9889 (March 1, 2018) with the following amendments.

2018 Amendment: R.C.M. 601(a) is amended and clarifies that referral is the order of a convening authority that charges and specifications against an accused will be tried by a specified court-martial.

R.C.M. 601(d) is amended and implements Article 34(b), as amended by Section 5205 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016), which requires a convening authority to consult a judge advocate on relevant legal issues before referring charge(s) and specification(s) to a special court-martial and also prohibits a convening authority from referring charge(s) and specification(s) to a general court-martial unless a staff judge advocate provides written advice stating that the specification alleges an offense under the UCMJ, there is probable cause to believe that the

accused committed the offense charges, and a court-martial would have jurisdiction over the accused and the offense. Prior to referring charge(s) and specification(s) to a general court-martial, the staff judge advocate is also required to provide a recommendation to the convening authority as to the disposition that should be made of the charges and specifications by the convening authority in the interest of justice and discipline. *See also* R.C.M. 406.

The Discussion accompanying R.C.M. 601(d)(1) is amended and references Appendix 2.1 (Non-binding disposition guidance), and reflects Article 33, as amended by Section 5204 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016).

The Discussion accompanying R.C.M. 601(d)(2) is new and reflects the opportunity of the accused to waive the preliminary hearing and the rules regarding waiver or forfeiture for failure to object to a defect under R.C.M. 601.

The Discussion accompanying R.C.M. 601(d)(3) is new and references limitations on referral of charges and specifications to special courts-martial.

R.C.M. 601(e)(1) is amended and implements Article 16, as amended by Section 5161 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016), as further amended by Section 1081(c)(1)(C) of the National Defense Authorization Act for Fiscal Year 2018, Pub. Law. No. 115-91, 131 Stat. 1283 (2017), concerning referring charges and specifications in a capital case or in a special court-martial consisting of a military judge alone under Article 16(c)(2)(A).

The Discussion following R.C.M. 602(a) reads as follows:

Discussion

Trial counsel should comply with this rule immediately upon receipt of the charges. Whenever after service the charges are amended or changed the trial counsel must give notice of the changes to the defense counsel. Whenever such amendments or changes add a new party, a new offense, or substantially new allegations, the charge sheet so amended or changed must be served anew. *See* R.C.M. 603.

Service may be made only upon the accused; substitute service upon defense counsel is insufficient. The trial counsel should promptly inform the defense counsel when charges have been served.

If the accused has questions when served with charges, the accused should be told to discuss the matter with defense counsel.

The Analysis following R.C.M. 602 reads as follows:

Analysis

This rule is taken from Rule 602 of the MCM (2016 edition) with the following amendment:

2018 Amendment: R.C.M. 602 is amended and implements Article 35, as amended by Section 5206 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016), regarding the time periods applicable to service of charges and commencement of trial, and sets forth the consequences for defense failure to object to proceeding during the applicable period

The Discussion following R.C.M. 603(b)(2) reads as follows:

Discussion

Minor changes include those necessary to correct inartfully drafted or redundant specifications; to correct a misnaming of the accused; to allege the proper article; or to correct other slight errors. Minor changes also include those which reduce the seriousness of an offense, as when the value of an allegedly stolen item in a larceny specification is reduced, or when a desertion specification is amended and alleges only unauthorized absence.

The Discussion following R.C.M. 603(d)(2) reads as follows:

Discussion

In the case of a general court-martial, a preliminary hearing under R.C.M. 405 will be necessary if the charge as amended or changed was not covered in a prior preliminary hearing. If the substance of the charge or specification as amended or changed has not been referred or, in the case of a general court-martial, considered at a preliminary hearing, a new referral and, if appropriate, preliminary hearing are necessary. When charges are re-referred, they must be served anew under R.C.M. 602.

The Discussion following R.C.M. 603(e) reads as follows:

Discussion

Charges and specifications forwarded or referred for trial should be free from defects of form and substance. Scriveners' errors may be corrected without the charge being sworn anew by the accuser. Other changes should be signed and sworn to by an accuser. All changes in the charges should be initialed by the person who makes the changes. A trial counsel acting under this provision ordinarily should consult with the convening authority before making any changes which, even though minor, change the nature or seriousness of the offense.

The Analysis following R.C.M. 603 reads as follows:

Analysis

This rule is taken from Rule 603 of the MCM (2016 edition) with the following amendments:

2018 Amendment: R.C.M. 603 and the accompanying Discussions are revised and clarify the definition of major and minor changes that may be made to charges and specifications that have been referred to trial by court-martial, and the timing requirements for making such changes to the charges and specifications.

The Discussion following R.C.M. 604(a) reads as follows:

Discussion

Charges that are withdrawn from a court-martial should be dismissed (*see* R.C.M. 401(c)(1)) unless it is intended to refer them anew promptly or to forward them to another authority for disposition.

Charges should not be withdrawn from a court-martial arbitrarily or unfairly to an accused. *See also* R.C.M. 604 (b).

Some or all charges and specifications may be withdrawn. In a joint or common trial the withdrawal may be limited to charges against one or some of the accused.

Charges that have been properly referred to a court-martial may be withdrawn only by the direction of the convening authority or a superior competent authority in the exercise of that officer's independent judgment. When directed to do so by the convening authority or a superior competent authority, trial counsel may withdraw charges or specifications by lining out the affected charges or specifications, renumbering remaining charges or specifications as necessary, and initialing the changes. Charges and specifications withdrawn before commencement of trial will not be brought to the attention of the members. When charges or specifications are withdrawn after they have come to the attention of the members, the military judge must instruct them that the withdrawn charges or specifications may not be considered for any reason.

The Discussion following R.C.M. 604(b) reads as follows:

Discussion

See also R.C.M. 915 (Mistrial).

When charges that have been withdrawn from a court-martial are referred to another court-martial, the reasons for the withdrawal and later referral should be included in the record of the later court-martial, if the later referral is more onerous to the accused. Therefore, if further prosecution is contemplated at the time of the withdrawal, the reasons for the withdrawal should be included in or attached to the record of the earlier proceeding.

Improper reasons for withdrawal include an intent to interfere with the free exercise by the accused of constitutional rights or rights provided under the UCMJ, or with the impartiality of a court-martial. A withdrawal is improper if it was not directed personally and independently by the convening authority or by a superior competent authority.

Whether the reason for a withdrawal is proper, for purposes of the propriety of a later referral, depends in part on the stage in the proceedings at which the withdrawal takes place. Before arraignment, there are many reasons for a withdrawal that will not preclude another referral. These include receipt of additional charges, absence of the accused, reconsideration by the convening authority or by a superior competent authority of the seriousness of the offenses, questions concerning the mental capacity of the accused, and routine duty rotation of the personnel constituting the court-martial. Charges withdrawn after arraignment may be referred to another court-martial under some circumstances. For example, it is permissible to refer charges that were withdrawn pursuant to a pretrial agreement if the accused fails to fulfill the terms of the agreement. *See* R.C.M. 705. Charges withdrawn after some evidence on the general issue of guilt is introduced may be re-referred only under the narrow circumstances described in the rule.

The Analysis following R.C.M. 604 reads as follows:

Analysis

This rule is taken from Rule 604 of the MCM (2016 edition) without substantive amendment.

CHAPTER VII. PRETRIAL MATTERS

The Discussion following R.C.M. 701(a)(1) reads as follows:

Discussion

The purpose of this rule is to ensure the prompt, efficient, and fair administration of military justice by encouraging early and broad disclosure of information by the parties. Discovery in the military justice system is intended to eliminate pretrial gamesmanship, minimize pretrial litigation, and reduce the potential for surprise and delay at trial. Parties to a court-martial should consider these purposes when evaluating pretrial disclosure issues. In addition to this rule, other sources, to include other Rules for Courts-Martial, case law, and rules of professional conduct, may require disclosure of additional information or evidence.

The Discussion following R.C.M. 701(a)(2)(B)(iii) reads as follows:

Discussion

For specific rules concerning certain mental examinations of the accused or third party patients, see R.C.M. 701(f), R.C.M. 706, Mil. R. Evid. 302 and Mil. R. Evid. 513.

The Discussion following R.C.M. 701(a)(3)(B) reads as follows:

Discussion

Such notice should be in writing except when impracticable.

The Discussion following R.C.M. 701(a)(6)(D) reads as follows:

Discussion

Nothing in this rule prohibits trial counsel or other Government counsel from disclosing information earlier than required by this rule or in addition to that required by this rule.

In addition to the matters required to be disclosed under subsection (a) of this rule, the Government is required to notify the defense of or provide to the defense certain information under other rules. Mil. R. Evid. 506 covers the disclosure of unclassified information which is under the control of the Government. Mil. R. Evid. 505 covers disclosure of classified information.

Other Rules for Courts-Martial and Military Rules of Evidence concern disclosure of other specific matters. *See* R.C.M. 308 (identification of accuser), 405 (report of Article 32 preliminary hearing), 706(c)(3)(B) (mental examination of accused), 914 (production of certain statements), and 1004(b)(1) (aggravating factors in capital cases); Mil.R. Evid. 301(d)(2) (notification of immunity or leniency to witnesses), 302 (mental examination of accused), 304(d) (statements by accused), 311(d)(1) (evidence seized from accused), 321(d)(1) (evidence based on lineups), 507 (identity of informants), 612 (memoranda used to refresh recollection), and 613(a) (prior inconsistent statements).

Requirements for notice of intent to use certain evidence are found in: Mil. R. Evid. 202(b) (judicial notice of foreign law), 301(d)(2) (notification of immunity or leniency to witnesses), 304(d) (notice of intent to use undisclosed confessions), 304(f)(3) (testimony of accused for limited purpose on confession), 311(d) (notice of intent to use undisclosed evidence seized), 311(d)(6) (testimony of accused for limited purpose on seizures), 321(d)(3)(notice of intent to use undisclosed line-up evidence), 321(d)(5) (testimony of accused for limited purpose of line-ups), 404(b) (intent to use evidence of other crimes, wrongs, or acts), 412(c)(1) and (2) (intent of defense to use evidence of sexual behavior or sexual predisposition of a victim); 505(i) (intent to disclose classified information), 506(h) (intent to disclose privileged government information), and 609(b) (intent to impeach with conviction over 10 years old).

In accordance with R.C.M. 701(d), trial counsel have a continuing duty to identify and disclose information that is favorable to the defense throughout the prosecution of the alleged offenses against the accused. In general, trial counsel should exercise due diligence and good faith in learning about any evidence favorable to the defense known to others acting on the Government's behalf in the case, including military, other governmental, and civilian law enforcement authorities.

In the spirit of eliminating "gamesmanship" from the discovery process, trial counsel should not avoid pursuit of information or evidence because the counsel believes it will damage the prosecution's case or aid the accused, nor should counsel intentionally attempt to obscure information identified pursuant to this subsection by disclosing it as part of a large volume of materials.

The Discussion following R.C.M. 701(b)(1)(B)(ii) reads as follows:

Discussion

See R.C.M. 701(f) for statements that would not be subject to disclosure.

The Discussion following R.C.M. 701(b)(2) reads as follows:

Discussion

See R.C.M. 916(k) concerning the defense of lack of mental responsibility. See R.C.M. 706 concerning inquiries into the mental responsibility of the accused. See Mil. R. Evid. 302 concerning statements by the accused during such inquiries. If the defense needs more detail as to the time, date, or place of the offense to comply with this rule, it should request a bill of particulars. *See* R.C.M. 906(b)(6).

The Discussion following R.C.M. 701(b)(5) reads as follows:

Discussion

In addition to the matters covered in subsection (b) of this rule, defense counsel is required to give notice or disclose evidence under certain Military Rules of Evidence: Mil. R. Evid. 202(b) (judicial notice of foreign law), 304(f)(3) (testimony by the accused for a limited purpose in relation to a confession), 311(d)(6) (same, search), 321(d)(5) (same, lineup), 412(c)(1) and (2) (intent to offer evidence of sexual misconduct by a victim), 505(i) (intent to disclose classified information), 506(h) (intent to disclose privileged government information), 609(b) (intent to impeach a witness with a conviction older than 10 years), 612(a)(2) (writing used to refresh recollection), and 613(a) (prior inconsistent statements).

The Discussion following R.C.M. 701(d) reads as follows:

Discussion

Trial counsel are encouraged to advise military authorities or other governmental agencies involved in the case of their continuing duty to identify, preserve, and disclose to the trial counsel or other Government counsel the information required to be disclosed under this rule.

The Discussion following R.C.M. 701(g)(2) reads as follows:

Discussion

In reviewing a motion under this paragraph, the military judge should consider the following: protection of witnesses and others from substantial risk of physical harm, bribes, economic reprisals, and other intimidation; maintenance of such secrecy regarding informants as is required for effective investigation of criminal activity; confidential information recognized by law, including protection of confidential relationships and privileges; and any other relevant considerations. If the military judge defers discovery or inspection, the military judge should ensure that all material and information to which a party is entitled are disclosed in sufficient time to permit counsel to make beneficial use of the disclosure. The terms of the sealing order may provide parameters for examination by or disclosure to those persons or entities whose interests are being protected.

The Discussion following R.C.M. 701(g)(3)(D) reads as follows:

Discussion

Factors to be considered in determining whether to grant an exception to exclusion under subsection (3)(C) include: the extent of disadvantage that resulted from a failure to disclose; the reason for the failure to disclose; the extent to which later events mitigated the disadvantage caused by the failure to disclose; and any other relevant factors.

The sanction of excluding the testimony of a defense witness should be used only upon finding that the defense counsel's failure to comply with this rule was willful and motivated by a desire to obtain a tactical advantage or to conceal a plan to present fabricated testimony. Moreover, the sanction of excluding the testimony of a defense witness should only be used if alternative sanctions could not have minimized the prejudice to the Government. Before imposing this sanction, the military judge must weigh the defendant's right to compulsory process against the countervailing public interests, including (1) the integrity of the adversary process; (2) the interest in the fair and efficient administration of military justice; and (3) the potential prejudice to the truth-determining function of the trial process.

Procedures governing refusal to disclose classified information are in Mil. R. Evid. 505. Procedures governing refusal to disclose other government information are in Mil. R. Evid. 506. Procedures governing refusal to disclose an informant's identity are in Mil. R. Evid. 507.

The Analysis following R.C.M. 701 reads as follows:

Analysis

This rule is taken from Rule 701 of the MCM (2016 edition) as amended by Exec. Order No. 13825, 83 Fed. Reg. 9889 (March 1, 2018), with the following amendments.

2018 Amendment: The amendments to R.C.M. 701 clarify discovery practice in the military justice system. The amendments enhance efficiency and ensure the prompt disposition of offenses, while at the same time ensuring fairness to the accused and the equal opportunity of both the prosecution and defense to obtain witnesses and evidence guaranteed by Article 46.

R.C.M. 701(a) is amended and aligns with the 2018 Amendments to the disclosure provisions of R.C.M. 404A.

The Discussion accompanying R.C.M. 701(a) is new and addresses the purposes of discovery in the military justice system.

R.C.M. 701(a)(2)(A)(i) and (a)(2)(B)(i) are amended and specify the scope of trial counsel discovery obligations. The provisions broaden the scope of discovery, requiring disclosure of items that are “relevant” rather than “material” to defense preparation of a case, and adding a requirement to disclose items the government anticipates using in rebuttal.

R.C.M. 701(a)(3) and (5), and R.C.M. 701(b)(1)(A) and (C)(i) are amended and require the trial counsel and defense counsel to provide contact information, rather than addresses, of witnesses.

R.C.M. 701(a)(6)(D) is added and clarifies that trial counsel must disclose to defense counsel information adverse to the credibility of prosecution witnesses or evidence. *See Strickler v. Greene*, 527 U.S. 263, 280 (1999) (duty to disclose evidence favorable to the defense applies even in the absence of a request by the defense and encompasses impeachment evidence as well as exculpatory evidence).

The Discussion accompanying R.C.M. 701(a)(6) is amended and reflects that trial counsel may disclose information earlier than required by R.C.M. 701 or in addition to that required by the rule; that trial counsel have a continuing duty to disclose information favorable to the defense and should exercise due diligence and good faith in learning about such evidence; and should not avoid pursuit of information that may be harmful to the prosecution’s case; and to update cross-references.

R.C.M. 701(b)(2) and the accompanying Discussion are amended and require that the defense provide notice of certain defenses in writing.

R.C.M. 701(b)(3) is amended and permits the trial counsel to copy or photograph the items listed for disclosure by the defense.

The Discussion accompanying R.C.M. 701(b)(5) is amended and updates cross-references.

The Discussion accompanying R.C.M. 701(d) is new and reflects that trial counsel should advise authorities involved in the case of their duty to identify, preserve, and disclose to trial counsel the information required to be disclosed under R.C.M. 701.

R.C.M. 701(e)(1) is amended and conforms to Article 6b, as amended by Section 5105 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016), as further amended by Sections 531(a), 1081(a)(22), and 1081(c)(1)(B) of the National Defense Authorization Act for Fiscal Year 2018, Pub. L. No. 115-91, 131 Stat. 1283 (2017).

R.C.M. 701(g)(2) is amended and clarifies the applicability of Part III of the Manual for Courts-Martial to the examination of materials by the military judge *in camera*. R.C.M. 701(g)(2) is further amended and clarifies the responsibilities of the military judge with respect to sealing materials and attaching materials examined to the record of trial.

The Discussion accompanying R.C.M. 701(g)(2) is new and addresses considerations relevant to the military judge’s authority to regulate discovery in order to achieve the purposes of the Rule and reflects that the terms of a sealing order may authorize listed persons or entities to examine or receive disclosure of sealed materials outside the procedures set forth in R.C.M. 1113(b).

The Discussion following R.C.M. 702(a)(5) reads as follows:

Discussion

A deposition is the out-of-court testimony of a witness under oath in response to questions by the parties, which is reduced to writing or recorded on videotape or audiotape or similar material. A deposition taken on oral examination is an oral deposition, and a deposition taken on written interrogatories is a written deposition. Written interrogatories are questions, prepared by the prosecution, defense, or both, which are reduced to writing before submission to a witness whose testimony is to be taken by deposition. The answers, reduced to writing and properly sworn to, constitute the deposition testimony of the witness.

Note that under R.C.M. 702(j) a deposition may be taken by agreement of the parties without the necessity of an order.

Part or all of a deposition, so far as otherwise admissible under the Military Rules of Evidence, may be used on the merits or on an interlocutory question as substantive evidence if the witness is unavailable under Mil. R. Evid. 804(a) except that a deposition may be admitted in a capital case only upon offer by the defense. *See* Mil. R. Evid. 804(b)(1). In any case, a deposition may be used by any party for the purpose of contradicting or impeaching the testimony of the deponent as a witness. *See* Mil. R. Evid. 613. If only a part of a deposition is offered in evidence by a party, an adverse party may require the proponent to offer all which is relevant to the part offered, and any party may offer other parts. *See* Mil. R. Evid. 106.

A deposition which is transcribed is ordinarily read to the court-martial by the party offering it. *See also* R.C.M. 702(i)(1)(B). The transcript of a deposition may not be inspected by the members. Objections may be made to testimony in a written deposition in the same way that they would be if the testimony were offered through the personal appearance of a witness.

Part or all of a deposition so far as otherwise admissible under the Military Rules of Evidence may be used in presentencing proceedings as substantive evidence as provided in R.C.M. 1001.

DD Form 456 (Interrogatories and Deposition) may be used in conjunction with this rule.

See Article 6b(e)(2) concerning a victim's right to petition a Court of Criminal Appeals to quash an order to submit to a deposition.

The Discussion following R.C.M. 702(c)(4) reads as follows:

Discussion

A copy of the request and any accompanying papers ordinarily should be served on the other party when the request is submitted.

The Discussion following R.C.M. 702(d)(3)(A) reads as follows:

Discussion

See Article 49(a)(4).

When a deposition will be at a point distant from the command, an appropriate authority may be requested to make available an officer to serve as deposition officer.

The Discussion following R.C.M. 702(d)(3)(B) reads as follows:

Discussion

The counsel who represents the accused at a deposition ordinarily will form an attorney-client relationship with the accused, which will continue through a later court-martial. *See* R.C.M. 506.

If the accused has formed an attorney-client relationship with military counsel concerning the charges in question, ordinarily that counsel should be appointed to represent the accused.

The Discussion following R.C.M. 702(d)(3)(C) reads as follows:

Discussion

Such instruction may include the time and place for taking the deposition.

The Discussion following R.C.M. 702(e)(9) reads as follows:

Discussion

When any unusual problem, such as improper conduct by counsel or a witness, prevents an orderly and fair proceeding, the deposition officer should adjourn the proceedings and inform the convening authority.

The authority who ordered the deposition should forward copies to the parties.

The Discussion following R.C.M. 702(g)(1)(A) reads as follows:

Discussion

As to objections, see R.C.M. 702(e)(7) and (h). As to production of prior statements of witnesses, see R.C.M. 914; Mil. R. Evid. 612, 613.

A sample oath for a deposition follows:

“Do you (swear) (affirm) that the evidence you give shall be the truth, the whole truth, and nothing but the truth (so help you God)?”

The Discussion following R.C.M. 702(g)(2)(B) reads as follows:

Discussion

The interrogatories and cross-interrogatories should be sent to the deposition officer by the party who requested the deposition. See R.C.M. 702(h)(3) concerning objections.

The Discussion following R.C.M. 702(h)(2) reads as follows:

Discussion

A party may show that an objection was made during the deposition but not recorded, but, in the absence of such evidence, the transcript of the deposition governs.

The Discussion following R.C.M. 702(i)(2) reads as follows:

Discussion

A deposition read into evidence or one that is played during a court-martial is recorded and transcribed by the reporter in the same way as any other testimony. Such a deposition need not be included in the record of trial.

The Analysis following R.C.M. 702 reads as follows:

Analysis

2018 Amendment: This rule is taken from Rule 702 of the MCM (2016 edition) with substantial amendments, clarifies the circumstances in which depositions may be ordered and their uses at trial, and reflects Article 49, as amended by Section 5231 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016), and the consequence for failure to object prior to or during a deposition, or to written interrogatories.

The Discussion following R.C.M. 703(a) reads as follows:

Discussion

See also R.C.M. 801(c) concerning the opportunity of the court-martial to obtain witnesses and evidence.

The Discussion following R.C.M. 703(b)(1) reads as follows:

Discussion

See Mil. R. Evid. 401 concerning relevance.

Relevant testimony is necessary when it is not cumulative and when it would contribute to a party's presentation of the case in some positive way on a matter in issue. A matter is not in issue when it is stipulated as a fact.

The procedures for receiving testimony via remote means and the definition thereof are contained in R.C.M. 914B. An issue may arise as both an interlocutory question and a question that bears on the ultimate issue of guilt. See R.C.M. 801(e)(5). In such circumstances, this rule authorizes the admission of testimony by remote means or similar technology over the accused's objection only as evidence on the interlocutory question. In most instances, testimony taken over a party's objection will not be admissible as evidence on the question that bears on the ultimate issue of guilt; however, there may be certain limited circumstances where the testimony is admissible on the ultimate issue of guilt. Such determinations must be made based upon the relevant rules of evidence.

The Discussion following R.C.M. 703(c)(2)(D) reads as follows:

Discussion

When significant or unusual costs would be involved in producing witnesses, the trial counsel should inform the convening authority, as the convening authority may elect to dispose of the matter by means other than a court-martial. See R.C.M. 906(b)(7). See also R.C.M. 905(j).

The Discussion following R.C.M. 703(d)(1) reads as follows:

Discussion

See Mil. R. Evid. 702; 706.

The Discussion following R.C.M. 703(e)(1) reads as follows:

Discussion

Relevance is defined by Mil. R. Evid. 401. Relevant evidence is necessary when it is not cumulative and when it would contribute to a party's presentation of the case in some positive way on a matter in issue. A matter is not in issue when it is stipulated as a fact. The discovery and introduction of classified or other government information is controlled by Mil. R. Evid. 505 and 506.

The Discussion following R.C.M. 703(g)(1) reads as follows:

Discussion

When military witnesses are located near the court-martial, their presence can usually be obtained through informal coordination with them and their commander. If the witness is not near the court-martial and attendance would involve travel at government expense, or if informal coordination is inadequate, the appropriate superior should be requested to issue the necessary order.

If practicable, a request for the attendance of a military witness should be made so that the witness will have at least 48 hours' notice before starting to travel to attend the court-martial.

The attendance of persons not on active duty should be obtained in the manner prescribed in R.C.M. 703(g)(3).

The Discussion following R.C.M. 703(g)(3)(A) reads as follows:

Discussion

A subpoena is not necessary if the witness appears voluntarily at no expense to the United States.

Civilian employees of the Department of Defense may be directed by appropriate authorities to appear as witnesses in courts-martial as an incident of their employment. Appropriate travel orders may be issued for this purpose.

A subpoena may not be used to compel a civilian to travel outside the United States and its territories.

A witness must be subject to United States jurisdiction to be subject to a subpoena. Foreign nationals in a foreign country are not subject to subpoena. Their presence may be obtained through cooperation of the host nation.

The Discussion following R.C.M. 703(g)(3)(B) reads as follows:

Discussion

A subpoena normally is prepared, signed, and issued in duplicate on the official forms. See Appendix 7 for an example of a subpoena with certificate of service and a Travel Order .

The Discussion following R.C.M. 703(g)(3)(C)(i) reads as follows:

Discussion

A pre-referral investigative subpoena may be issued in accordance with R.C.M. 309 or subsection (g)(3)(D)(v) of this rule for the production of evidence not under control of the government for use at an Article 32 preliminary hearing. *See also* R.C.M. 405.

The Discussion following R.C.M. 703(g)(3)(C)(ii) reads as follows:

Discussion

The term "victim" has the same meaning as the term "victim of an offense under this chapter" in Article 6b. A subpoena requiring the production of personal or confidential information of a named victim may be served on individuals, such as medical professionals, counselors, employers, or journalists, or upon an organization, such as a medical facility, school, treatment center, financial institution, news organization, or insurance company. Subpoenas to which R.C.M. 703(g)(3)(C) applies may also be subject to additional statutory requirements, *e.g.*, the Right to Financial Privacy Act, 12 USC §§ 3401-3422, which applies to financial records. Notice may be given to the victim or to a victim's representative such as a representative under R.C.M. 801(a)(6) or legal counsel. This provision is drawn from Fed. R. Crim. P. 17(c)(3) with differences to account for military justice circumstances. For a discussion of "exceptional circumstances," see Fed. R. Crim. P. 17 (Advisory Committee Notes, 2008 Amendments).

The Discussion following R.C.M. 703(g)(3)(E) reads as follows:

Discussion

If practicable, a subpoena should be issued in time to permit service at least 24 hours before the time the witness will have to travel to comply with the subpoena.

Informal service. Unless formal service is advisable, the person who issued the subpoena may mail it to the witness in duplicate, enclosing a postage-paid envelope bearing a return address, with the request that the witness sign the acceptance of service on the copy and return it in the envelope provided. The return envelope should be addressed to the person who issued the subpoena. The person who issued the subpoena should include with it a statement to the effect that the rights of the witness to fees and mileage will not be impaired by voluntary compliance with the request and that a voucher for fees and mileage will be delivered to the witness promptly on being discharged from attendance.

Formal service. Formal service is advisable whenever it is anticipated that the witness will not comply voluntarily with the subpoena. Appropriate fees and mileage must be paid or tendered. *See* Article 47. If formal service is advisable, the person who issued the subpoena must assure timely and economical service. That person may do so by serving the subpoena personally when the witness is in the vicinity. When the witness is not in the vicinity, the subpoena may be sent in duplicate to the commander of a military installation near the witness. Such commanders should give prompt and effective assistance, issuing travel orders for their personnel to serve the subpoena when necessary.

Service should ordinarily be made by a person subject to the UCMJ. The duplicate copy of the subpoena must have entered upon it proof of service as indicated on the form and must be promptly returned to the person who issued the subpoena. If service cannot be made, the person who issued the subpoena must be informed promptly. A stamped, addressed envelope should be provided for these purposes.

Hardship means any situation which would substantially preclude reasonable efforts to appear that could be solved by providing transportation or fees and mileage to which the witness is entitled for appearing at the hearing in question.

The Discussion following R.C.M. 703(g)(3)(H)(i) reads as follows:

Discussion

A warrant of attachment (DD Form 454) may be used when necessary to compel a witness to appear or produce evidence under this rule. A warrant of attachment is a legal order addressed to an official directing that official to have the person named in the order brought before a court.

Subpoenas issued under R.C.M. 703 are federal process and a person not subject to the UCMJ may be prosecuted in a federal civilian court under Article 47 for failure to comply with a subpoena issued in compliance with this rule and formally served.

Failing to comply with such a subpoena is a felony offense, and may result in a fine or imprisonment, or both, at the discretion of the district court. The different purposes of the warrant of attachment and criminal complaint under Article 47 should be borne in mind. The warrant of attachment, available without the intervention of civilian judicial proceedings, has as its purpose the obtaining of the witness' presence, testimony, or documents. The criminal complaint, prosecuted through the federal civilian courts, has as its purpose punishment for failing to comply with process issued by military authority. It serves to vindicate the military interest in obtaining compliance with its lawful process.

A general court-martial convening authority may only issue a warrant of attachment to compel compliance with an investigative subpoena issued prior to referral. *See* Article 46(d).

The Discussion following R.C.M. 703(g)(3)(H)(iv) reads as follows:

Discussion

In executing a warrant of attachment, no more force than necessary to bring the witness to the court-martial, deposition, or court of inquiry may be used.

The Analysis following R.C.M. 703 reads as follows:

Analysis

2018 Amendment: This rule is taken from Rule 703 of the MCM (2016 edition) with substantial amendments and clarifies the procedures for requesting the production of witnesses and evidence at trial. The amendments are as follows:

R.C.M. 703(d) is amended and clarifies the distinction between expert witnesses and expert consultants. *See, e.g., United States v. Warner*, 62 M.J. 114 (C.A.A.F. 2005); *United States v. Turner*, 28 M.J. 487 (C.M.A. 1989); *United States v. Langston*, 32 M.J. 894 (A.F.C.M.R. 1991).

R.C.M. 703(g)(3)(C) and (D) and the Discussion accompanying R.C.M. 703(g)(3)(C) are new and reflect Article 46, as amended by Section 5228 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016), which authorizes the issuance of a pre-referral investigative subpoena under specified circumstances.

R.C.M. 703(g)(3)(C)(i) and (ii) and the accompanying Discussions are new. R.C.M. 703(g)(3)(C)(i) describes requirements for investigative subpoenas; R.C.M. 703(g)(3)(C)(ii) establishes a category of investigative subpoenas with respect to personal or confidential information of a victim consistent with the Fed. R. Crim. P. 17. This category of investigative subpoenas has special notice requirements, with appropriate exceptions for exceptional circumstances. The Discussion accompanying R.C.M. 703(g)(3)(C)(ii) also clarifies the meaning of the term “victim” for purposes of this provision.

R.C.M. 703(g)(3)(G) and (H) and the Discussion accompanying R.C.M. 703(g)(3)(H)(i) are amended and reflect Articles 30a and 46, as added and amended, respectively, by Sections 5202 and 5228 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016), which authorizes a military judge to review requests for relief from subpoenas prior to referral. Article 30a was amended by Section 531(b) of the National Defense Authorization Act for Fiscal Year 2018, Pub. L. No. 115-91, 131 Stat. 1283 (2017).

R.C.M. 703(g)(4) is new and reflects that a request for subpoena may be accompanied by a request that the custodian of the evidence take all necessary step to preserve records and other evidence until such time as the items may be produced or inspected. *Cf. United States v. Stellato*, 74 M.J. 473 (C.A.A.F. 2015).

The Discussion following R.C.M. 703A(a)(4)(F) reads as follows:

Discussion

See Article 46(d)(3) and 18 U.S.C. § 2703 concerning the authority for, and U.S. district court procedures concerning, warrants and court orders for electronically stored information.

The Discussion following R.C.M. 703A(c)(2) reads as follows:

Discussion

An order may be unreasonable or oppressive if the information or records requested are unusually voluminous in nature or compliance with such order otherwise would cause an undue burden on a provider.

The Analysis following R.C.M. 703A reads as follows:

Analysis

2018 Amendment: R.C.M. 703A is new and implements Article 46, as amended by Section 5228 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016), which provides authority for a military judge to issue a warrant or order for the disclosure of the contents of electronic communications by a provider of an electronic communication service or a remote computing service. *See also* 18 U.S.C. §§ 2703 and 2711, as amended by Section 5228 of the Military

The Discussion following R.C.M. 704(a)(2) reads as follows:

Discussion

“Testimonial” immunity is also called “use” immunity.

Immunity ordinarily should be granted only when testimony or other information from the person is necessary to the public interest, including the needs of good order and discipline, and when the person has refused or is likely to refuse to testify or provide other information on the basis of the privilege against self-incrimination.

Testimonial immunity is preferred because it does not bar prosecution of the person for the offenses about which testimony or information is given under the grant of immunity.

In any trial of a person granted testimonial immunity after the testimony or information is given, the Government must meet a heavy burden to show that it has not used in any way for the prosecution of that person the person’s statements, testimony, or information derived from them. In many cases this burden makes difficult a later prosecution of such a person for any offense that was the subject of that person’s testimony or statements. Therefore, if it is intended to prosecute a person to whom testimonial immunity has been or will be granted for offenses about which that person may testify or make statements, it may be necessary to try that person before the testimony or statements are given.

The Discussion following R.C.M. 704(c) reads as follows:

Discussion

Only general court-martial convening authorities or their designees are authorized to grant immunity. However, in some circumstances, when a person testifies or makes statements pursuant to a promise of immunity, or a similar promise, by a person with apparent authority to make it, such testimony or statements and evidence derived from them may be inadmissible in a later trial. Under some circumstances, a promise of immunity by someone other than a general court-martial convening authority or designee may bar prosecution altogether. Persons not authorized to grant immunity should exercise care when dealing with accused or suspects to avoid inadvertently causing statements to be inadmissible or prosecution to be barred.

When the victim of an alleged offense requests an expedited response to a request for immunity for misconduct that is collateral to the underlying offense, the convening authority should respond to the request as soon as practicable.

A convening authority who grants immunity to a prosecution witness in a court-martial may be disqualified from taking post-trial action in the case under some circumstances.

The Discussion following R.C.M. 704(c)(1) reads as follows:

Discussion

When testimony or a statement for which a person subject to the UCMJ may be granted immunity may relate to an offense for which that person could be prosecuted in a United States District Court, immunity should not be granted without prior coordination with the Department of Justice. Ordinarily, coordination with the local United States Attorney is appropriate. Unless the Department of Justice indicates it has no interest in the case, authorization for the grant of immunity should be sought from the Attorney General. A request for such authorization should be forwarded through the office of the Judge Advocate General concerned. Service regulations may provide additional guidance. Even if the Department of Justice expresses no interest in the case, authorization by the Attorney General for the grant of immunity may be necessary to compel the person to testify or make a statement if such testimony or statement would make the person liable for a federal civilian offense.

The Discussion following R.C.M. 704(c)(2) reads as follows:

Discussion

See the discussion accompanying R.C.M. 704(c)(1) concerning forwarding a request for authorization to grant immunity to the Attorney General.

The Discussion following R.C.M. 704(c)(3) reads as follows:

Discussion

A general court-martial convening authority has wide latitude under this section to exercise his or her discretion in delegating immunity authority. For example, a general court-martial convening authority may decide to delegate only the authority for a designee to grant immunity for certain offenses, such as a list of specific offenses or any offense not warranting a punitive discharge, while withholding authority to grant immunity for all others. A general court-martial convening authority may also delegate only authority for certain categories of grantees, such as victims of alleged sex-related offenses.

Department of Defense Instruction 5525.07 (18 June 2007) provides: “A proposed grant of immunity in a case involving espionage, subversion, aiding the enemy, sabotage, spying, or violation of rules or statutes concerning classified information or the foreign relations of the United States, shall be forwarded to the General Counsel of the Department of Defense for the purpose of consultation with the Department of Justice. The General Counsel shall obtain the view of other appropriate elements of the Department of Defense in furtherance of such consultation.”

The Discussion following R.C.M. 704(d) reads as follows:

Discussion

A person who has received a valid grant of immunity from a proper authority may be ordered to testify. In addition, a Servicemember who has received a valid grant of immunity may be ordered to answer questions by investigators or counsel pursuant to that grant. *Cf.* Mil. R. Evid. 301(d). A person who refuses to testify despite a valid grant of immunity may be prosecuted for such refusal. Persons subject to the UCMJ may be charged under Article 131d. A grant of immunity removes the right to refuse to testify or make a statement on self-incrimination grounds. It does not, however, remove other privileges against disclosure of information. *See* Mil. R. Evid., Section V.

An immunity order or grant must not specify the contents of the testimony it is expected the witness will give.

When immunity is granted to a prosecution witness, the accused must be notified in accordance with Mil. R. Evid. 301(d)(2).

The Analysis following R.C.M. 704 reads as follows:

Analysis

This rule is taken from Rule 704 of the MCM (2016 edition) as amended by Exec. Order No. 13825, 83 Fed. Reg. 9889 (March 1, 2018), with the following amendments: The Discussion accompanying R.C.M. 704(d) is amended and updates cross-references and reflects the reorganization of the punitive articles in the Military Justice Act of 2016. *See* Articles 79-134, as amended by Sections 5401-5452 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016), as further amended by Section 1081(c) of the National Defense Authorization Act for Fiscal Year 2018, Pub. Law. No. 115-91, 131 Stat. 1283 (2017).

The Discussion following R.C.M. 705(a) reads as follows:

Discussion

The authority of convening authorities to refer cases to trial and approve plea agreements extends only to trials by court-martial. To ensure that such actions do not preclude appropriate action by federal civilian authorities in cases likely to be prosecuted in the United States District Courts, convening authorities shall ensure that appropriate consultation under the “Memorandum of Understanding Between the Departments of Justice and Defense Relating to the Investigation and Prosecution of Crimes Over Which the Two Departments Have Concurrent Jurisdiction” has taken place prior to trial by court-martial or approval of a plea agreement in cases where such consultation is required. *See* Appendix 3. Convening authorities should also review and consider Appendix 2.1 (Non-binding disposition guidance) for guidance concerning the disposition of charges and specifications through plea agreements.

The Discussion following R.C.M. 705(b)(2)(C) reads as follows:

Discussion

A convening authority may withdraw certain specifications and/or charges from a court-martial and dismiss them if the accused fulfills the accused’s promises in the agreement. Except when jeopardy has attached (*see* R.C.M. 907(b)(2)(C)), such withdrawal and dismissal does not bar later reinstitution of the charges by the same or a different convening authority. A judicial determination that the accused breached the plea agreement is not required prior to reinstitution of withdrawn or dismissed specifications and/or charges. If the defense moves to dismiss the reinstituted specifications and/or charges on the grounds that the government remains bound by the terms of the plea agreement, the government will be required to prove, by a preponderance of the evidence, that the accused has breached the terms of the plea agreement. If the agreement is intended to grant immunity to an accused, *see* R.C.M. 704.

The Discussion following R.C.M. 705(c)(1)(B) reads as follows:

Discussion

A plea agreement provision which prohibits the accused from making certain pretrial motions, such as for issues that are not waivable (*see* R.C.M. 905-907), is improper.

The Discussion following R.C.M. 705(c)(2)(E) reads as follows:

Discussion

A plea agreement that includes a waiver of the accused’s right to request trial by a court-martial composed of members necessarily waives the right to elect sentencing by members. *See* R.C.M. 1002.

A plea agreement that permits the accused to request trial by a court-martial composed of members necessarily preserves the accused’s right to elect sentencing by military judge alone or members. In such cases, the accused will be sentenced for all offenses for which the accused was found guilty in accordance with the accused’s election. *See* R.C.M. 1002.

The Discussion following R.C.M. 705(c)(2)(F) reads as follows:

Discussion

A provision requiring the sentences to confinement be served concurrently or consecutively is applicable only to plea agreements in which the military judge determines the sentence under R.C.M. 1002(d)(2).

The Discussion following R.C.M. 705(e)(2) reads as follows:

Discussion

The plea agreement ordinarily contains an offer to plead guilty and a description of the offenses to which the offer extends. It must also contain a complete and accurate statement of any other agreed terms or conditions. For example, if the convening authority agrees to withdraw certain specifications, or if the accused agrees to waive the right to an Article 32 preliminary hearing or the right to elect sentencing by members, this should be stated. The written agreement should contain a statement by the accused that the accused enters it freely and voluntarily and may contain a statement that the accused has been advised of certain rights in connection with the agreement.

The Discussion following R.C.M. 705(e)(3)(A) reads as follows:

Discussion

The convening authority should consult with the staff judge advocate or trial counsel and should review the applicable sections of Appendix 2.1 (Non-binding disposition guidance) before acting on an offer to enter into a plea agreement.

The Discussion following R.C.M. 705(f) reads as follows:

Discussion

See R.C.M. 1002 and 1005.

The Analysis following R.C.M. 705 reads as follows:

Analysis

This rule is taken from Rule 705 of the MCM (2016 edition) with the following amendments:

2018 Amendment: R.C.M. 705 and the accompanying Discussions are substantially amended and reflect Article 53a, as added by Section 5237 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016), as amended by Sections 531(d) and 1081(c)(1)(H) of the National Defense Authorization Act for Fiscal Year 2018, Pub. Law. No. 115-91, 131 Stat. 1283 (2017), and Articles 33, 56 and 60, as amended by Sections 5204, 5301 and 5321 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016). Article 56 was further amended by Section 531(e) of the National Defense Authorization Act for Fiscal Year 2018, Pub. Law. No. 115-91, 131 Stat. 1283 (2017).

The Discussion following R.C.M. 705(d)(1)(C) is new and reflects the role of the military judge and the members in adjudging a sentence as part of a plea agreement.

R.C.M. 705(e) of the MCM (2016 edition) is renumbered as R.C.M. 705(f) and is amended and allows a military judge to notify a court-martial of the existence of a plea agreement upon either the request of an accused or to prevent a manifest injustice.

The Discussion following R.C.M. 706(a) reads as follows:

Discussion

See R.C.M. 909 concerning the capacity of the accused to stand trial and R.C.M. 916(k) concerning mental responsibility of the accused.

The Discussion following R.C.M.706(c)(3)(C) reads as follows:

Discussion

Based on the report, further action in the case may be suspended, the charges may be dismissed by the convening authority, administrative action may be taken to discharge the accused from the service or, subject to Mil. R. Evid. 302, the charges may be tried by court-martial.

The Discussion following R.C.M. 706(c)(5) reads as follows:

Discussion

See Mil. R. Evid. 302.

The Analysis following R.C.M. 706 reads as follows:

Analysis

This rule is taken from Rule 706 of the MCM (2016 edition) without substantive amendment.

The Discussion following R.C.M. 707(a)(1) reads as follows:

Discussion

Delay from the time of an offense to preferral of charges or the imposition of pretrial restraint is not considered for speedy trial purposes. *See also* Article 43 (statute of limitations). In some circumstances such delay may prejudice the accused and may result in dismissal of the charges or other relief.

The Discussion following R.C.M. 707(c)(1) reads as follows:

Discussion

The decision to grant or deny a reasonable delay is a matter within the sole discretion of the convening authority or a military judge. This decision should be based on the facts and circumstances then and there existing. Reasons to grant a delay might include, for example, the need for: time to enable counsel to prepare for trial in complex cases; time to allow examination into the mental capacity of the accused; time to process a member of the reserve component to active duty for disciplinary action; time to complete other proceedings related to the case; time requested by the defense; time to secure the availability of the accused, substantial witnesses, or other evidence; time to obtain appropriate security clearances for access to classified information or time to declassify evidence; or additional time for other good cause. Pretrial delays should not be granted ex parte, and when practicable, the decision granting the delay, together with supporting reasons and the dates covering the delay, should be reduced to writing.

Prior to referral, the convening authority may delegate the authority to grant continuances to an Article 32 preliminary hearing officer.

The Discussion following R.C.M. 707(d)(2) reads as follows:

Discussion

See R.C.M. 707(c)(1) and the accompanying Discussion concerning reasons for delay and procedures for parties to request delay.

The Discussion following R.C.M. 707(e) reads as follows:

Discussion

Speedy trial issues may also be forfeited by a failure to raise the issue at trial. *See* R.C.M. 905(e) and 907(b)(2).

The Analysis following R.C.M. 707 reads as follows:

Analysis

This rule is taken from Rule 707 of the MCM (2016 edition) with the following amendments:

2018 Amendment: R.C.M. 707(b)(3)(A) is amended and clarifies the effect of dismissal of charges or mistrial on the 120-day time period in which to bring a case to trial. The rule addresses both the circumstance where the accused, on the date of dismissal or mistrial, is under pretrial restraint and the circumstance where the accused, on the date of dismissal or retrial, is not under pretrial restraint. *See United States v. Anderson*, 50 M.J. 447 (C.A.A.F. 1997).

R.C.M. 707(e) is amended and clarifies the consequences of a plea of guilty on speedy trial issues as to the offense to which a plea of guilty is entered.

R.C.M. 707(f) is new and mandates that the trial of an accused held in pretrial restraint under R.C.M. 304(a)(3)-(4) be given priority, consistent with the Speedy Trial Act, *see* 18 U.S.C. § 3164 and Article 10, as amended by Section 5121 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016).

CHAPTER VIII. TRIAL PROCEDURE GENERALLY

The Discussion following R.C.M. 801(a) reads as follows:

Discussion

The military judge is responsible for ensuring that court-martial proceedings are conducted in a fair and orderly manner, without unnecessary delay or waste of time or resources.

The Discussion following R.C.M. 801(a)(1) reads as follows:

Discussion

The military judge should consult with counsel concerning the scheduling of sessions and the uniform to be worn. The military judge recesses or adjourns the court-martial as appropriate. Subject to R.C.M. 504(d)(1), the military judge may also determine the place of trial. *See also* R.C.M. 906(b)(11).

The Discussion following R.C.M. 801(a)(2) reads as follows:

Discussion

See generally R.C.M. 804 and 806. Courts-martial should be conducted in an atmosphere which is conducive to calm and detached deliberation and determination of the issues presented and which reflects the seriousness of the proceedings.

The Discussion following R.C.M. 801(a)(3) reads as follows:

Discussion

See R.C.M. 102. The military judge may, within the framework established by the code and this Manual, prescribe the manner and order in which the proceedings may take place. Thus, the military judge may determine: when, and in what order, motions will be litigated (*see* R.C.M. 905); the manner in which voir dire will be conducted and challenges made (*see* R.C.M. 902(d) and 912); the order in which witnesses may testify (*see* R.C.M. 913; Mil. R. Evid. 611); the order in which the parties may argue on a motion or objection; and the time limits for argument (*see* R.C.M. 905; 919; 1001(h)).

The military judge should prevent unnecessary waste of time and promote the ascertainment of truth, but must avoid undue interference with the parties' presentations or the appearance of partiality. The parties are entitled to a reasonable opportunity to properly present and support their contentions on any relevant matter.

The Discussion following R.C.M. 801(a)(5) reads as follows:

Discussion

The military judge instructs the members concerning findings (*see* R.C.M. 920) and, when applicable, sentence (*see* R.C.M. 1005), and when otherwise appropriate. For example, preliminary instructions to the members concerning their duties and the duties of other trial participants and other matters are normally appropriate. *See* R.C.M. 913. Other instructions (for example, instructions on the limited purpose for which evidence has been introduced, *see* Mil. R. Evid. 105) may be given whenever the need arises.

The Discussion following R.C.M. 801(a)(6)(E) reads as follows:

Discussion

The term "victim of an offense under the UCMJ" has the same meaning as the term "victim of an offense under this chapter" in Article 6b.

The Discussion following R.C.M. 801(c) reads as follows:

Discussion

The members may request and the military judge may require that a witness be recalled, or that a new witness be summoned, or other evidence produced. The members or military judge may direct trial counsel to make an inquiry along certain lines to discover and produce additional evidence. *See also* Mil. R. Evid. 614. In taking such action, the court-martial must not depart from an impartial role.

The Discussion following R.C.M. 801(d) reads as follows:

Discussion

A report of the matter may be made to the convening authority after trial. If charges are preferred for an offense indicated by the evidence referred to in this subsection, no member of the court-martial who participated in the first trial should sit in any later trial. Such a member would ordinarily be subject to a challenge for cause. *See* R.C.M. 912. *See also* Mil. R. Evid. 105 concerning instructing the members on evidence of uncharged misconduct.

The Discussion following R.C.M. 801(e)(1)(C) reads as follows:

Discussion

Sessions without members are appropriate for interlocutory questions, questions of law, and instructions. *See also* Mil. R. Evid. 103, 304, 311, 321. Such sessions should be used to the extent possible consistent with the orderly, expeditious progress of the proceedings.

The Discussion following R.C.M. 801(e)(4) reads as follows:

Discussion

A ruling on an interlocutory question should be preceded by any necessary inquiry into the pertinent facts and law. For example, the party making the objection, motion, or request may be required to furnish evidence or legal authority in support of the contention. An interlocutory issue may have a different standard of proof. *See, for example*, Mil. R. Evid. 314(e)(5), which requires consent for a search to be proved by clear and convincing evidence.

Most of the common motions are discussed in specific rules in this Manual, and the burden of persuasion is assigned therein. The prosecution usually bears the burden of persuasion (*see* Mil. R. Evid. 304(f)(6); 311(d)(5); *see also* R.C.M. 905 through 907) once an issue has been raised. What “raises” an issue may vary with the issue. Some issues may be raised by a timely motion or objection. *See, e.g.*, Mil. R. Evid. 304(f). Others may not be raised until the defense has made an offer of proof or presented evidence in support of its position. *See, e.g.*, Mil. R. Evid. 311(d)(4)(B). The rules in this Manual and relevant decisions should be consulted when a question arises as to whether an issue is raised, as well as which side has the burden of persuasion. The military judge may require a party to clarify a motion or objection or to make an offer of proof, regardless of the burden of persuasion, when it appears that the motion or objection is vague, inapposite, irrelevant, or spurious.

The Discussion following R.C.M. 801(e)(5) reads as follows:

Discussion

Questions of law and interlocutory questions include all issues which arise during trial other than the findings (that is, guilty or not guilty), sentence, and administrative matters such as declaring recesses and adjournments. A question may be both interlocutory and a question of law. Challenges are specifically covered in R.C.M. 902 and 912.

Questions of the applicability of a rule of law to an undisputed set of facts are normally questions of law. Similarly, the legality of an act is normally a question of law. For example, the legality of an order when disobedience of an order is charged, the legality of restraint when there is a prosecution for breach of arrest, or the sufficiency of warnings before interrogation are normally questions of law. It is possible, however, for such questions to be decided solely upon some factual issue, in which case they would be questions of fact. For example, the question of what warnings, if any, were given by an interrogator to a suspect would be a factual question.

A question is interlocutory unless the ruling on it would finally decide whether the accused is guilty. Questions which may determine the ultimate issue of guilt are not interlocutory. An issue may arise as both an interlocutory question and a question which may determine the ultimate issue of guilt. An issue is not purely interlocutory if an accused raises a defense or objection and the disputed facts involved determine the ultimate question of guilt. For example, if during a trial for desertion the accused moves to dismiss for lack of jurisdiction and presents some evidence that the accused is not a member of an armed force, the accused’s status as a military person may determine the ultimate question of guilt because status is an element of the offense. If the motion is denied, the disputed facts must be resolved by each member in deliberation upon the findings. (The accused’s status as a Servicemember would have to be proved by a preponderance of the evidence to uphold jurisdiction, *see* R.C.M. 907, but beyond a reasonable doubt to permit a finding of guilty.) If, on the other hand, the accused was charged with larceny and presented the same evidence as to military status, the evidence would bear only upon amenability to trial and the issue would be disposed of solely as an interlocutory question.

Interlocutory questions may be questions of fact or questions of law.

The Discussion following R.C.M. 801(f) reads as follows:

Discussion

See R.C.M. 808 and 1112 concerning preparation of the record of trial.

The Analysis following R.C.M. 801 reads as follows:

Analysis

This rule is taken from Rule 801 of the MCM (2016 edition) with the following amendments:

2018 Amendment: The Discussion accompanying R.C.M. 801(a) is amended and reflects the elimination of special courts-martial without a military judge. *See* Article 16, as amended by Section 5161 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016), as further amended by Section 1081(c)(1)(C) of the National Defense Authorization Act for Fiscal Year 2018, Pub. Law. No. 115-91, 131 Stat. 1283 (2017).

The Discussion accompanying R.C.M. 801(a)(3) is amended and updates a cross-reference.

R.C.M. 801(a)(6) and the Discussion accompanying R.C.M. 801(a)(6)(E) are amended and reflect Article 6b, as amended by Section 5105 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016), as further amended by Sections 531(a), 1081(a)(22), and 1081(c)(1)(B) of the National Defense Authorization Act for Fiscal Year 2018, Pub. Law. No. 115-91, 131 Stat. 1283 (2017). The Discussion accompanying R.C.M. 801(a)(6)(E) also clarifies the meaning of the term “victim of an offense under the UCMJ” as it pertains to this rule.

R.C.M. 801(e) and (f) are amended and reflect the elimination of special courts-martial without a military judge. *See* Article 16, as amended by Section 5161 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016), as further amended by Section 1081(c)(1)(C) of the National Defense Authorization Act for Fiscal Year 2018, Pub. Law. No. 115-91, 131 Stat. 1283 (2017).

The Discussion accompanying R.C.M. 801(e)(4) is amended and updates cross-references, and reflects the elimination of special courts-martial without a military judge. *See* Article 16, as amended by Section 5161 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016), as further amended by Section 1081(c)(1)(C) of the National Defense Authorization Act for Fiscal Year 2018, Pub. Law. No. 115-91, 131 Stat. 1283 (2017).

The Discussion accompanying R.C.M. 801(e)(5) is amended and reflects the elimination of special courts-martial without a military judge. *See* Article 16, as amended by Section 5161 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016), as further amended by Section 1081(c)(1)(C) of the National Defense Authorization Act for Fiscal Year 2018, Pub. Law. No. 115-91, 131 Stat. 1283 (2017).

The Discussion following R.C.M. 802(a) reads as follows:

Discussion

The military judge may hold a conference when detailed to the court-martial following referral as well as after being detailed to conduct any pre-referral proceeding pursuant to Article 30a. *See* R.C.M. 309.

Conferences between the military judge and counsel may be held when necessary before or during trial. The purpose of such conference is to inform the military judge of anticipated issues and to expeditiously resolve matters on which the parties can agree, not to litigate or decide contested issues. No party may be compelled to resolve any matter at a conference. *See* R.C.M. 802(c).

A conference may be appropriate in order to resolve scheduling difficulties, so that witnesses and members are not unnecessarily inconvenienced. Matters which will ultimately be in the military judge’s discretion, such as conduct of voir dire, seating arrangements in the courtroom, or procedures when there are multiple accused may be resolved at a conference. Conferences may be used to advise the military judge of issues or problems, such as

unusual motions or objections, which are likely to arise during trial.

Occasionally it may be appropriate to resolve certain issues, in addition to routine or administrative matters, if this can be done with the consent of the parties. For example, a request for a witness which, if litigated and approved at trial, would delay the proceedings and cause expense or inconvenience, might be resolved at a conference. Note, however, that this could only be done by an agreement of the parties and not by a binding ruling of the military judge. Such a resolution must be included in the record. *See* R.C.M. 802(b).

A military judge may not participate in negotiations relating to pleas. *See* R.C.M. 705 and Mil. R. Evid. 410.

No place or method is prescribed for conducting a conference. A conference may be conducted by remote means or similar technology consistent with the definition in R.C.M. 914B.

The Discussion following R.C.M. 802(d) reads as follows:

Discussion

Normally the defense counsel may be presumed to speak for the accused.

The Analysis following R.C.M. 802 reads as follows:

Analysis

This rule is taken from Rule 802 of the MCM (2016 edition) with the following amendments.

2018 Amendment: R.C.M. 802(a) is amended and reflects Article 30a, as added by Section 5202 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016), as amended by Section 531(b) of the National Defense Authorization Act for Fiscal Year 2018, Pub. L. No. 155-91, 131 Stat. 1283 (2017), which provides the authority for military judges to preside over specified proceedings prior to referral.

Subsection (f) is amended and reflects the elimination of special courts-martial without a military judge. *See* Article 16, as amended by Section 5161 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016), as further amended by Section 1081(c)(1)(C) of the National Defense Authorization Act of 2018, Pub. Law. No. 115-91, 131 Stat. 1283 (2017).

The Discussion following R.C.M. 803 reads as follows:

Discussion

The purpose of Article 39(a) is “to give statutory sanction to pretrial and other hearings without the presence of the members concerning those matters which are amenable to disposition on either a tentative or final basis by the military judge.” The military judge may, and ordinarily should, call the court-martial into session without members to ascertain the accused’s understanding of the right to counsel and forum selection, and the accused’s choices with respect to these matters; dispose of interlocutory matters; hear objections and motions; rule upon other matters that may legally be ruled upon by the military judge, such as admitting evidence; and perform other procedural functions which do not require the presence of members. *See, e.g.,* R.C.M. 901–910. The military judge may hold the arraignment, receive pleas, enter findings of guilty upon an accepted plea of guilty, and conduct presentencing proceedings under R.C.M. 1001 without the members present.

Evidence may be admitted and process, including a subpoena, may be issued to compel attendance of witnesses and production of evidence at such sessions. *See* R.C.M. 703.

Article 39(a) authorizes sessions only after charges have been referred to trial and served on the accused, but the accused has an absolute right to object, in time of peace, to any session until the period prescribed by Article 35 has run.

See R.C.M. 804 concerning waiver by the accused of the right to be present. *See also* R.C.M. 802 concerning conferences.

See R.C.M. 309 concerning proceedings conducted before referral under Article 30a.

The Analysis following R.C.M. 803 reads as follows:

Analysis

This rule is taken from Rule 803 of the MCM (2016 edition) with the following amendments:

2018 Amendment: R.C.M. 803 is amended and reflects the requirement for an entry of judgment in special and general courts-martial. *See* Article 60c, as added by Section 5324 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016). The last line of R.C.M. 803 is deleted and reflects the elimination of special courts-martial without a military judge. *See* Articles 16, 25, and 53, as amended by Sections 5161, 5182, and 5236, respectively, of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016), as further amended by Sections 1081(c)(1)(C) and 1081(c)(1)(G) of the National Defense Authorization Act for Fiscal Year 2018, Pub. Law. No. 115-91, 131 Stat. 1283 (2017).

The Discussion accompanying R.C.M. 803 is amended and reflects changes to court-martial forums, the establishment of military judge alone sentencing as the default rule, and the elimination of special courts-martial without a military judge. *See* Articles 16, 25, and 53, as amended by Sections 5161, 5182, and 5236, respectively, of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016), as further amended by Sections 1081(c)(1)(C) and 1081(c)(1)(G) of the National Defense Authorization Act for Fiscal Year 2018, Pub. Law. No. 115-91, 131 Stat. 1283 (2017).

The Discussion following R.C.M. 804(a) reads as follows:

Discussion

An accused travelling to attend any military justice proceeding listed in R.C.M. 804(a) is not travelling for “disciplinary action” as used in paragraph 030706 of the Joint Travel Regulations Uniformed Service Members and DoD Civilian Employees, dated 1 August 2017. An accused attending these sessions shall be deemed to be travelling for “official business” and entitled to the same travel allowances as any other military member required to execute the same travel.

The Discussion following R.C.M. 804(c)(2) reads as follows:

Discussion

Express waiver. The accused may expressly waive the right to be present at trial proceedings. There is no right to be absent, however, and the accused may be required to be present over objection. Thus, an accused cannot frustrate efforts to identify the accused at trial by waiving the right to be present. The right to be present is so fundamental, and the Government’s interest in the attendance of the accused so substantial, that the accused should be permitted to waive the right to be present only for good cause, and only after the military judge explains to the accused the right, and the consequences of forgoing it, and secures the accused’s personal consent to proceeding without the accused.

Voluntary absence. In any case the accused may forfeit the right to be present by being voluntarily absent after arraignment.

“Voluntary absence” means voluntary absence from trial. For an absence from court-martial proceedings to be voluntary, the accused must have known of the scheduled proceedings and intentionally missed them. For example, although an accused Servicemember might voluntarily be absent without authority, this would not justify proceeding with a court-martial in the accused’s absence unless the accused was aware that the court-martial would be held during the period of the absence.

An accused who is in military custody or otherwise subject to military control at the time of trial or other proceeding may not properly be absent from the trial or proceeding without securing the permission of the military judge on the record.

The prosecution has the burden to establish by a preponderance of the evidence that the accused's absence from trial is voluntary. Voluntariness may not be presumed, but it may be inferred, depending on the circumstances. For example, it may be inferred, in the absence of evidence to the contrary, that an accused who was present when the trial recessed and who knew when the proceedings were scheduled to resume, but who nonetheless is not present when court reconvenes at the designated time, is absent voluntarily.

Where there is some evidence that an accused who is absent for a hearing or trial may lack mental capacity to stand trial, capacity to voluntarily waive the right to be present for trial must be shown. *See* R.C.M. 909.

Subsection (1) authorizes but does not require trial to proceed in the absence of the accused upon the accused's voluntary absence. When an accused is absent from trial after arraignment, a continuance or a recess may be appropriate, depending on all the circumstances.

Presence of the accused by remote means does not require the consent of the accused.

Removal for disruption. Trial may proceed without the presence of an accused who has disrupted the proceedings, but only after at least one warning by the military judge that such behavior may result in removal from the courtroom. In order to justify removal from the proceedings, the accused's behavior should be of such a nature as to materially interfere with the conduct of the proceedings.

The military judge should consider alternatives to removal of a disruptive accused. Such alternatives include physical restraint (such as binding, shackling, and gagging) of the accused, or physically segregating the accused in the courtroom. Such alternatives need not be tried before removing a disruptive accused under subsection (2). Removal may be preferable to such an alternative as binding and gagging, which can be an affront to the dignity and decorum of the proceedings.

Disruptive behavior of the accused may also constitute contempt. *See* R.C.M. 809. When the accused is removed from the courtroom for disruptive behavior, the military judge should—

(A) Afford the accused and defense counsel ample opportunity to consult throughout the proceedings. To this end, the accused should be held or otherwise required to remain in the vicinity of the trial, and frequent recesses permitted to allow counsel to confer with the accused.

(B) Take such additional steps as may be reasonably practicable to enable the accused to be informed about the proceedings. Although not required, technological aids, such as closed-circuit television or audio transmissions, may be used for this purpose.

(C) Afford the accused a continuing opportunity to return to the courtroom upon assurance of good behavior. To this end, the accused should be brought to the courtroom at appropriate intervals, and offered the opportunity to remain upon good behavior.

(D) Ensure that the reasons for removal appear in the record.

The Discussion following R.C.M. 804(e)(1) reads as follows:

Discussion

This subsection recognizes the right, as well as the obligation, of an accused Servicemember to present a good military appearance at trial. An accused Servicemember who refuses to present a proper military appearance before a court-martial may be compelled to do so.

The Analysis following R.C.M. 804 reads as follows:

Analysis

This rule is taken from Rule 804 of the MCM (2016 edition) with the following amendment:

2018 Amendment: The Discussion accompanying R.C.M. 804(a) is new and reflects the accused's entitlement to travel allowances for official travel to attend military justice proceedings.

R.C.M. 804(b) is amended and reflects the requirements of Article 39(b) with respect to remote proceedings and the physical presence of defense counsel with the accused, and prohibits the use of remote sessions for presentencing proceedings.

The Discussion following R.C.M. 805(b) reads as follows:

Discussion

See R.C.M. 501 and R.C.M. 505 concerning the minimum number of members and the procedures to follow when members are dismissed.

See R.C.M. 1002 concerning the accused's right to elect sentencing by members, except where the court-martial is composed of a military judge alone.

The Discussion following R.C.M. 805(c) reads as follows:

Discussion

See R.C.M. 502(d) concerning qualifications of counsel.

Ordinarily, no court-martial proceeding should take place if any defense or assistant defense counsel is absent unless the accused expressly consents to the absence. The military judge may, however proceed in the absence of one or more defense counsel, without the consent of the accused, if the military judge finds that, under the circumstances, a continuance is not warranted and that the accused's right to be adequately represented would not be impaired.

See R.C.M. 502(d)(5) , 505(d)(2), and 506(c) concerning withdrawal or substitution of counsel. See R.C.M. 506(d) concerning the right of the accused to proceed without counsel.

The Discussion following R.C.M. 805(d)(1) reads as follows:

Discussion

When a new member is detailed, the military judge should give such instructions as may be appropriate. See also R.C.M. 912 concerning voir dire and challenges.

The Analysis following R.C.M. 805 reads as follows:

Analysis

This rule is taken from Rule 805 of the MCM (2016 edition) with the following amendments:

2018 Amendment: R.C.M. 805(a) is amended and reflects the elimination of special courts-martial without a military judge. *See* Article 16, as amended by Section 5121 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016), as further amended by Section 1081(c)(1)(C) of the National Defense Authorization Act for Fiscal Year 2018, Pub. Law. No. 115-91, 131 Stat. 1283 (2017).

R.C.M. 805(b) and the accompanying Discussion are amended and reflect Articles 16 and 25, as amended by Sections 5161 and 5182 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016), as further amended by Section 1081(c)(1)(C) of the National Defense Authorization Act for Fiscal Year 2018, Pub. Law. No. 115-91, 131 Stat. 1283 (2017), which requires the use of fixed panel sizes, permits the accused the ability to request specified officer or enlisted composition, and permits the accused to elect sentencing by members, except where the court-martial is composed of a military judge alone.

R.C.M. 805(c) is amended and reflects the requirements of Article 39(b), with respect to remote proceedings and the physical presence of defense counsel with the accused, and prohibits the use of remote means to conduct presentencing proceedings.

The Discussion accompanying R.C.M. 805(c) is amended and updates cross-references.

R.C.M. 805(d) is amended and reflects Article 29(f), as amended by Section 5187 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat.

2000 (2016), which provides the option of playing an audio recording of the trial to newly detailed panel members and judges.

The Discussion following R.C.M. 806(a) reads as follows:

Discussion

Because of the requirement for public trials, courts-martial must be conducted in facilities which can accommodate a reasonable number of spectators. Military exigencies may occasionally make attendance at courts-martial difficult or impracticable, as, for example, when a court-martial is conducted on a ship at sea or in a unit in a combat zone. This does not violate this rule. However, such exigencies should not be manipulated to prevent attendance at a court-martial. The requirements of this rule may be met even though only Servicemembers are able to attend a court-martial. Although not required, Servicemembers should be encouraged to attend courts-martial.

When public access to a court-martial is limited for some reason, including lack of space, special care must be taken to avoid arbitrary exclusion of specific groups or persons. This may include allocating a reasonable number of seats to members of the press and to relatives of the accused, and establishing procedures for entering and exiting from the courtroom. *See also* R.C.M. 806(b). There is no requirement that there actually be spectators at a court-martial.

The fact that a trial is conducted with members does not make it a public trial.

The Discussion following R.C.M. 806(b)(1) reads as follows:

Discussion

The military judge must ensure that the dignity and decorum of the proceedings are maintained and that the other rights and interests of the parties and society are protected. Public access to a session may be limited, specific persons may be excluded from the courtroom, and, under unusual circumstances, a session may be closed.

Exclusion of specific persons, if unreasonable under the circumstances, may violate the accused's right to a public trial, even though other spectators remain. Whenever specific persons or some members of the public are excluded, exclusion must be limited in time and scope to the minimum extent necessary to achieve the purpose for which it is ordered. Prevention of over crowding or noise may justify limiting access to the courtroom. Disruptive or distracting appearance or conduct may justify excluding specific persons. Specific persons may be excluded when necessary to protect witnesses from harm or intimidation. Access may be reduced when no other means is available to relieve a witness' inability to testify due to embarrassment or extreme nervousness. Witnesses will ordinarily be excluded from the courtroom so that they cannot hear the testimony of other witnesses. *See* Mil. R. Evid. 615.

The Discussion following R.C.M. 806(b)(3) reads as follows:

Discussion

Victims are also entitled to notice of all such proceedings, the right to confer with counsel for the Government, and the right to be reasonably protected from the accused. *See* Article 6b. For purposes of this rule, the term "victim of an alleged offense" has the same meaning as the term "victim of an offense under this chapter" in Article 6b.

The Discussion following R.C.M. 806(b)(4) reads as follows:

Discussion

The military judge is responsible for protecting both the accused's right to, and the public's interest in, a public trial. A court-martial session is "closed" when no member of the public is permitted to attend. A court-martial is not "closed" merely because the exclusion of certain individuals results in there being no spectators present, as long as the exclusion is not so broad as to effectively bar everyone who might attend the sessions and is put into place for a proper purpose.

A session may be closed over the objection of the accused or the public upon meeting the constitutional standard set forth in this Rule. *See also* Mil. R. Evid. 412(c)(2), 505(k)(3), and 513(e)(2).

The accused may waive his right to a public trial. The fact that the prosecution and defense jointly seek to have a session closed does not, however, automatically justify closure, for the public has a right in attending courts-martial. Opening trials to public scrutiny reduces the chance of arbitrary and capricious decisions and enhances public confidence in the court-martial process.

The most likely reason for a defense request to close court-martial proceedings is to minimize the potentially adverse effect of publicity on the trial. For example, a pretrial Article 39(a) hearing at which the admissibility of a confession will be litigated may, under some circumstances, be closed, in accordance with this Rule, in order to prevent disclosure to the public (and hence to potential members) of the very evidence that may be excluded. When such publicity may be a problem, a session should be closed only as a last resort.

There are alternative means of protecting the proceedings from harmful effects of publicity, including a thorough *voir dire* (see R.C.M. 912), and, if necessary, a continuance to allow the harmful effects of publicity to dissipate (see R.C.M. 906(b)(1)). Alternatives that may occasionally be appropriate and are usually preferable to closing a session include: directing members not to read, listen to, or watch any accounts concerning the case; issuing a protective order (see R.C.M. 806(d)); selecting members from recent arrivals in the command, or from outside the immediate area (see R.C.M. 503(a)(3)); changing the place of trial (see R.C.M. 906(b)(11)); or sequestering the members.

The Discussion following R.C.M. 806(d) reads as follows:

Discussion

A protective order may proscribe extrajudicial statements by counsel, parties, and witnesses that might divulge prejudicial matter not of public record in the case. Other appropriate matters may also be addressed by such a protective order. Before issuing a protective order, the military judge must consider whether other available remedies would effectively mitigate the adverse effects that any publicity might create, and consider such an order's likely effectiveness in ensuring an impartial court-martial panel. A military judge should not issue a protective order without first providing notice to the parties and an opportunity to be heard. The military judge must state on the record the reasons for issuing the protective order. If the reasons for issuing the order change, the military judge may reconsider the continued necessity for a protective order.

The Analysis following R.C.M. 806 reads as follows:

Analysis

This rule is taken from Rule 806 of the MCM (2016 edition) with the following amendments:

2018 Amendment: R.C.M. 806(b)(1) is amended and deletes a provision addressing exclusion of spectators, which is now addressed in R.C.M. 806(b)(2).

R.C.M. 806(b)(2) is amended and addresses exclusion of spectators.

R.C.M. 806(b)(3) is amended and addresses the right of the victim not to be excluded. The Discussion accompanying R.C.M. 806(b)(3) is amended and addresses additional matters pertaining to victims, and clarifies the meaning of the term "victim of an alleged offense" as it pertains to this rule.

R.C.M. 806(b)(4) and (6) are deleted and the subject matter of those provisions is now addressed in a new R.C.M. 806(b)(3) and the accompanying Discussion.

R.C.M. 806(b)(5) is redesignated as R.C.M. 806(b)(4), and the accompanying Discussion is amended and updates cross-references.

R.C.M. 806(d) is amended and reflects the elimination of special courts-martial without a military judge. See Article 16, as amended by Section 5121 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016), as further amended by Section 1081(c)(1)(C) of the National Defense Authorization Act for Fiscal Year 2018, Pub. Law. No. 115-91, 131 Stat. 1283 (2017).

The Discussion following R.C.M. 807(b)(1)(A) reads as follows:

Discussion

Article 42(a) provides that regulations of the Secretary concerned shall prescribe: the form of the oath; the time and place of the taking thereof; the manner of recording it; and whether the oath shall be taken for all cases in which the duties are to be performed or in each case separately. In the case of certified legal personnel (Article 26(b); Article 27(b)), these regulations may provide for the administration of an oath on a one-time basis. See also R.C.M. 813 and 901 concerning the point in the proceedings at which it is ordinarily determined whether the required oaths have been taken or are then administered.

The Discussion following R.C.M. 807(b)(1)(B) reads as follows:

Discussion

See R.C.M. 307 concerning the requirement for an oath in preferral of charges. See R.C.M. 405 and 702 concerning the requirements for an oath in Article 32 preliminary hearings and depositions.

An accused making an unsworn statement is not a “witness.” See R.C.M. 1001(d)(2)(C).

A victim of an offense for which the accused has been found guilty is not a “witness” when making an unsworn statement during the presentencing phase of a court-martial. See R.C.M. 1001(c).

The Discussion following R.C.M. 807(b)(2) reads as follows:

Discussion

See Article 136 concerning persons authorized to administer oaths.

When the oath is administered in a session to the military judge, members, or any counsel, all persons in the courtroom should stand. In those rare circumstances in which the trial counsel testifies as a witness, the military judge administers the oath.

Unless otherwise prescribed by the Secretary concerned the forms in this Discussion may be used, as appropriate, to administer an oath.

(A) *Oath for military judge.* When the military judge is not previously sworn, the trial counsel will administer the following oath to the military judge:

“Do you (swear) (affirm) that you will faithfully and impartially perform, according to your conscience and the laws applicable to trial by court-martial, all the duties incumbent upon you as military judge of this court-martial (, so help you God)?”

(B) *Oath for members.* The following oath, as appropriate, will be administered to the members by the trial counsel:

“Do you (swear) (affirm) that you will answer truthfully the questions concerning whether you should serve as a member of this court-martial; that you will faithfully and impartially try, according to the evidence, your conscience, and the laws applicable to trial by court-martial, the case of the accused now before this court; and that you will not disclose or discover the vote or opinion of any particular member of the court (upon a challenge or) upon the findings or sentence unless required to do so in due course of law (, so help you God)?”

(C) *Oaths for counsel.* When counsel for either side, including any associate or assistant, is not previously sworn, the following oath, as appropriate, will be administered by the military judge:

“Do you (swear) (affirm) that you will faithfully perform all the duties of (trial) (assistant trial) (defense) (associate defense) (assistant defense) counsel in the case now in hearing (, so help you God)?”

(D) *Oath for reporter.* The trial counsel will administer the following oath to every reporter of a court-martial who has not been previously sworn:

“Do you (swear) (affirm) that you will faithfully perform the duties of reporter to this court-martial (, so help you God)?”

(E) *Oath for interpreter.* The trial counsel or the summary court-martial shall administer the following oath to every interpreter in the trial of any case before a court-martial:

“Do you (swear) (affirm) that in the case now in hearing you will interpret truly the testimony you are called upon to interpret (, so help you God)?”

(F) *Oath for witnesses.* The trial counsel or the summary court-martial will administer the following oath to each witness before the witness first testifies in a case:

“Do you (swear) (affirm) that the evidence you shall give in the case now in hearing shall be the truth, the whole truth, and nothing but the truth (, so help you God)?”

(G) *Oath for escort.* The escort on views or inspections by the court-martial will, before serving, take the following oath, which will be administered by the trial counsel:

“Do you (swear) (affirm) that you will escort the court-martial and will well and truly point out to them (the place in which the offense charged in this case is alleged to have been committed) (____); and that you will not speak to the members concerning (the alleged offense) (____), except to describe (the place aforesaid) (____) (, so help you God)?”

The Analysis following R.C.M. 807 reads as follows:

Analysis

This rule is taken from Rule 807 of the MCM (2016 edition) without substantive amendment.

The Analysis following R.C.M. 808 reads as follows:

Analysis

This rule is taken from Rule 808 of the MCM (2016 edition) with the following amendments:

2018 Amendment: R.C.M. 808 is amended and updates a cross-reference.

The Discussion accompanying R.C.M. 808 is deleted in its entirety and the subject matter is covered by the 2018 Amendments to R.C.M. 1112.

The Discussion following R.C.M. 809(a) reads as follows:

Discussion

Under Article 48, the contempt power may be exercised by the following judicial officers: any judge of the Court of Appeals for the Armed Forces and any judge of a Court of Criminal Appeals under Article 66; any military judge detailed to a court-martial, a provost court, a military commission, or any other proceeding under the UCMJ; any military magistrate designated to preside under Article 19; and the president of a court of inquiry.

Article 48 makes punishable “direct” contempt, as well as “indirect” or “constructive” contempt. “Direct” contempt is that which is committed in the presence of the judicial officer during the proceeding or in the immediate proximity. “Presence” includes those places outside the courtroom itself, such as waiting areas, deliberation rooms, and other places set aside for the use of the court-martial or other proceeding while it is in session. “Indirect” or “constructive” contempt is non-compliance with lawful writs, processes, orders, rules, decrees, or commands of the judicial officer. A “direct” or “indirect” contempt may be actually seen or heard by the judicial officer, in which case it may be punished summarily. *See* subsection (b)(1) of this rule. A “direct” or “indirect” contempt may also be a contempt not actually observed by the judicial officer, for example, when an unseen person makes loud noises, whether inside or outside the courtroom, which impede the orderly progress of the proceedings. In such a case the procedures for punishing for contempt are more extensive. *See* R.C.M. 809(b)(2).

The words “any person,” as used in Article 48, include all persons, whether or not subject to military law, except the military judge, members, and foreign nationals outside the territorial limits of the United States who are not subject to the UCMJ. The military judge may order the offender removed whether or not contempt

proceedings are held. It may be appropriate to warn a person whose conduct is improper that persistence in a course of behavior may result in removal or punishment for contempt. *See* R.C.M. 804, 806.

Each contempt may be separately punished.

A person subject to the UCMJ who commits contempt may be tried by court-martial or otherwise disciplined under Article 134 for such misconduct in addition to or instead of punishment for contempt. *See* paragraph 85, Part IV; *see also* Article 131d. The 2011 amendment of Article 48 expanded the contempt power of military courts to enable them to enforce orders, such as discovery orders or protective orders regarding evidence, against military or civilian attorneys. Persons not subject to military jurisdiction under Article 2, having been duly subpoenaed, may be prosecuted in federal civilian court under Article 47 for neglect or refusal to appear or refusal to qualify as a witness or to testify or to produce evidence.

The Discussion following R.C.M. 809(d)(3) reads as follows:

Discussion

The appeal and defense of a contempt punishment will normally be handled by the Service appellate divisions. In unusual circumstances, the Judge Advocate General may appoint counsel to appeal and defend a contempt punishment.

Decisions of the Court of Criminal Appeals may be reviewed by the Court of Appeals for the Armed Forces and the Supreme Court of the United States in accordance with the rules of appellate procedure for each respective Court.

The Discussion following R.C.M. 809(e)(4)(B) reads as follows:

Discussion

The immediate commander of the person held in contempt, or, in the case of a civilian, the convening authority should be notified immediately so that the necessary action on the sentence may be taken. *See* R.C.M. 1102.

The Analysis following R.C.M. 809 reads as follows:

Analysis

This rule is taken from Rule 809 of the MCM (2016 edition) with the following amendments:

2018 Amendment: R.C.M. 809(a) and (b) and the Discussion accompanying R.C.M. 809(a) are amended and reflect Article 48(a), as amended by Section 5230 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016), which uses the term “judicial officer.” The use of the term reflects that judges are not detailed to courts of inquiry, and that judges serving on the Court of Appeals for the Armed Forces and the Courts of Criminal Appeals are not “detailed” to those courts in the sense that military judges are “detailed” to courts-martial.

The Discussion following R.C.M. 809(a) is further amended and reflects that, since 2011, the contempt power includes “indirect” contempts in addition to “direct” contempts. *See* Article 48, as amended by Section 542 of the Ike Skelton National Defense Authorization Act for Fiscal Year 2011, Pub. L. No. 111-383, 124 Stat. 4218 (2011), as further amended by Section 5230 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016), as further amended by Section 1081(c)(1)(F) of the National Defense Authorization Act for Fiscal Year 2018, Pub. Law. No. 115-91, 131 Stat. 1283 (2017).

R.C.M. 809(d) is amended and reflects Article 48, as amended by Section 5230 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016), as further amended by Section 1081(c)(1)(F) of the National Defense Authorization Act for Fiscal Year 2018, Pub. Law. No. 115-91, 131 Stat. 1283 (2017), which provides for appellate review of contempt punishments when imposed by military judges and military magistrates.

R.C.M. 809(e) is amended and addresses when execution of a sentence of contempt begins to run or becomes effective and the permissible maximum punishments that may be imposed for contempt *See* Article 48, as amended by Section 542 of the Ike Skelton National Defense Authorization Act for Fiscal Year 2011, Pub. L. No. 111-383, 124 Stat. 4218 (2011), as further amended by Section 5230 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016), as further amended by Section 1081(c)(1)(F) of the National Defense Authorization Act for Fiscal Year 2018, Pub. Law. No. 115-91, 131 Stat. 1283 (2017).

R.C.M. 809(f) is amended and reflects that judicial officers may exercise contempt authority and requires that a person held in contempt be informed of the procedures for review of a finding of contempt. *See* Article 48, as amended by Section 5230 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016), as further amended by Section 1081(c)(1)(F) of the National Defense Authorization Act for Fiscal Year 2018, Pub. Law. No. 115-91, 131 Stat. 1283 (2017).

The Discussion following R.C.M. 810(a)(2)(A) reads as follows:

Discussion

The terms “rehearings,” “new trials,” “other trials,” and “remands” generally have the following meanings: “rehearings” refers to a proceeding ordered by an appellate or reviewing authority on the findings and the sentence or on the sentence only; “new trials” refers to proceedings under Article 73 because of newly discovered evidence or fraud committed on the court; “other trials” refers to a proceeding ordered to consider new charges and specifications when the original proceedings are declared invalid because of a lack of jurisdiction or failure of a charge to state an offense; and “remands” connotes proceedings for determining issues raised on appeal which require additional inquiry. Matters excluded from the record of the original trial on the merits or improperly admitted on the merits must not be brought to the attention of the members as a part of the original record of trial.

The Discussion following R.C.M. 810(b)(3) reads as follows:

Discussion

See R.C.M. 902; 903; and 1002(b).

The Discussion following R.C.M. 810(f)(3) reads as follows:

Discussion

The Court of Criminal Appeals may direct that the remand proceed, or it may rescind the remand order and take any other appropriate action that resolves the issue that was to be settled at the remand. Such action may include modifying the findings or sentence. *See* Article 66(f).

The Analysis following R.C.M. 810 reads as follows:

Analysis

This rule is taken from Rule 810 of the MCM (2016 edition) with the following amendments:

2018 Amendment: R.C.M. 810(a)-(d) and the accompanying Discussions are amended and reflect Article 63, as added by Section 5327 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016), as amended by Section 531(i) of the National Defense Authorization Act for Fiscal Year 2018, Pub. Law. No. 115-91, 131 Stat. 1283 (2017), which addressed the limitations on sentences at rehearings.

R.C.M. 810(f) is new and reflects Article 66(f)(3), as amended by Section 5330 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat.

2000 (2016), as further amended by Sections 531(j) and 1081(c)(1)(K) of the National Defense Authorization Act for Fiscal Year 2018, Pub. Law. No. 115-91, 131 Stat. 1283 (2017), and reflects, but does not expand, current practice regarding *DuBay* hearings. *See United States v. DuBay*, 37 C.M.R. 411 (C.M.A. 1967).

The Discussion following R.C.M. 811(b) reads as follows:

Discussion

Although the decision to stipulate should ordinarily be left to the parties, the military judge should not accept a stipulation if there is any doubt of the accused's or any other party's understanding of the nature and effect of the stipulation. The military judge should also refuse to accept a stipulation which is unclear or ambiguous. A stipulation of fact which amounts to a complete defense to any offense charged should not be accepted nor, if a plea of not guilty is outstanding, should one which practically amounts to a confession, except as described in the discussion under R.C.M. 811(c). If a stipulation is rejected, the parties may be entitled to a continuance.

The Discussion following R.C.M. 811(c) reads as follows:

Discussion

Ordinarily, before accepting any stipulation the military judge should inquire to ensure that the accused understands the right not to stipulate, understands the stipulation, and consents to it.

If the stipulation practically amounts to a confession to an offense to which a not guilty plea is outstanding, it may not be accepted unless the military judge ascertains: (A) from the accused that the accused understands the right not to stipulate and that the stipulation will not be accepted without the accused's consent; that the accused understands the contents and effect of the stipulation; that a factual basis exists for the stipulation; and that the accused, after consulting with counsel, consents to the stipulation; and (B) from the accused and counsel for each party whether there are any agreements between the parties in connection with the stipulation, and, if so, what the terms of such agreements are.

A stipulation practically amounts to a confession when it is the equivalent of a guilty plea, that is, when it establishes, directly or by reasonable inference, every element of a charged offense and when the defense does not present evidence to contest any potential remaining issue of the merits. Thus, a stipulation which tends to establish, by reasonable inference, every element of a charged offense does not practically amount to a confession if the defense contests an issue going to guilt which is not foreclosed by the stipulation. For example, a stipulation of fact that contraband drugs were discovered in a vehicle owned by the accused would normally practically amount to a confession if no other evidence were presented on the issue, but would not if the defense presented evidence to show that the accused was unaware of the presence of the drugs. Whenever a stipulation establishes the elements of a charged offense, the military judge should conduct an inquiry as described in this rule.

If, during an inquiry into a confessional stipulation the military judge discovers that there is a plea agreement, the military judge must conduct an inquiry into the pretrial agreement. *See* R.C.M. 910(f). *See also* R.C.M. 705.

The Discussion following R.C.M. 811(d) reads as follows:

Discussion

If a party withdraws from an agreement to stipulate or from a stipulation, before or after it has been accepted, the opposing party may be entitled to a continuance to obtain proof of the matters which were to have been stipulated.

If a party is permitted to withdraw from a stipulation previously accepted, the stipulation must be disregarded by the court-martial, and an instruction to that effect should be given.

The Analysis following R.C.M. 811 reads as follows:

Analysis

This rule is taken from Rule 811 of the MCM (2016 edition) without substantive amendment.

The Discussion following R.C.M. 812 reads as follows:

Discussion

A “joint trial” is one in which two or more accused are charged with a joint offense, that is, one in which they acted together with a common purpose. The offense is stated in a single specification and the accused are joined by the pleading. A “common trial” is one in which two or more accused are tried for an offenses or offenses which, although not jointly committed, were committed at the same time and place and are provable by the same evidence. The common trial is ordered in the discretion of the convening authority by endorsement on the charge sheet. See R.C.M. 307(c)(5) concerning preparing charges and specifications for joint trials. See R.C.M. 601(e)(3) concerning referral of charges for joint or common trials, and the distinction between the two. See R.C.M. 906(b)(9) concerning motions to sever and other appropriate motions in joint or common trials.

In a joint or common trial, each accused may be represented by separate counsel; make challenges for cause; make peremptory challenges (*see* R.C.M. 912); cross-examine witnesses; elect whether to testify; introduce evidence; request that the membership of the court include enlisted persons or be limited to officer members, if an enlisted accused; and request trial by military judge alone.

In a joint or common trial, evidence which is admissible against only one or some of the joint or several accused may be considered only against the accused concerned. For example, when a stipulation is accepted which was made by only one or some of the accused, the stipulation does not apply to those accused who did not join it. *See also* Mil. R. Evid. 306. In such instances the members must be instructed that the stipulation or evidence may be considered only with respect to the accused with respect to whom it is accepted.

The Analysis following R.C.M. 812 reads as follows:

Analysis

This rule is taken from Rule 812 of the MCM (2016 edition) with the following amendment:

2018 Amendment: The Discussion accompanying R.C.M. 812 is amended and addresses the differences between a joint and a common trial. *See* Major Robert S. Stubbs II, USMC, *Joint and Common Trials*, 1956 JAG Journal 16 (September-October).

The Analysis following R.C.M. 813 reads as follows:

Analysis

This rule is taken from Rule 813 of the MCM (2016 edition) with the following amendment:

2018 Amendment: R.C.M. 813(a)(3) is amended and reflects the elimination of special courts-martial without a military judge. *See* Article 16, as amended by Section 5161 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016), as further amended by Section 1081(c)(1)(C) of the National Defense Authorization Act for Fiscal Year 2018, Pub. Law. No. 115-91, 131 Stat. 1283 (2017).

CHAPTER IX. TRIAL PROCEDURES THROUGH FINDINGS

The Discussion following R.C.M. 901(a) reads as follows:

Discussion

The military judge should examine the charge sheet, convening order, and any amending orders before calling the initial session to order.

See also R.C.M. 602(b)(1) concerning the waiting periods applicable after service of charges in general and special courts-martial.

The Discussion following R.C.M. 901(b) reads as follows:

Discussion

If the orders detailing the military judge and counsel have not been reduced to writing, an oral announcement of such detailing is required. *See* R.C.M. 503(b) and (c).

The Discussion following R.C.M. 901(c) reads as follows:

Discussion

See R.C.M. 807 concerning the oath to be administered to a court reporter or interpreter. If a reporter or interpreter is replaced at any time during trial, this should be noted for the record, and the procedures in this subsection should be repeated.

The Discussion following R.C.M. 901(d)(3) reads as follows:

Discussion

Counsel may be disqualified because of lack of necessary qualifications, or because of duties or actions which are inconsistent with the role of counsel. See R.C.M. 502(d) concerning qualifications of counsel.

If it appears that any counsel may be disqualified, the military judge should conduct an inquiry or hearing. If any detailed counsel is disqualified, the appropriate authority should be informed. If any defense counsel is disqualified, the accused should be so informed.

If the disqualification of trial or defense counsel is one which the accused may waive, the accused should be so informed by the military judge, and given the opportunity to decide whether to waive the disqualification. In the case of defense counsel, if the disqualification is not waivable or if the accused elects not to waive the disqualification, the accused should be informed of the choices available and given the opportunity to exercise such options.

If any counsel is disqualified, the military judge should ensure that the accused is not prejudiced by any actions of the disqualified counsel or any break in representation of the accused.

Disqualification of counsel is not a jurisdictional defect; such error must be tested for prejudice.

If the membership of the prosecution or defense changes at any time during the proceedings, the procedures in this subsection should be repeated as to the new counsel. In addition, the military judge should ascertain on the record whether the accused objects to a change of defense counsel. *See* R.C.M. 505(d)(2) and 506(c).

See R.C.M. 502(d)(2)(C) regarding qualifications of counsel learned in the law applicable to capital cases.

The Discussion following R.C.M. 901(d)(4)(D) reads as follows:

Discussion

Whenever it appears that any defense counsel may face a conflict of interest, the military judge should inquire into

the matter, advise the accused of the right to effective assistance of counsel, and ascertain the accused's choice of counsel. When defense counsel is aware of a potential conflict of interest, counsel should discuss the matter with the accused. If the accused elects to waive such conflict, counsel should inform the military judge of the matter at an Article 39(a) session so that an appropriate record can be made.

The Discussion following R.C.M. 901(d)(5) reads as follows:

Discussion

See R.C.M. 807.

The Analysis following R.C.M. 901 reads as follows:

Analysis

This rule is taken from Rule 901 of the MCM (2016 edition) with the following amendments:

2018 Amendment: The Discussion following R.C.M. 901(a) is amended and provides a cross-reference reflecting applicable waiting periods between service of charges and commencement of trial by special and general courts-martial. *See* Article 35, as amended by Section 5206 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016).

R.C.M. 901(d)(2) and the Discussion accompanying R.C.M. 901(d)(3) are amended and reflect Article 27, as amended by Section 5186 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016), which requires, to the greatest extent practicable, that at least one defense counsel in a capital case be learned in the law applicable to capital cases.

R.C.M. 901(e) is amended and provides for the conduct of designated procedures without the members present, and reflects the elimination of special courts-martial without a military judge. *See* Article 16, as amended by Section 5161 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016), as further amended by Section 1081(c)(1)(C) of the National Defense Authorization Act for Fiscal Year 2018, Pub. Law. No. 115-91, 131 Stat. 1283 (2017).

The Discussion following R.C.M. 902(b)(5)(C) reads as follows:

Discussion

A military judge should inform himself or herself about his or her financial interests, and make a reasonable effort to inform himself or herself about the financial interests of his or her spouse and minor children living in his or her household.

The Discussion following R.C.M. 902(c)(2) reads as follows:

Discussion

Relatives within the third degree of relationship are children, grandchildren, great grandchildren, parents, grandparents, great grandparents, brothers, sisters, uncles, aunts, nephews, and nieces.

The Discussion following R.C.M. 902(d)(1) reads as follows:

Discussion

There is no peremptory challenge against a military judge. A military judge should carefully consider whether any of the grounds for disqualification in this rule exist in each case. The military judge should broadly construe grounds for challenge but should not step down from a case unnecessarily.

Possible grounds for disqualification should be raised at the earliest reasonable opportunity. They may be raised at any time, and an earlier adverse ruling does not bar later consideration of the same issue, as, for example, when additional evidence is discovered.

The Discussion following R.C.M. 902(d)(2) reads as follows:

Discussion

Nothing in this rule prohibits the military judge from reasonably limiting the presentation of evidence, the scope of questioning, and argument on the subject so as to ensure that only matters material to the central issue of the military judge's possible disqualification are considered, thereby preventing the proceedings from becoming a forum for unfounded opinion, speculation or innuendo.

The Analysis following R.C.M. 902 reads as follows:

Analysis

This rule is taken from Rule 902 of the MCM (2016 edition) with the following amendments:

2018 Amendment: R.C.M. 902(c)(1) is amended and reflects Article 30a, as added by Section 5202 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016), as amended by Section 531(b) of the National Defense Authorization Act for Fiscal Year 2018, Pub. L. No. 155-91, 131 Stat. 1283 (2017), which provides limited pre-referral authority to the military judge.

R.C.M. 902(c)(3) is deleted and reflects the elimination of special courts-martial without a military judge. *See* Article 16, as amended by Section 5161 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016), as further amended by Section 1081(c)(1)(C) of the National Defense Authorization Act for Fiscal Year 2018, Pub. Law. No. 115-91, 131 Stat. 1283 (2017).

The Analysis following R.C.M. 902A reads as follows:

Analysis

2018 Amendment: R.C.M. 902A is new and implements Section 5542 of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016), which establishes effective dates for the amendments made by the Military Justice Act of 2016 and authorizes the President to prescribe regulations regarding applicable sentencing rules. R.C.M. 902A applies in cases where charges were referred to trial by court-martial after the effective date designated by the President for offenses allegedly committed both before and on or after the effective date.

The Discussion following R.C.M. 903(a)(2) reads as follows:

Discussion

Only an enlisted accused may request that enlisted members be detailed to a court-martial. Trial by military judge alone is not permitted in capital cases (*see* R.C.M. 201(f)(1)(C)).

If an accused makes no forum selection, the accused will be tried by a court-martial composed of a military

judge and members, as specified in the convening order. When presenting the accused's forum options, the military judge should inform the accused of the effect of not making an election.

The Discussion following R.C.M. 903(c)(2)(A) reads as follows:

Discussion

Ordinarily the military judge should inquire personally of the accused to ensure that the accused's waiver of the right to trial by members is knowing and understanding. The military judge should ensure the accused understands that the approval of a request for trial before military judge alone under Article 16(b)(3) or (c)(2)(B) means that the military judge will determine the findings and, if the accused is found guilty of any charge and specification, the sentence. *See* R.C.M. 1002. Failure to do so is not error, however, where such knowledge and understanding otherwise appear on the record.

DD Form 1722 (Request for Trial Before Military Judge Alone (Article 16, UCMJ)) should normally be used for the purpose of requesting trial by military judge alone under this rule, if a written request is used.

The Discussion following R.C.M. 903(c)(2)(B) reads as follows:

Discussion

A timely request for trial by military judge alone should be granted unless there is substantial reason why, in the interest of justice, the military judge should not sit as factfinder. The military judge may hear arguments from counsel before acting on the request. The basis for denial of a request must be made a matter of record.

The Discussion following R.C.M. 903(d)(2) reads as follows:

Discussion

Withdrawal of a request for enlisted members, all officer members, or trial by military judge alone should be shown in the record. The effect of such withdrawal is that the accused will be tried by a court-martial composed of members as specified by the convening order. *See* R.C.M. 505(c) concerning changing members prior to assembly.

The Discussion following R.C.M. 903(e) reads as follows:

Discussion

In exercising discretion whether to approve an untimely request or withdrawal of a request, the military judge should balance the reason for the request (for example, whether it is a mere change of tactics or results from a substantial change of circumstances) against any expense, delay, or inconvenience which would result from granting the request.

The Analysis following R.C.M. 903 reads as follows:

Analysis

This rule is taken from Rule 903 of the MCM (2016 edition) with the following amendments:

2018 Amendment: R.C.M. 903 and its accompanying Discussion are amended and reflect Article 25, as amended by Section 5182 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016), which permits an accused to elect trial by military judge alone or by members, and, if the accused is enlisted, trial by a panel with at least one-third enlisted members or by an all-officer panel, and the elimination of special courts-martial without a military judge. *See* Article 16, as amended by Section 5161 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act

for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016), as further amended by Section 1081(c)(1)(C) of the National Defense Authorization Act for Fiscal Year 2018, Pub. Law. No. 115-91, 131 Stat. 1283 (2017).

The Discussion following R.C.M. 904 reads as follows:

Discussion

Arraignment is complete when the accused is called upon to plead; the entry of pleas is not part of the arraignment.

The arraignment should be conducted at an Article 39(a) session. The accused may not be arraigned at a conference under R.C.M. 802.

Once the accused has been arraigned, no additional charges against that accused may be referred to that court-martial for trial with the previously referred charges. *See* R.C.M. 601(e)(2).

The defense should be asked whether it has any motions to make before pleas are entered. Some motions ordinarily must be made before a plea is entered. *See* R.C.M. 905(b).

The Analysis following R.C.M. 904 reads as follows:

Analysis

This rule is taken from Rule 904 of the MCM (2016 edition) with the following amendment:

2018 Amendment: The Discussion accompanying R.C.M. 904 is amended and reflects the elimination of special courts-martial without a military judge. *See* Article 16, as amended by Section 5161 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016), as further amended by Section 1081(c)(1)(C) of the National Defense Authorization Act for Fiscal Year 2018, Pub. Law. No. 115-91, 131 Stat. 1283 (2017).

The Discussion following R.C.M. 905(b)(1) reads as follows:

Discussion

Such nonjurisdictional defects include unsworn charges, inadequate Article 32 preliminary hearing, and inadequate pretrial advice. *See* R.C.M. 307, 401–407, 601–604, 906(b)(3).

The Discussion following R.C.M. 905(b)(2) reads as follows:

Discussion

See R.C.M. 307, 906(b)(4).

The Discussion following R.C.M. 905(b)(3) reads as follows:

Discussion

Mil. R. Evid. 304(f), 311(d), and 321(d) deal with the admissibility of confessions and admissions, evidence obtained from unlawful searches and seizures, and eyewitness identification, respectively. Questions concerning the admissibility of evidence on other grounds may be raised by objection at trial or by motions *in limine*. *See* R.C.M. 906(b)(13); Mil. R. Evid. 103, 104(a) and (c).

The Discussion following R.C.M. 905(b)(4) reads as follows:

Discussion

See R.C.M. 703, 1001(f).

The Discussion following R.C.M. 905(b)(5) reads as follows:

Discussion

See R.C.M. 812, 906(b)(9) and (10).

The Discussion following R.C.M. 905(b)(6) reads as follows:

Discussion

See R.C.M. 506(b), 906(b)(2).

The Discussion following R.C.M. 905(c)(1) reads as follows:

Discussion

See Mil. R. Evid. 104(a) concerning the applicability of the Military Rules of Evidence to certain preliminary questions.

The Discussion following R.C.M. 905(c)(2)(A) reads as follows:

Discussion

See, for example, R.C.M. 905(c)(2)(B), R.C.M. 908, and Mil. R. Evid. 304(f), 311(d)(5), and 321(d)(6) for provisions specifically assigning the burden of proof.

The Discussion following R.C.M. 905(d) reads as follows:

Discussion

When trial cannot proceed further as the result of dismissal or other rulings on motions, the court-martial should adjourn and a record of the proceedings should be prepared. See R.C.M. 908(b)(4) regarding automatic stay of certain rulings and orders subject to appeal under that rule. Notwithstanding the dismissal of some specifications, trial may proceed in the normal manner as long as one or more charges and specifications remain. The judgment entered into the record should reflect the action taken by the court-martial on each charge and specification, including any of which were dismissed by the military judge on a motion. *See* R.C.M. 1111.

The Discussion following R.C.M. 905(e)(2) reads as follows:

Discussion

See also R.C.M. 910(j) concerning matters waived by a plea of guilty.

The Discussion following R.C.M. 905(f) reads as follows:

Discussion

The military judge may reconsider any ruling that affects the legal sufficiency of any finding of guilt or the sentence. See R.C.M. 917(d) for the standard to be used to determine the legal sufficiency of evidence. See also R.C.M. 1104 concerning procedures for post-trial reconsideration. Different standards may apply depending on the nature of the ruling. *See United States v. Scaff*, 29 M.J. 60 (C.M.A. 1989).

The Discussion following R.C.M. 905(g) reads as follows:

Discussion

See R.C.M. 907(b)(2)(C). Whether a matter has been finally determined in another judicial proceeding with jurisdiction to decide it, and whether such determination binds the United States in another proceeding are interlocutory questions. *See* R.C.M. 801(e). It does not matter whether the earlier proceeding ended in an acquittal, conviction, or otherwise, as long as the determination is final. Except for a ruling which is, or amounts to, a finding of not guilty, a ruling ordinarily is not final until action on the court-martial is completed. *See* Article 76; R.C.M. 1209. The accused is not bound in a court-martial by rulings in another court-martial. *But see* Article 3(b); R.C.M. 202.

The determination must have been made by a court-martial, reviewing authority, or appellate court, or by another judicial body, such as a United States court. A pretrial determination by a convening authority is not a final determination under this rule, although some decisions by a convening authority may bind the Government under other rules. *See, e.g.*, R.C.M. 601, 604, 704, 705.

The United States is bound by a final determination by a court of competent jurisdiction even if the earlier determination is erroneous, except when the offenses charged at the second proceeding arose out of a different transaction from those charged at the first and the ruling at the first proceeding was based on an incorrect determination of law.

A final determination in one case may be the basis for a motion to dismiss or a motion for appropriate relief in another case, depending on the circumstances. The nature of the earlier determination and the grounds for it will determine its effect in other proceedings.

Examples:

(1) The military judge dismissed a charge for lack of personal jurisdiction, on grounds that the accused was only 16 years old at the time of enlistment and when the offenses occurred. At a second court-martial of the same accused for a different offense, the determination in the first case would require dismissal of the new charge unless the prosecution could show that since that determination the accused had effected a valid enlistment or constructive enlistment. *See* R.C.M. 202. Note, however, that if the initial ruling had been based on an error of law (for example, if the military judge had ruled the enlistment invalid because the accused was 18 at the time of enlistment) this would not require dismissal in the second court-martial for a different offense.

(2) The accused was tried in United States district court for assault on a federal officer. The accused defended solely on the basis of alibi and was acquitted. The accused is then charged in a court-martial with assault on a different person at the same time and place as the assault on a federal officer was alleged to have occurred. The acquittal of the accused in federal district court would bar conviction of the accused in the court-martial. In cases of this nature, the facts of the first trial must be examined to determine whether the finding of the first trial is logically inconsistent with guilt in the second case.

(3) At a court-martial for larceny, the military judge excluded evidence of a statement made by the accused relating to the larceny and other uncharged offenses because the statement was obtained by coercion. At a second court-martial for an unrelated offense, the statement excluded at the first trial would be inadmissible, based on the earlier ruling, if the first case had become final. If the earlier ruling had been based on an incorrect interpretation of law, however, the issue of admissibility could be litigated anew at the second proceeding.

(4) At a court-martial for absence without authority, the charge and specification were dismissed for failure to state an offense. At a later court-martial for the same offense, the earlier dismissal would be grounds for dismissing the same charge and specification, but would not bar further proceedings on a new specification not containing the same defect as the original specification.

The Analysis following R.C.M. 905 reads as follows:

Analysis

This rule is taken from Rule 905 of the MCM (2016 edition) with the following amendments:

2018 Amendment: The Discussion accompanying R.C.M. 905(b)(3) and (4) and R.C.M. 905(d) is amended and cross-references are updated.

R.C.M. 905(e) is amended and clarifies the applicability throughout the Manual of the concepts of waiver and forfeiture.

R.C.M. 905(f) and the Discussion accompanying R.C.M. 905(d) are amended to reflect the requirement for an entry of judgment in special and general courts-martial and the elimination of authentication of the record of trial. *See* Article 60c, as added by Section 5324 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016).

R.C.M. 905(h) is amended and authorizes the military judge to exercise his or her discretion to determine whether an Article 39(a) session is necessary for the resolution of a motion.

The Discussion following R.C.M. 906(b)(1) reads as follows:

Discussion

The military judge should, upon a showing of reasonable cause, grant a continuance to any party for as long and as often as is just. *See* Article 40. Whether a request for a continuance should be granted is a matter within the discretion of the military judge. Reasons for a continuance may include: insufficient opportunity to prepare for trial; unavailability of an essential witness; the interest of Government in the order of trial of related cases; and illness of an accused, counsel, military judge, or member. *See also* R.C.M. 602, 803.

The Discussion following R.C.M. 906(b)(3) reads as follows:

Discussion

See R.C.M. 405, 406, 406A. If the motion is granted, the military judge should ordinarily grant a continuance so the defect may be corrected.

The Discussion following R.C.M. 906(b)(4) reads as follows:

Discussion

See also R.C.M. 307.

An amendment may be appropriate when a specification is unclear, redundant, inartfully drafted, misnames an accused, or is laid under the wrong article. A specification may be amended by striking surplusage, or substituting or adding new language. Surplusage may include irrelevant or redundant details or aggravating circumstances which are not necessary to enhance the maximum authorized punishment or to explain the essential facts of the offense. When a specification is amended after the accused has entered a plea to it, the accused should be asked to plead anew to the amended specification. A bill of particulars (*see* R.C.M. 906(b)(6)) may also be used when a specification is indefinite or ambiguous.

If a specification, although stating an offense, is so defective that the accused appears to have been misled, the accused should be given a continuance upon request, or, in an appropriate case, the specification may be dismissed. *See* R.C.M. 907(b)(3).

The Discussion following R.C.M. 906(b)(5) reads as follows:

Discussion

Each specification may state only one offense. *See* R.C.M. 307(c)(4). A duplicitous specification is one which alleges two or more separate offenses. Lesser included offenses (*see* Part IV, paragraph 3; Appendix 12A) are not separate, nor is a continuing offense involving several separate acts. The sole remedy for a duplicitous specification is severance of the specification into two or more specifications, each of which alleges a separate offense contained in the duplicitous specification. However, if the duplicitousness is combined with or results in other defects, such as misleading the accused, other remedies may be appropriate. *See* R.C.M. 906(b)(3). *See also* R.C.M. 907(b)(3).

The Discussion following R.C.M. 906(b)(6) reads as follows:

Discussion

The purposes of a bill of particulars are to inform the accused of the nature of the charge with sufficient precision to enable the accused to prepare for trial, to avoid or minimize the danger of surprise at the time of trial, and to enable the accused to plead the acquittal or conviction in bar of another prosecution for the same offense when the specification itself is too vague and indefinite for such purposes.

A bill of particulars should not be used to conduct discovery of the Government's theory of a case, to force detailed disclosure of acts underlying a charge, or to restrict the Government's proof at trial.

A bill of particulars need not be sworn because it is not part of the specification. A bill of particulars cannot be used to repair a specification which is otherwise not legally sufficient.

The Discussion following R.C.M. 906(b)(7) reads as follows:

Discussion

See R.C.M. 701 concerning discovery. *See* R.C.M. 703, 914, and 1001(f) concerning production of evidence and witnesses.

The Discussion following R.C.M. 906(b)(8) reads as follows:

Discussion

See R.C.M. 305(j).

The Discussion following R.C.M. 906(b)(9) reads as follows:

Discussion

A motion for severance is a request that one or more accused against whom charges have been referred to a joint or common trial be tried separately. Such a request should be granted if good cause is shown. For example, a severance may be appropriate when: the moving party wishes to use the testimony of one or more of the coaccused or the spouse of a coaccused; a defense of a coaccused is antagonistic to the moving party; or evidence as to any other accused will improperly prejudice the moving accused.

If a severance is granted by the military judge, the military judge will decide which accused will be tried first. *See* R.C.M. 801(a). In the case of joint charges, the military judge will direct an appropriate amendment of the charges and specifications.

See also R.C.M. 307(c)(5), 601(e)(3), 604, 812.

The Discussion following R.C.M. 906(b)(10)(B) reads as follows:

Discussion

Ordinarily, all known charges should be tried at a single court-martial. *But see* R.C.M. 902A. Joinder of minor and major offenses, or of unrelated offenses, is not alone a sufficient ground to sever offenses. For example, when an essential witness as to one offense is unavailable, it might be appropriate to sever that offense to prevent violation of the accused's right to a speedy trial.

The Discussion following R.C.M. 906(b)(11) reads as follows:

Discussion

A change of the place of trial may be necessary when there exists in the place where the court-martial is pending so great a prejudice against the accused that the accused cannot obtain a fair and impartial trial there, or to obtain compulsory process over an essential witness.

When it is necessary to change the place of trial, the choice of places to which the court-martial will be transferred will be left to the convening authority, as long as the choice is not inconsistent with the ruling of the military judge.

The Discussion following R.C.M. 906(b)(12)(B) reads as follows:

Discussion

A ruling on this motion ordinarily should be deferred until after findings are entered.

The Discussion following R.C.M. 906(b)(13) reads as follows:

Discussion

See Mil. R. Evid. 104(c).

A request for a preliminary ruling on admissibility is a request that certain matters which are ordinarily decided during trial of the general issue be resolved before they arise, outside the presence of members. The purpose of such a motion is to avoid the prejudice which may result from bringing inadmissible matters to the attention of court members.

Whether to rule on an evidentiary question before it arises during trial is a matter within the discretion of the military judge. *But see* R.C.M. 905(b)(3) and (d); and Mil. R. Evid. 304(f)(5); 311(d)(7); 321(d)(7). Reviewability of preliminary rulings will be controlled by the Supreme Court's decision in *Luce v. United States*, 469 U.S. 38 (1984).

The Discussion following R.C.M. 906(b)(14) reads as follows:

Discussion

See R.C.M. 706, 909, and 916(k) regarding procedures and standards concerning the mental capacity or responsibility of the accused.

The Analysis following R.C.M. 906 reads as follows:

Analysis

This rule is taken from Rule 906 of the MCM (2016 edition) with the following amendments.

2018 Amendment: R.C.M. 906(b)(4) is amended and clarifies the provisions governing amendment of charges after referral.

The Discussion accompanying R.C.M. 905(b)(5) is amended and updates a cross-reference and reflects the addition of Appendix 12A with respect to lesser included offenses. *See* Article 79, as amended by Section 5402 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016).

The Discussion accompanying R.C.M. 906(b)(7) is amended and updates a cross-reference.

R.C.M. 906(b)(10) is amended and addresses the standards applicable to severance of charges in capital and non-capital cases.

R.C.M. 906(b)(12) and the accompanying Discussion are amended and clarify the remedies available to address findings of unreasonable multiplication of charges in light of the requirement for segmented sentencing by military judges. *See* Article 56, as amended by Section 5301 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016), as further amended by Section 531(e) of the National Defense Authorization Act for Fiscal Year 2018, Pub. Law. No. 115-91, 131 Stat. 1283 (2017).

The Discussion following R.C.M. 907(a) reads as follows:

Discussion

Dismissal of a specification terminates the proceeding with respect to that specification unless the decision to dismiss is reconsidered and reversed by the military judge. *See* R.C.M. 905(f). Dismissal of a specification on grounds stated in R.C.M. 907(b)(1) or (b)(3)(A) does not ordinarily bar a later court-martial for the same offense if the grounds for dismissal no longer exist. *See also* R.C.M. 905(g) and R.C.M. 907(b)(2).

See R.C.M. 916 concerning defenses.

The Discussion following R.C.M. 907(b)(2)(B) reads as follows:

Discussion

Except for certain offenses for which there is either: no limitation as to time; or child abuse offenses for which a time limitation has been enacted and applies that is based upon the life of a child abuse victim, *see* Article 43(a) and (b)(2), a person charged with an offense under the UCMJ may not be tried by court-martial over objection if sworn charges have not been received by the officer exercising summary court-martial jurisdiction over the command within five years. *See* Article 43(b). This period may be tolled (Article 43(c) and (d)), extended (Article 43(e) and (g)), or suspended (Article 43(f)) under certain circumstances. The prosecution bears the burden of proving that the statute of limitations has been tolled, extended, or suspended if it appears that it has run.

Some offenses are continuing offenses and any period of the offense occurring within the statute of limitations is not barred. Absence without leave, desertion, and fraudulent enlistment are not continuing offenses and are committed, respectively, on the day the person goes absent, deserts, or first receives pay or allowances under the enlistment.

When computing the statute of limitations, periods in which the accused was fleeing from justice or periods when the accused was absent without leave or in desertion are excluded. The military judge must determine by a preponderance, as an interlocutory matter, whether the accused was absent without authority or fleeing from justice. It would not be necessary that the accused be charged with the absence offense. In cases where the accused is charged with both an absence offense and a non-absence offense, but is found not guilty of the absence offense, the military judge would reconsider, by a preponderance, his or her prior determination whether that period of time is excludable.

If sworn charges have been received by an officer exercising summary court-martial jurisdiction over the command within the period of the statute, minor amendments (*see* R.C.M. 603(a)) may be made in the specification after the statute of limitations has run. However, if new charges are drafted or a major amendment made (*see* R.C.M. 603(d)) after the statute of limitations has run, prosecution is barred. The date of receipt of sworn charges is excluded when computing the appropriate statutory period. The date of the offense is included in the computation of

the elapsed time. Article 43(g) allows the government time to reinstate charges dismissed as defective or insufficient for any cause. The government would have up to six months to reinstate the charges if the original period of limitations has expired or will expire within six months of the dismissal.

In some cases, the issue whether the statute of limitations has run will depend on the findings on the general issue of guilt. For example, where the date of an offense is in dispute, a finding by the court-martial that the offense occurred at an earlier time may affect a determination as to the running of the statute of limitations.

When the statute of limitations has run as to a lesser included offense, but not as to the charged offense, see R.C.M. 920(e)(2) with regard to instructions on the lesser offense.

The Discussion following R.C.M. 907(b)(2)(C)(iv) reads as follows:

Discussion

R.C.M. 907(b)(2)(C)(i)(I) includes special courts-martial consisting of a military judge alone under Article 16(c)(2)(A).

The Discussion following R.C.M. 907(b)(2)(D)(ii) reads as follows:

Discussion

See R.C.M. 704.

The Discussion following R.C.M. 907(b)(2)(D)(iii) reads as follows:

Discussion

See Article 13 and Appendix 12, Maximum Punishment Chart.

The Discussion following R.C.M. 907(b)(3)(B) reads as follows:

Discussion

Ordinarily, a specification should not be dismissed for multiplicity before trial unless it clearly alleges the same offense, or one necessarily included therein, as is alleged in another specification. It may be appropriate to dismiss the less serious of any multiplicitous specifications after findings have been reached. Due consideration must be given, however, to possible post-trial or appellate action with regard to the remaining specification.

The Analysis following R.C.M. 907 reads as follows:

Analysis

This rule is taken from Rule 907 of the MCM (2016 edition) with the following amendments: *2018 Amendment:* R.C.M. 907(b)(2)(C) and the accompanying Discussion are amended and reflect Article 44, as amended by Section 5226 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016), regarding the point when jeopardy attaches in a court-martial.

R.C.M. 907(b)(2)(D)(iii) is deleted and R.C.M. 907(b)(2)(D)(iv) is redesignated as R.C.M. 907(b)(2)(D)(iii).

The Discussion following R.C.M. 908(a) reads as follows:

Discussion

For the scope of these provisions, see Article 62(e). For rulings on a motion for a finding of not guilty, see R.C.M. 917.

The Discussion following R.C.M. 908(b)(7) reads as follows:

Discussion

When the Government files an appeal with the Court of Criminal Appeals under R.C.M. 908(b)(7), the Court maintains jurisdiction to review the case under Article 66(b) regardless of the sentence imposed.

The Discussion following R.C.M. 908(c)(3) reads as follows:

Discussion

The United States may appeal a sentence in accordance with Article 56(d) and the procedures set forth in R.C.M. 1117.

The Analysis following R.C.M. 908 reads as follows:

Analysis

This rule is taken from Rule 908 of the MCM (2016 edition) with the following amendments: *2018 Amendment:* R.C.M. 908(a) is amended and implements Article 62, as amended by Section 5326 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016), as further amended by Section 531(h) of the National Defense Authorization Act for Fiscal Year 2018, Pub. Law. No. 115-91, 131 Stat. 1283 (2017), which authorizes a Government appeal when a military judge sets aside a panel's guilty verdict. The Discussion accompanying R.C.M. 908(a) is new.

R.C.M. 908(b)(5) is amended and implements Article 54, as amended by Section 5238 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016), which requires the certification of the record of trial.

The Discussion accompanying R.C.M. 908(b)(7) is new and reflects changes to the jurisdiction of the Courts of Criminal Appeals. See Article 66(b), as amended by Section 5330 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016), as further amended by Sections 531(j) and 1081(c)(1)(K) of the National Defense Authorization Act for Fiscal Year 2018, Pub. Law. No. 115-91, 131 Stat. 1283 (2017), which provides that the Courts of Criminal Appeals maintain jurisdiction to review a case under Article 66(b) regardless of the sentence imposed when the government has filed an appeal under Article 62 or Article 56.

The Discussion accompanying R.C.M. 908(c) is new and reflects that the Government may appeal a sentence under certain circumstances and utilizing certain procedures. *See* Article 56, as amended by Section 5301 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016), as further amended by Section 531(e) of the National Defense Authorization Act for Fiscal Year 2018, Pub. Law. No. 115-91, 131 Stat. 1283 (2017).

R.C.M. 908(d) of the MCM (2016 edition) is deleted and reflects the elimination of special courts-martial without a military judge. *See* Article 16, as amended by Section 5163 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016), as further amended by Section 1081(c)(1)(C) of the National Defense Authorization Act for Fiscal Year 2018, Pub. Law. No. 115-91, 131 Stat. 1283 (2017).

The Discussion following R.C.M. 909(a) reads as follows:

Discussion

See also R.C.M. 916(k).

The Discussion following R.C.M. 909(f) reads as follows:

Discussion

Under 18 U.S.C. § 4241(d), the initial period of hospitalization for an incompetent accused shall not exceed four months. However, in determining whether there is a substantial probability the accused will attain the capacity to permit the trial to proceed in the foreseeable future, the accused may be hospitalized for an additional reasonable period of time. This additional period of time ends either when the accused's mental condition is improved so that trial may proceed, or when the pending charges against the accused are dismissed. If charges are dismissed solely due to the accused's mental condition, the accused is subject to hospitalization as provided in 18 U.S.C. § 4246.

The Analysis following R.C.M. 909 reads as follows:

Analysis

This rule is taken from Rule 909 of MCM (2016 edition) without amendment.

The Discussion following R.C.M. 910(a)(1)(D) reads as follows:

Discussion

See paragraph 3, Part IV and Appendix 12A, concerning lesser included offenses. When the plea is to a lesser included offense without the use of exceptions and substitutions, the defense counsel should provide a written revised specification accurately reflecting the plea and request that the revised specification be included in the record as an appellate exhibit.

A plea of guilty to a lesser included offense does not bar the prosecution from proceeding on the offense as charged. *See also* R.C.M. 901(g).

A plea of guilty does not prevent the introduction of evidence, either in support of the factual basis for the plea, or, after findings are entered, in aggravation. *See* R.C.M. 1001(b)(4).

There are no offenses under the UCMJ for which a sentence of death is mandatory.

The Discussion following R.C.M. 910(b) reads as follows:

Discussion

An irregular plea includes pleas such as guilty without criminality or guilty to a charge but not guilty to all specifications thereunder. When a plea is ambiguous, the military judge should have it clarified before proceeding further.

The Discussion following R.C.M. 910(c)(1) reads as follows:

Discussion

The elements of each offense to which the accused has pleaded guilty should be described to the accused. *See also* R.C.M. 910(e). The term "maximum possible penalty" as used in this rule refers to the total penalty that may be adjudged for all offenses for which the accused is pleading guilty.

The Discussion following R.C.M. 910(c)(5) reads as follows:

Discussion

R.C.M. 910(c)(5) is inapplicable in a court-martial in which the accused is not represented by counsel.

The Discussion following R.C.M. 910(c)(6) reads as follows:

Discussion

In a case in which the accused has not elected trial by military judge alone and has pleaded guilty to some offenses but not others, the case will proceed to trial on the merits on the remaining offenses before members. Following announcement of findings by the members on all offenses, the accused will be sentenced by the military judge unless the accused elects to be sentenced by members. *See* Articles 53(b) and 56, and R.C.M. 1002.

The Discussion following R.C.M. 910(e) reads as follows:

Discussion

A plea of guilty must be in accord with the truth. Before the plea is accepted, the accused must admit every element of the offense(s) to which the accused pleaded guilty. Ordinarily, the elements should be explained to the accused. If any potential defense is raised by the accused's account of the offense or by other matter presented to the military judge, the military judge should explain such a defense to the accused and should not accept the plea unless the accused admits facts which negate the defense. If the statute of limitations would otherwise bar trial for the offense, the military judge should not accept a plea of guilty to it without an affirmative waiver by the accused. *See* R.C.M. 907(b)(2)(B).

The accused need not describe from personal recollection all the circumstances necessary to establish a factual basis for the plea. Nevertheless the accused must be convinced of, and able to describe, all the facts necessary to establish guilt. For example, an accused may be unable to recall certain events in an offense, but may still be able to adequately describe the offense based on witness statements or similar sources which the accused believes to be true.

The accused should remain at the counsel table during questioning by the military judge.

The Discussion following R.C.M. 910(f)(2) reads as follows:

Discussion

The military judge should ask whether a plea agreement exists. *See* R.C.M. 910(d). Even if the military judge fails to so inquire or the accused answers incorrectly, counsel have an obligation to bring any agreements or understandings in connection with the plea to the attention of the military judge. However, the military judge may not participate in discussions between the parties concerning the prospective terms and conditions of the plea agreement. *See* Article 53a(a)(2).

The Discussion following R.C.M. 910(f)(4)(B)(ii) reads as follows:

Discussion

If the plea agreement contains any unclear or ambiguous terms, the military judge should obtain clarification from the parties. If there is doubt about the accused's understanding of any terms in the agreement, including the maximum possible penalty that may be adjudged pursuant to any sentence limitation, the military judge should explain those terms to the accused. If the accused after entering a plea of guilty sets up a matter inconsistent with the plea, the military judge shall resolve the inconsistency or reject the plea. *See* Article 45.

The Discussion following R.C.M. 910(f)(5) reads as follows:

Discussion

If the accused has elected to be sentenced by members, the military judge shall instruct the members on any sentencing limitations contained in the plea agreement. *See* R.C.M. 1005(e)(1).

The Discussion following R.C.M. 910(f)(7)(C) reads as follows:

Discussion

See Article 53a and R.C.M. 705 regarding the military judge's responsibility to review the terms and conditions of the plea agreement.

The Discussion following R.C.M. 910(g) reads as follows:

Discussion

If the accused has pleaded guilty to some offenses but not to others, and the accused has not elected to be tried by military judge alone, upon announcement of findings the accused will be sentenced by the military judge unless the accused elects to be sentenced by members. *See* R.C.M. 1002. The military judge should ordinarily defer informing the members of the offenses to which the accused has pleaded guilty until after findings on the remaining offenses have been entered *See* R.C.M. 913(a), Discussion and R.C.M. 920(e), Discussion, paragraph 3.

The Discussion following R.C.M. 910(h)(2) reads as follows:

Discussion

When the accused withdraws a previously accepted plea for guilty or a plea of guilty is set aside, counsel should be given a reasonable time to prepare to proceed. In a trial by military judge alone, recusal of the military judge will ordinarily be necessary when a plea is rejected or withdrawn after findings; in trial with members, a mistrial will ordinarily be necessary.

The Discussion following R.C.M. 910(j) reads as follows:

Discussion

Other errors with respect to the plea inquiry or acceptance of a plea under this rule are subject to forfeiture if not brought to the attention of the military judge, and will be reviewed for harmless error under Article 45.

The Analysis following R.C.M. 910 reads as follows:

Analysis

This rule is taken from Rule 910 of the MCM (2016 edition) with the following amendments:

2018 Amendment: R.C.M. 910(a)(1) is amended and implements Article 45, as amended by Section 5227 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016), which permits a military judge to accept a guilty plea in a capital case except where death is the mandatory punishment. Although the 2016 Amendments eliminated the sentence of death as a mandatory punishment for any offense, the prohibition against accepting a guilty plea in a capital case where death is the mandatory punishment is retained.

The Discussion accompanying R.C.M. 910(a)(1) is amended and reflects the addition of Appendix 12A with respect to lesser included offenses and reflects that no offenses carry a mandatory penalty of death. *See* Article 79, as amended by Section 5402 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016).

R.C.M. 910(c)(1) and the accompanying Discussion are amended and reflect changes to plea agreements and the sentencing proceeding in courts-martial. *See* Article 53a, as added by Section 5237 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016), as amended by Sections 531(d) and 1081(c)(1)(H) of the National Defense Authorization Act for Fiscal Year 2018, Pub. Law. No. 115-91, 131 Stat. 1283 (2017); and Article 56, as amended by Section 5301 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016), as further amended by Section 531(e) of the National Defense Authorization Act for Fiscal Year 2018, Pub. Law. No. 115-91, 131 Stat. 1283 (2017).

R.C.M. 910(c)(6) and the accompanying Discussion are new and reflect forum options for sentencing under the Military Justice Act of 2016. *See* Articles 53 and 56, as amended by Sections 5236 and 5301 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016). Article 56 was further amended by Section 531(e) of the National Defense Authorization Act for Fiscal Year 2018, Pub. Law. No. 115-91, 131 Stat. 1283 (2017).

R.C.M. 910(f) and the accompanying Discussions are amended and reflect changes to plea agreement practice in the military as a result of the Military Justice Act of 2016. *See* Article 53a, as added by Section 5237 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016), as amended by Sections 531(d) and 1081(c)(1)(H) of the National Defense Authorization Act for Fiscal Year 2018, Pub. Law. No. 115-91, 131 Stat. 1283 (2017).

R.C.M. 910(g) is amended and implements Articles 45 and 19, as amended by Sections 5227 and 5163 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016), which removed the requirement for the Services to maintain separate rules authorizing entry of a finding of guilty without a vote when a guilty plea has been accepted and eliminated special courts-martial without a military judge.

R.C.M. 910(h) is amended by deleting paragraph (3) and reflects the manner in which the military judge addresses the plea agreement under R.C.M. 910(f).

R.C.M. 910(i) is deleted. The requirement for a certified record of guilty plea proceedings is governed by R.C.M. 1112, 1114 and 1305.

R.C.M. 910(j) is redesignated as 910(i) and reflects the application of plain-error review to errors concerning guilty pleas raised for the first time on appeal. *See* Article 45, as amended by Section 5227 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016).

The Discussion following R.C.M. 911 reads as follows:

Discussion

When trial is by a court-martial with members, the court-martial is ordinarily assembled immediately after the members are sworn. The members are ordinarily sworn at the first session at which they appear, as soon as all parties and personnel have been announced. The members are seated with the president, who is the senior member, in the center, and the other members alternately to the president's right and left according to rank. If the rank of a member is changed, or if the membership of the court-martial changes, the members should be reseated accordingly.

When an accused's request to be tried by military judge alone is approved, the court-martial is ordinarily assembled immediately following approval of the request.

In a special court-martial consisting of a military judge alone under Article 16(c)(2)(A), the court-martial is assembled prior to beginning of the trial on the merits.

Assembly of the court-martial is significant because it marks the point after which: substitution of the members and military judge may no longer take place without good cause (*see* Article 29, R.C.M. 505, 902, 912); the accused may no longer, as a matter of right, request trial by military judge alone or withdraw such a request previously

approved (*see* Article 16, R.C.M. 903(d)); and the accused may no longer request, even with the permission of the military judge, or withdraw from a request for members (*see* Article 25(c)(2), R.C.M. 903(d)).

The Analysis following R.C.M. 911 reads as follows:

Analysis

This rule is taken from Rule 911 of the MCM (2016 edition) with the following amendments:

2018 Amendment: The Discussion accompanying R.C.M. 911 is amended and authorizes the convening authority to refer charges to a special court-martial consisting of a military judge alone under such limitations as the President may prescribe by regulation, and updates a cross-reference. *See* Articles 16 and 19, as amended by Sections 5161 and 5163 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016).

The Discussion following R.C.M. 912 (a)(1)(K) reads as follows:

Discussion

Using questionnaires before trial may expedite voir dire and may permit more informed exercise of challenges.

If the questionnaire is marked or admitted as an exhibit at the court-martial it must be attached to or included in the record of trial. *See* R.C.M. 1112(b)(6).

The Discussion following R.C.M. 912(b)(1) reads as follows:

Discussion

See R.C.M. 502(a) and 503(a) concerning selection of members. Members are also improperly selected when, for example, a certain group or class is arbitrarily excluded from consideration as members.

The Discussion following R.C.M. 912(d) reads as follows:

Discussion

Examination of the members is called “voir dire.” If the members have not already been placed under oath for the purpose of voir dire (*see* R.C.M. 807(b)(2) Discussion (B)), they should be sworn before they are questioned.

The opportunity for voir dire should be used to obtain information for the intelligent exercise of challenges; counsel should not purposely use voir dire to present factual matter which will not be admissible or to argue the case.

The nature and scope of the examination of members is within the discretion of the military judge. Members may be questioned individually or collectively. Ordinarily, the military judge should permit counsel to personally question the members.

Trial counsel ordinarily conducts an inquiry before the defense. Whether trial counsel will question all the members before the defense begins or whether some other procedure will be followed depends on the circumstances. For example, when members are questioned individually outside the presence of other members, each party would ordinarily complete questioning that member before another member is questioned. The military judge and each party may conduct additional questioning, after initial questioning by a party, as necessary.

Ordinarily the members should be asked whether they are aware of any ground for challenge against them. This may expedite further questioning. The members should be cautioned, however, not to disclose information in the presence of other members which might disqualify them.

The Discussion following R.C.M. 912(f)(1)(N) reads as follows:

Discussion

Examples of matters which may be grounds for challenge are that the member: has a direct personal interest in the result of the trial; is closely related to the accused, a counsel, or a witness in the case; has participated as a member or counsel in the trial of a closely related case; has a decidedly friendly or hostile attitude toward a party; or has an inelastic opinion concerning an appropriate sentence for the offenses charged.

The Discussion following R.C.M. 912(f)(4) reads as follows:

Discussion

See Mil. R. Evid. 606 regarding when a member may be a witness.

The Discussion following R.C.M. 912(f)(5) reads as follows:

Discussion

Random numbers are assigned to the members in order to organize and identify the members to be impaneled under R.C.M. 912A.

The Discussion following R.C.M. 912(g)(1) reads as follows:

Discussion

Generally, no reason is necessary for a peremptory challenge. *But see Batson v. Kentucky* 476 U.S. 79 (1986); *United States v. Tulloch*, 47 M.J. 283 (C.A.A.F. 1997); *United States v. Curtis*, 33 M.J. 101 (C.M.A. 1991), *cert. denied*, 502 U.S. 1097 (1992); *United States v. Moore*, 28 M.J. 366 (C.M.A. 1989); *United States v. Santiago-Davilla*, 26 M.J. 380 (C.M.A. 1988).

The Discussion following R.C.M. 912(g)(2) reads as follows:

Discussion

When the membership of the court-martial has been reduced below the number of members required under R.C.M. 501(a), as applicable, or when enlisted members have been requested and the fraction of enlisted members has been reduced below one-third, the proceedings should be adjourned and the convening authority notified so that new members may be detailed. *See* R.C.M. 505. *See also* R.C.M. 805(d) concerning other procedures when new members are detailed.

The Discussion following R.C.M. 912(h)(1) reads as follows:

Discussion

For example, a person who by certificate has attested or otherwise authenticated an official record or other writing introduced in evidence is a witness.

The Analysis following R.C.M. 912 reads as follows:

Analysis

This rule is taken from Rule 912 of the MCM (2016 edition) with the following amendments:

2018 Amendment: R.C.M. 912(a)(1) is amended and reflects the authority of the convening authority to detail alternate members. *See* Article 29, as amended by Section 5187 the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016).

The Discussion accompanying R.C.M. 912(a)(1) is amended and updates a cross-reference.

R.C.M. 912(b)(3) is amended and clarifies that failure to make a timely motion challenging the selection of the members shall forfeit, but not waive, the improper selection, except in specified circumstances where the failure to make a timely motion neither forfeits nor waives the improper selection.

R.C.M. 912(f)(4) is amended and implements Article 25, as amended by Section 5182 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016), which eliminates the prohibition against detailing enlisted members from the same unit.

The Discussion accompanying R.C.M. 912(f)(4) is amended and updates a cross-reference.

R.C.M. 912(f)(5) is new and addresses the assignment of random numbers to members following challenges for cause for the purpose of impaneling members and alternate members as set forth in R.C.M. 912A.

The Discussion accompanying R.C.M. 912(g)(2) is amended and reflects the requirement for a specified number of members in special and general courts-martial. *See* Article 16, as amended by Section 5161 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016), as further amended by Section 1081(c)(1)(C) of the National Defense Authorization Act for Fiscal Year 2018, Pub. Law. No. 115-91, 131 Stat. 1283 (2017).

R.C.M. 912(h) of the MCM (2016 edition) is deleted and R.C.M. 912(i) is redesignated as R.C.M. 912(h). This reflects the elimination of special courts-martial without a military judge. *See* Article 16, as amended by Section 5161 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016), as further amended by Section 1081(c)(1)(C) of the National Defense Authorization Act for Fiscal Year 2018, Pub. Law. No. 115-91, 131 Stat. 1283 (2017).

The Discussion following R.C.M. 912A(a)(4)(B) reads as follows:

Discussion

See Article 29(c), R.C.M. 503(a)(1), and R.C.M. 912A(d).

The Discussion following R.C.M. 912A(d)(4) reads as follows:

Discussion

When the accused has elected to be tried by a panel consisting of at least one-third enlisted members in accordance with R.C.M. 503(a)(2), the military judge is required to identify the minimum number of enlisted members before identifying the remaining members to ensure the number of members required under R.C.M. 501(a), as applicable, is reached. For example, in a general court-martial in which the accused has requested at least one-third enlisted members, there must be at least three enlisted members. If, after the exercise of all challenges, the number of enlisted members is greater than three, the military judge first seats the three enlisted members assigned the three lowest numbers during voir dire. The military judge then seats the next five members, regardless of grade, assigned the lowest numbers.

If the convening authority authorized the military judge to impanel alternate members, the military judge would follow this process to identify the authorized number of alternate members. For example, in a court-martial in which the convening authority has authorized the military judge to impanel alternate members, but has not directed that a specific number of alternate members be impaneled, the military judge first seats the number of members required for the court-martial. If three or fewer excess members remain, the military judge identifies all excess members as alternate members. If more than three excess members remain, the military judge then identifies the next three members, regardless of grade, assigned the next lowest numbers as alternate members.

All members not seated as members or identified as alternate members are then excused by the military judge.

The Discussion following R.C.M. 912A(e) reads as follows:

Discussion

For example, the following numbers are listed numerically from lowest to highest: 1, 2, 3, and 4.

The Analysis following 912A reads as follows:

Analysis

2018 Amendment: R.C.M. 912A is new and implements Articles 16, 25, and 29, as amended by Sections 5161, 5182, and 5187 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016), regarding the process for impaneling members after challenges for cause and peremptory challenges, and the process for impaneling alternate members if authorized by the convening authority. Article 16 was further amended by Section 1081(c)(1)(C) of the National Defense Authorization Act for Fiscal Year 2018, Pub. Law. No. 115-91, 131 Stat. 1283 (2017).

The Discussion following R.C.M. 912B(b) reads as follows:

Discussion

When an accused has elected to be tried by a court-martial composed of at least one-third enlisted members, an officer member cannot replace an excused enlisted member unless the total panel membership remains at least one-third enlisted.

The Analysis following R.C.M. 912B reads as follows:

Analysis

2018 Amendment: R.C.M. 912B is new and implements Article 29, as amended by Section 5187 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016), which prescribes the process by which impaneled members may be excused and replaced by alternate members or additionally detailed members.

The Discussion following R.C.M. 913(a) reads as follows:

Discussion

Preliminary instructions may include a description of the duties of members, procedures to be followed in the court-martial, and other appropriate matters.

Exceptions to the rule requiring the military judge to defer informing the members of an accused's prior pleas of guilty include cases in which the accused has specifically requested, on the record, that the military judge instruct the members of the prior pleas of guilty and cases in which a plea of guilty was to a lesser included offense within the contested offense charged in the specification. *See* R.C.M. 910(g), Discussion and R.C.M. 920(e), Discussion, paragraph 3.

The Discussion following R.C.M. 913(b) reads as follows:

Discussion

Counsel should confine their remarks to evidence they expect to be offered which they believe in good faith will be available and admissible and a brief statement of the issues in the case.

The Discussion following R.C.M. 913(c)(1)(F) reads as follows:

Discussion

See R.C.M. 801(a) and Mil. R. Evid. 611 concerning control by the military judge over the order of proceedings.

The Discussion following R.C.M. 913(c)(2) reads as follows:

Discussion

Each witness must testify under oath. *See* R.C.M. 807(b)(1)(B), Mil. R. Evid. 603. After a witness is sworn, the witness should be identified for the record (full name, rank, and unit, if military, or full name and address, if civilian). The party calling the witness conducts direct examination of the witness, followed by cross-examination of the witness by the opposing party. Redirect and re-cross-examination are conducted as necessary, followed by any questioning by the military judge and members. *See* Mil. R. Evid. 611, 614.

All documentary and real evidence (except marks or wounds on a person's body) should be marked for identification when first referred to in the proceedings and should be included in the record of trial whether admitted in evidence or not. *See* R.C.M. 1112. "Real evidence" include physical objects, such as clothing, weapons, and marks or wounds on a person's body. If it is impracticable to attach an item of real evidence to the record, the item should be clearly and accurately described by testimony, photographs, or other means so that it may be considered on review. Similarly, when documentary evidence is used, if the document cannot be attached to the record (as in the case of an original official record or a large map), a legible copy or accurate extract should be included in the record. When a witness points to or otherwise refers to certain parts of a map, photograph, diagram, chart, or other exhibit, the place to which the witness pointed or referred should be clearly identified for the record, either by marking the exhibit or by an accurate description of the witness' actions with regard to the exhibit.

The Discussion following R.C.M. 913(c)(3) reads as follows:

Discussion

The fact that a view or inspection has been made does not necessarily preclude the introduction in evidence of photographs, diagrams, maps, or sketches of the place or item viewed, if these are otherwise admissible.

The Discussion following R.C.M. 913(c)(4) reads as follows:

Discussion

The military judge should not exclude evidence which is not objected to by a party except in extraordinary circumstances. Counsel should be permitted to try the case and present the evidence without unnecessary interference by the military judge. *See also* Mil. R. Evid. 103.

The Analysis following R.C.M. 913 reads as follows:

Analysis

This rule is taken from Rule 913 of the MCM (2016 edition) with the following amendments:

2018 Amendment: The Discussion to R.C.M. 913(c)(2) is amended and updates a cross-reference.

The Discussion to R.C.M. 913(c)(3) is amended and deletes the first sentence, which reflected that views and inspections should be permitted only in extraordinary circumstances.

The Discussion following R.C.M. 914(a)(2) reads as follows:

Discussion

See also R.C.M. 701.

Counsel should anticipate legitimate demands for statements under this and similar rules and avoid delays in the proceedings by voluntary disclosure before arraignment.

This rule does not apply to preliminary hearings under Article 32.

As to procedures for certain government information as to which a privilege is asserted, *see* Mil. R. Evid. 505, 506.

The Analysis following R.C.M. 914 reads as follows:

Analysis

This rule is taken from Rule 914 of MCM (2016 edition) without substantive amendment.

The Discussion following R.C.M. 914A(c) reads as follows:

Discussion

For purposes of this rule, unlike R.C.M. 914B, remote means or similar technology does not include receiving testimony by telephone where the parties cannot see and hear each other.

The Analysis following R.C.M. 914A reads as follows:

Analysis

This rule is taken from Rule 914A of the MCM (2016 edition) without amendment.

The Discussion following R.C.M. 914B(b) reads as follows:

Discussion

This rule applies for all witness testimony other than child witness testimony specifically covered by Mil. R. Evid. 611(d) and R.C.M. 914A. When utilizing testimony via remote means, military justice practitioners are encouraged to consult the procedure used in *In re San Juan Dupont Plaza Hotel Fire Litigation*, 129 F.R.D. 424 (D.P.R. 1989), and to read *United States v. Gigante*, 166 F.3d 75 (2d Cir. 1999), *cert. denied*, 528 U.S. 1114 (2000).

The Analysis following R.C.M. 914B reads as follows:

Analysis

This rule is taken from Rule 914B of MCM (2016 edition) without amendment.

The Discussion following R.C.M. 915(a) reads as follows:

Discussion

The power to grant a mistrial should be used with great caution, under urgent circumstances, and for plain and obvious reasons. As examples, a mistrial may be appropriate when inadmissible matters so prejudicial that a curative instruction would be inadequate are brought to the attention of the members or when members engage in prejudicial

misconduct. Also a mistrial is appropriate when the proceedings must be terminated because of a legal defect, such as a jurisdictional defect or a defective referral.. See also R.C.M. 905(g) concerning the effect of rulings in one proceeding on later proceedings.

The Discussion following R.C.M. 915(c)(1) reads as follows:

Discussion

Upon declaration of a mistrial, the affected charges are returned to the convening authority who may refer them anew or otherwise dispose of them. *See* R.C.M. 401-407.

The Analysis following R.C.M. 915 reads as follows:

Analysis

This rule is taken from Rule 915 of the MCM (2016 edition) with the following amendment:

2018 Amendment: The Discussion accompanying R.C.M. 915(b) is deleted and reflects the elimination of special courts-martial without a military judge. *See* Article 16, as amended by Section 5161 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016), as further amended by Section 1081(c)(1)(C) of the National Defense Authorization Act for Fiscal Year 2018, Pub. Law. No. 115-91, 131 Stat. 1283 (2017).

The Discussion following R.C.M. 916(a) reads as follows:

Discussion

Special defenses are also called “affirmative defenses.”

“Alibi” and “good character” are not special defenses, as they operate to deny that the accused committed one or more of the acts constituting the offense. As to evidence of the accused’s good character, see Mil. R. Evid. 404(a)(1). *See* R.C.M. 701(b)(2) concerning notice of alibi.

The Discussion following R.C.M. 916(b)(3) reads as follows:

Discussion

A defense may be raised by evidence presented by the defense, the prosecution, or the court-martial. For example, in a prosecution for assault, testimony by prosecution witnesses that the victim brandished a weapon toward the accused may raise a defense of self-defense. *See* R.C.M. 916(e). More than one defense may be raised as to a particular offense. The defenses need not necessarily be consistent.

See R.C.M. 920(e)(3) concerning instructions on defenses.

The Discussion following R.C.M. 916(c) reads as follows:

Discussion

The duty may be imposed by statute, regulation, or order. For example, the use of force by a law enforcement officer when reasonably necessary in the proper execution of a lawful apprehension is justified because the duty to apprehend is imposed by lawful authority. Also, killing an enemy combatant in battle is justified.

The Discussion following R.C.M. 916(d) reads as follows:

Discussion

Ordinarily the lawfulness of an order is decided by the military judge. *See* R.C.M. 801(e). An exception might exist when the sole issue is whether the person who gave the order in fact occupied a certain position at the time.

An act performed pursuant to a lawful order is justified. *See* R.C.M. 916(c). An act performed pursuant to an unlawful order is excused unless the accused knew it to be unlawful or a person of ordinary sense and understanding would have known it to be unlawful.

The Discussion following R.C.M. 916(e)(1)(B) reads as follows:

Discussion

The words “involving deadly force” described the factual circumstances of the case, not specific assault offenses. If the accused is charged with simple assault, battery or any form of aggravated assault, or if simple assault, battery or any form of aggravated assault is in issue as a lesser included offense, the accused may rely on this subparagraph if the test specified in subparagraphs (A) and (B) is satisfied.

The test for the first element of self-defense is objective. Thus, the accused’s apprehension of death or grievous bodily harm must have been one which a reasonable, prudent person would have held under the circumstances. Because this test is objective, such matters as intoxication or emotional instability of the accused are irrelevant. On the other hand, such matters as the relative height, weight, and general build of the accused and the alleged victim, and the possibility of safe retreat are ordinarily among the circumstances which should be considered in determining the reasonableness of the apprehension of death or grievous bodily harm.

The test for the second element is entirely subjective. The accused is not objectively limited to the use of reasonable force. Accordingly, such matters as the accused’s emotional control, education, and intelligence are relevant in determining the accused’s actual belief as to the force necessary to repel the attack.

See also Mil. R. Evid. 404(a)(2) as to evidence concerning the character of the victim.

The Discussion following R.C.M. 916(e)(2)(B) reads as follows:

Discussion

The principles in the discussion of R.C.M. 916(e)(1) concerning reasonableness of the apprehension of bodily harm apply here.

The Discussion following R.C.M. 916(e)(3)(B) reads as follows:

Discussion

The principles in the discussion under R.C.M. 916(e)(1) apply here.

If, in using only such force as the accused was entitled to use under this aspect of self-defense, death or serious injury to the victim results, this aspect of self-defense may operate in conjunction with the defense of accident (see subsection (f) of this rule) to excuse the accused’s acts. The death or serious injury must have been an unintended and unexpected result of the accused’s proper exercise of the right of self-defense.

The Discussion following R.C.M. 916(e)(4) reads as follows:

Discussion

A person does not become an aggressor or provocateur merely because that person approaches another to seek an interview, even if the approach is not made in a friendly manner. For example, one may approach another and demand

an explanation of offensive words or redress of a complaint. If the approach is made in a nonviolent manner, the right to self-defense is not lost.

Failure to retreat, when retreat is possible, does not deprive the accused of the right to self-defense if the accused was lawfully present. The availability of avenues of retreat is one factor which may be considered in addressing the reasonableness of the accused's apprehension of bodily harm and the sincerity of the accused's belief that the force used was necessary for self-protection.

The Discussion following R.C.M. 916(e)(5) reads as follows:

Discussion

The accused acts at the accused's peril when defending another. Thus, if the accused goes to the aid of an apparent assault victim, the accused is guilty of any assault the accused commits on the apparent assailant if, unbeknownst to the accused, the apparent victim was in fact the aggressor and not entitled to use self-defense.

The Discussion following R.C.M. 916(f) reads as follows:

Discussion

The defense of accident is not available when the act which caused the death, injury, or event was a negligent act.

The Discussion following R.C.M. 916(g) reads as follows:

Discussion

The "Government" includes agents of the Government and persons cooperating with them (for example, informants). The fact that persons acting for the Government merely afford opportunities or facilities for the commission of the offense does not constitute entrapment. Entrapment occurs only when the criminal conduct is the product of the creative activity of law enforcement officials.

When the defense of entrapment is raised, evidence of uncharged misconduct by the accused of a nature similar to that charged is admissible to show predisposition. *See* Mil. R. Evid. 404(b).

The Discussion following R.C.M. 916(h) reads as follows:

Discussion

The immediacy of the harm necessary may vary with the circumstances. For example, a threat to kill a person's wife the next day may be immediate if the person has no opportunity to contact law enforcement officials or otherwise protect the intended victim or avoid committing the offense before then.

The Discussion following R.C.M. 916(i) reads as follows:

Discussion

The test of inability is objective in nature. The accused's opinion that a physical impairment prevented performance of the duty will not suffice unless the opinion is reasonable under all the circumstances.

If the physical or financial inability of the accused occurred through the accused's own fault or design, it is not a defense. For example, if the accused, having knowledge of an order to get a haircut, spends money on other nonessential items, the accused's inability to pay for the haircut would not be a defense.

The Discussion following R.C.M. 916(j)(2) reads as follows:

Discussion

Examples of ignorance or mistake which need only exist in fact include: ignorance of the fact that the person assaulted was an officer; belief that property allegedly stolen belonged to the accused; belief that a controlled substance was really sugar.

Examples of ignorance or mistake which must be reasonable as well as actual include: belief that the accused charged with unauthorized absence had permission to go; belief that the accused had a medical “profile” excusing shaving as otherwise required by regulation. Some offenses require special standards of conduct (*see, e.g.*, paragraph 94, Part IV, Check, worthless making and uttering – by dishonorably failing to maintain funds); the element of reasonableness must be applied in accordance with the standards imposed by such offenses.

Examples of offenses in which the accused’s intent or knowledge is immaterial include: rape of a child, sexual assault of a child, or sexual abuse of a child (if the victim is under 12 years of age, knowledge or belief as to age is immaterial). However, such ignorance or mistake may be relevant in extenuation and mitigation.

See R.C.M. 916(l)(1) concerning ignorance or mistake of law.

The Discussion following R.C.M. 916(k)(1) reads as follows:

Discussion

See R.C.M. 706 concerning sanity inquiries; R.C.M. 909 concerning the capacity of the accused to stand trial; and R.C.M. 1105 concerning any post-trial hearing for an accused found not guilty only by reason of lack of mental responsibility.

The Discussion following R.C.M. 916(k)(2) reads as follows:

Discussion

Evidence of a mental condition not amounting to a lack of mental responsibility may be admissible as to whether the accused entertained a state of mind necessary to be proven as an element of the offense. The defense must notify the trial counsel before the beginning of trial on the merits if the defense intends to introduce expert testimony as to the accused’s mental condition. *See* R.C.M. 701(b)(2).

The Discussion following R.C.M. 916(k)(3)(A) reads as follows:

Discussion

The accused is presumed to be mentally responsible, and this presumption continues throughout the proceedings unless the finder of fact determines that the accused has proven lack of mental responsibility by clear and convincing evidence. *See* R.C.M. 916(b).

The Discussion following R.C.M. 916(k)(3)(B) reads as follows:

Discussion

If an inquiry is directed, priority should be given to it.

The Discussion following R.C.M. 916(l)(1) reads as follows:

Discussion

For example, ignorance that it is a crime to possess marijuana is not a defense to wrongful possession of marijuana.

Ignorance or mistake of law may be a defense in some limited circumstances. If the accused, because of a mistake as to a separate nonpenal law, lacks the criminal intent or state of mind necessary to establish guilt, this may be a defense. For example, if the accused, under mistaken belief that the accused is entitled to take an item under property law, takes an item, this mistake of law (as to the accused's legal right) would, if genuine, be a defense to larceny. On the other hand, if the accused disobeyed an order, under the actual but mistaken belief that the order was unlawful, this would not be a defense because the accused's mistake was as to the order itself, and not as to a separate nonpenal law. Also, mistake of law may be a defense when the mistake results from reliance on the decision or pronouncement of an authorized public official or agency. For example, if an accused, acting on the advice of an official responsible for administering benefits that the accused is entitled to those benefits, applies for and receives those benefits, the accused may have a defense even though the accused was not legally eligible for the benefits. On the other hand, reliance on the advice of counsel that a certain course of conduct is legal is not, of itself, a defense.

The Discussion following R.C.M. 916(l)(2) reads as follows:

Discussion

Intoxication may reduce premeditated murder to unpremeditated murder, but it will not reduce murder to manslaughter or any other lesser offense. *See* paragraph 56.c.(2)(c), Part IV.

Although voluntary intoxication is not a defense, evidence of voluntary intoxication may be admitted in extenuation

The Analysis following R.C.M. 916 reads as follows:

Analysis

This rule is taken from Rule 916 of MCM (2016 edition) with the following amendments:

2018 Amendment: The Discussion accompanying R.C.M. 916(e)(2)(B) is amended to align with Article 128, as amended by Section 5441 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016), as further amended by 1081(c)(1)(P) of the National Defense Authorization Act for Fiscal Year 2018, Pub. Law. No. 115-91, 131 Stat. 1283 (2017).

R.C.M. 916(e)(3) and (5) and the Discussion accompanying R.C.M. 916(j) and R.C.M. 916(l)(2) are amended and reflect the reorganization of the punitive articles in the Military Justice Act of 2016. *See* Articles 79-134, as amended by Sections 5401-5452 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016), as further amended by Section 1081(c) of the National Defense Authorization Act for Fiscal Year 2018, Pub. Law. No. 115-91, 131 Stat. 1283 (2017).

The Discussion accompanying R.C.M. 916(k)(1) is amended and updates a cross-reference.

R.C.M. 916(k)(3)(B) and the accompanying discussion are amended and reflect the elimination of special courts-martial without a military judge. *See* Article 16, as amended by Section 5161 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016), as further amended by Section 1081(c)(1)(C) of the National Defense Authorization Act for Fiscal Year 2018, Pub. Law. No. 115-91, 131 Stat. 1283 (2017).

The Discussion following R.C.M. 917(a) reads as follows:

Discussion

In a case with members, the military judge may reserve ruling on a motion until any time prior to entry of judgment, including after the members return with findings. *See* R.C.M. 908 on appeals by the United States when the military judge sets aside a panel's finding of guilty.

The Discussion following R.C.M. 917(c) reads as follows:

Discussion

For a motion made under R.C.M. 917(a), the military judge ordinarily should permit the trial counsel to reopen the case as to the insufficiency specified in the motion before findings on the general issue of guilt are announced.

See R.C.M. 1104(b)(1)(B) regarding post-trial motions to set aside a finding of guilty.

The Analysis following R.C.M. 917 reads as follows:

Analysis

This rule is taken from Rule 917 of the MCM (2016 edition) with the following amendments:

2018 Amendment: R.C.M. 917(a) is amended and allows a military judge to rule on a motion under R.C.M. 917 after a panel returns findings, similar to the practice in U.S. District Court. *See* Fed. R. Crim. P. 29; *United States v. Wilson*, 420 U.S. 332 (1975).

The Discussion accompanying R.C.M. 917(a) is new and refers to R.C.M. 908(a) concerning the ability of the Government to file an interlocutory appeal when the military judge sets aside a panel's finding of guilty. *See* Article 62, as amended by Section 5326 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016), as further amended by Section 531(h) of the National Defense Authorization Act for Fiscal Year 2018, Pub. Law. No. 115-91, 131 Stat. 1283 (2017).

The Discussion accompanying R.C.M. 917(c) is amended and reflects the elimination of special courts-martial without a military judge. *See* Article 16, as amended by Section 5161 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016), as further amended by Section 1081(c)(1)(C) of the National Defense Authorization Act for Fiscal Year 2018, Pub. Law. No. 115-91, 131 Stat. 1283 (2017).

R.C.M. 917(f) is amended and permits the military judge to reconsider a denial of a motion for a finding of not guilty at any time before entry of judgment. *See* Article 60c, as added by Section 5324 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016).

The Discussion following R.C.M. 918(a)(1)(E) reads as follows:

Discussion

Exceptions and substitutions. One or more words or figures may be excepted from a specification and, when necessary, others substituted, if the remaining language of the specification, with or without substitutions, states an offense by the accused which is punishable by court-martial. Changing the date or place of the offense may, but does not necessarily, change the nature or identity of an offense.

If A and B are joint accused and A is convicted but B is acquitted of the offense charged, A should be found guilty by excepting the name of B from the specification as well as any other words indicating the offense was a joint one.

Lesser included offenses. If the evidence fails to prove the offense charged but does prove an offense necessarily included in the offense charged, the factfinder may find the accused not guilty of the offense charged but guilty of the lesser included offense. *See* paragraph 3 of Part IV and Appendix 12A concerning lesser included offenses.

Offenses arising from the same act or transaction. The accused may be found guilty of two or more offenses arising from the same act or transaction, whether or not the offenses are separately punishable. *But see* R.C.M. 906(b)(12) and 907(b)(3)(B).

The Discussion following R.C.M. 918(a)(2)(D) reads as follows:

Discussion

Where there are two or more specifications under one charge, conviction of any of those specifications requires a finding of guilty of the corresponding charge. Under such circumstances any findings of not guilty as to the other specifications do not affect that charge. If the accused is found guilty of one specification and of a lesser included offense prohibited by a different Article as to another specification under the same charge, the findings as to the corresponding charge should be: “Of the Charge as to specification 1: Guilty; as to specification 2: not guilty, but guilty of _____, a violation of Article _____.”

An attempt should be found as a violation of Article 80 unless the attempt is punishable under Articles 85, 94, 100, 103a, 103b, 119a, or 128, in which case it should be found as a violation of that Article.

A court-martial may not find an offense as a violation of an article under which it was not charged solely for the purpose of increasing the authorized punishment or for the purpose of adjudging less than the prescribed mandatory punishment.

The Discussion following R.C.M. 918(b) reads as follows:

Discussion

Special findings ordinarily include findings as to the elements of the offenses of which the accused has been found guilty, and any affirmative defense relating thereto.

See also R.C.M. 905(d); Mil. R. Evid. 304(f)(5), 311(d)(7), and 321(d)(7) concerning other findings to be made by the military judge.

Members may not make special findings. Special findings do not include, for example, the members’ deliberation and voting on aggravating factors in a capital case under RCM 1004(b)(4), or on the defense of mental responsibility under R.C.M. 921(c)(4).

The Discussion following R.C.M. 918(c) reads as follows:

Discussion

“Direct evidence” is evidence which tends directly to prove or disprove a fact in issue (for example, an element of the offense charged). “Circumstantial evidence” is evidence which tends directly to prove not a fact in issue but some other fact or circumstance from which, either alone or together with other facts or circumstances, one may reasonably infer the existence or non-existence of a fact in issue. There is no general rule for determining or comparing the weight to be given to direct or circumstantial evidence.

A reasonable doubt is a doubt based on reason and common sense. A reasonable doubt is not mere conjecture; it is an honest, conscientious doubt suggested by the evidence, or lack of it, in the case. An absolute or mathematical certainty is not required. The rule as to reasonable doubt extends to every element of the offense. It is not necessary that each particular fact advanced by the prosecution which is not an element be proved beyond a reasonable doubt.

The factfinder should consider the inherent probability or improbability of the evidence, using common sense and knowledge of human nature, and should weigh the credibility of witnesses. A fact finder may properly believe one witness and disbelieve others whose testimony conflicts with that of the one. A factfinder may believe part of the testimony of a witness and disbelieve other parts.

The Analysis following R.C.M. 918 reads as follows:

Analysis

This rule is taken from Rule 918 of the MCM (2016 edition) with the following amendments:

2018 Amendment: The Discussion accompanying R.C.M. 918(a)(1) is amended and clarifies when the fact finder may consider a lesser included offense if the evidence fails to prove the offense charged. *See* Article 79, as amended

by Section 5402 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016).

The Discussion accompanying R.C.M. 918(a)(2) is amended and reflects the reorganization of the punitive articles in the Military Justice Act of 2016. *See* Articles 79-134, as amended by Sections 5401-5452 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016), as amended by Section 1081(c) of the National Defense Authorization Act for Fiscal Year 2018, Pub. Law. No. 115-91, 131 Stat. 1283 (2017).

R.C.M. 918(b) is amended and requires the entry of special findings prior to the entry of judgment. *See* Article 60c, as added by Section 5324 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016).

The Discussion following R.C.M. 919(b) reads as follows:

Discussion

The military judge may exercise reasonable control over argument. *See* R.C.M. 801(a)(3).

Argument may include comment about the testimony, conduct, motives, interests, and biases of witnesses to the extent supported by the evidence. Counsel should not express a personal belief or opinion as to the truth or falsity of any testimony or evidence or the guilt or innocence of the accused, nor should counsel make arguments calculated to inflame passions or prejudices. In argument, counsel may treat the testimony of witnesses as conclusively establishing the facts related by the witnesses. Counsel may not cite legal authorities or the facts of other cases when arguing to members on findings.

Trial counsel may not comment on the accused's exercise of the right against self-incrimination or the right to counsel. *See* Mil. R. Evid. 512. Trial counsel may not argue that the prosecution's evidence is un rebutted if the only rebuttal could come from the accused. When the accused is on trial for several offenses and testifies only as to some of the offenses, trial counsel may not comment on the accused's failure to testify as to the others. When the accused testifies on the merits regarding an offense charged, trial counsel may comment on the accused's failure in that testimony to deny or explain specific incriminating facts that the evidence for the prosecution tends to establish regarding that offense.

Trial counsel may not comment on the failure of the defense to call witnesses or of the accused to testify at the Article 32 preliminary hearing or upon the probable effect of the court-martial's findings on relations between the military and civilian communities.

The rebuttal argument of trial counsel is generally limited to matters argued by the defense. If trial counsel is permitted to introduce new matter in closing argument, the defense should be allowed to reply in rebuttal. However, this will not preclude trial counsel from presenting a final argument.

The Discussion following R.C.M. 919(c) reads as follows:

Discussion

If an objection that an argument is improper is sustained, the military judge should immediately instruct the members that the argument was improper and that they must disregard it. In extraordinary cases, improper argument may require a mistrial. *See* R.C.M. 915. The military judge should be alert to improper argument and take appropriate action when necessary.

The Analysis following R.C.M. 919 reads as follows:

Analysis

This rule is taken from Rule 919 of the MCM (2016 edition) with the following amendment:

2018 Amendment: R.C.M. 919(c) is amended and addresses the consequences of a failure to object to error in argument.

The Discussion following R.C.M. 920(a) reads as follows:

Discussion

Instructions consist of a statement of the issues in the case and an explanation of the legal standards and procedural requirements by which the members will determine findings. Instructions should be tailored to fit the circumstances of the case, and should fairly and adequately cover the issues presented.

The Discussion following R.C.M. 920(b) reads as follows:

Discussion

After members have reached a finding on a specification, instructions may not be given on an offense included therein which was not described in an earlier instruction unless the finding is illegal. This is true even if the finding has not been announced. When instructions are to be given is a matter within the sole discretion of the military trial judge.

The Discussion following R.C.M. 920(c) reads as follows:

Discussion

Requests for and objections to instructions should be resolved at an Article 39(a) session. *See* R.C.M. 803.

If an issue has been raised, ordinarily the military judge must instruct on the issue when requested to do so. The military judge is not required to give the specific instruction requested by counsel, however, as long as the issue is adequately covered in the instructions.

The military judge should not identify the source of any instruction when addressing the members.

All written requests for instructions should be marked as appellate exhibits, whether or not they are given.

The Discussion following R.C.M. 920(d) reads as follows:

Discussion

A copy of any written instructions delivered to the members should be marked as an appellate exhibit.

The Discussion following R.C.M. 920(e)(7) reads as follows:

Discussion

A matter is “in issue” when some evidence, without regard to its source or credibility, has been admitted upon which members might rely if they choose. An instruction on a lesser included offense is proper when (1) the offense is “necessarily included” in the charged offense in accordance with Article 79(b)(1); or (2) the offense is designated a lesser included offense by the President under Article 79(b)(2).

See R.C.M. 918(c) and the accompanying Discussion as to reasonable doubt and other matters relating to the basis for findings which may be the subject of an instruction.

Other matters which may be the subject of instruction in appropriate cases included: inferences (see the explanations in Part IV concerning inferences relating to specific offenses); the limited purpose for which evidence was admitted (regardless of whether such evidence was offered by the prosecution or defense) (*see* Mil. R. Evid. 105); the effect of character evidence (*see* Mil. R. Evid. 404, 405); the effect of judicial notice (*see* Mil. R. Evid. 201, 202); the weight to be given a pretrial statement (*see* Mil. R. Evid. 304(e)); the effect of stipulations (*see* R.C.M. 811); that, when a guilty plea to a lesser included offense has been accepted, the members should accept as proved the matters admitted by the plea, but must determine whether the remaining elements are established; that a

plea of guilty to one offense may not be the basis for inferring the existence of a fact or element of another offense; the absence of the accused from trial should not be held against the accused; and that no adverse inferences may be drawn from an accused's failure to testify (*see* Mil. R. Evid. 301(f)).

The military judge may summarize and comment upon evidence in the case in instructions. In doing so, the military judge should present an accurate, fair, and dispassionate statement of what the evidence shows; not depart from an impartial role; not assume as true the existence or nonexistence of a fact in issue when the evidence is conflicting or disputed, or when there is no evidence to support the matter; and make clear that the members must exercise their independent judgment as to the facts.

The Analysis following R.C.M. 920 reads as follows:

Analysis

This rule is taken from Rule 920 of the MCM (2016 edition) with the following amendments:

2018 Amendment: The Discussion accompanying R.C.M. 920(e) is amended and reflects the two statutory grounds by which to designate an offense as lesser included: those offenses that are “necessarily included” in the greater offense, and those offenses designated in regulations prescribed by the President that are “reasonably included” in the greater offense. *See* Article 79, as amended by Section 5402 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016).

R.C.M. 920(f) is amended and addresses the consequences of a failure to object to an instruction or the omission of an instruction.

The Discussion following R.C.M. 921(c)(2) reads as follows:

Discussion

In computing the number of votes required to convict, any fraction of a vote is rounded up to the next whole number. For example, in a general court-martial with eight members, the concurrence of at least six members is required to convict. In the unusual case where a member has been excused after impanelment, resulting in a panel of seven members, the concurrence of at least six members would be required to convict. Likewise, if there are only six members, the concurrence of at least five members is required to convict. In a case that was referred as capital with 12 members, the concurrence of at least nine members is required to convict. However, a sentence of death is not authorized without the unanimous concurrence of all twelve members. *See* R.C.M. 1004(b)(7). The military judge should instruct the members on the specific number of votes required to convict.

The Discussion following R.C.M. 921(c)(4) reads as follows:

Discussion

If lack of mental responsibility is in issue with regard to more than one specification, the members should determine the issue of lack of mental responsibility on each specification separately.

The Discussion following R.C.M. 921(c)(6)(B) reads as follows:

Discussion

Once findings have been reached, they may be reconsidered only in accordance with R.C.M. 924.

The Discussion following R.C.M. 921(d) reads as follows:

Discussion

Ordinarily a findings worksheet should be provided to the members as an aid to putting the findings in proper form. If the military judge examines any writing by the members or otherwise assists them to put findings in proper form, this must be done in an open session and counsel should be given the opportunity to examine such a writing and to be heard on any instructions the military judge may give. *See* Article 39(b).

The president should not disclose any specific number of votes for or against any finding.

The Analysis following R.C.M. 921 reads as follows:

Analysis

This rule is taken from Rule 921 of the MCM (2016 edition) with the following amendment:

2018 Amendment: R.C.M. 921(c) and the accompanying Discussion are amended and reflect Article 52, as amended by Section 5235 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016), concerning voting on findings in a non-capital case.

The Discussion following R.C.M. 922(a) reads as follows:

Discussion

A finding of an offense about which no instructions were given is not proper.

The Discussion following R.C.M. 922(b) reads as follows:

Discussion

If the findings announced are ambiguous, the military judge should seek clarification. *See also* R.C.M. 924.

The Discussion following R.C.M. 922(d) reads as follows:

Discussion

See R.C.M. 1104 concerning the action to be taken if the error in the announcement is discovered after final adjournment.

The Analysis following R.C.M. 922 reads as follows:

Analysis

This rule is taken from Rule 922 of the MCM (2016 edition) with the following amendments:

2018 Amendment: R.C.M. 922(a) is amended and conforms to Article 53, as amended by Section 5236 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016), as further amended by Section 1081(c)(1)(G) of the National Defense Authorization Act for Fiscal Year 2018, Pub. Law. No. 115-91, 131 Stat. 1283 (2017).

R.C.M. 922(b) and the accompanying Discussion are amended and conform to changes regarding the acceptance of guilty pleas by the military judge and the announcement of findings by the members.

The Discussion following R.C.M. 923 reads as follows:

Discussion

Deliberations of the members ordinarily are not subject to disclosure. *See* Mil. R. Evid. 606. Unsound reasoning by a member, misconception of the evidence, or misapplication of the law is not a proper basis for challenging the findings. However, when a showing of a ground for impeaching the verdict has been made, members may be questioned about such a ground. The military judge determines, as an interlocutory matter, whether such an inquiry will be conducted and whether a finding has been impeached.

The Analysis following R.C.M. 923 reads as follows:

Analysis

This rule is taken from Rule 923 of MCM (2016 edition) without substantive amendment.

The Discussion following R.C.M. 924(b) reads as follows:

Discussion

After the initial secret ballot vote on a finding in closed session, no other vote may be taken on that finding unless a vote to reconsider succeeds.

The Analysis following R.C.M. 924 reads as follows:

Analysis

This rule is taken from Rule 924 of the MCM (2016 edition) with the following amendments:

2018 Amendment: R.C.M. 924(b) is amended and implements Article 52, as amended by Section 5235 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016), which reflects the changes in voting requirements. The subsection is also amended and reflects the elimination of any provisions imposing a mandatory death penalty.

R.C.M. 924(c) is amended and reflects the requirement for an entry of judgment and the elimination of authentication of the record of trial. *See* Article 60c, as added by Section 5324 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016).

CHAPTER X. SENTENCING

The Discussion following R.C.M. 1001(a)(3)(A) reads as follows:

Discussion

In capital cases, the right to be reasonably heard does not include the right to make an unsworn statement. *See* R.C.M. 1001(c)(2)(D)(i).

The Discussion following R.C.M. 1001(b)(2) reads as follows:

Discussion

Defense counsel may also, subject to the Military Rules of Evidence and this rule, present personnel records of the accused not introduced by trial counsel in accordance with R.C.M. 1001(b). A forfeited matter may be subject to review for plain error.

The Discussion following R.C.M. 1001(b)(3)(A) reads as follows:

Discussion

A vacation of a suspended sentence (*see* R.C.M. 1108) is not a conviction and is not admissible as such, but may be admissible under R.C.M. 1001(b)(2) as reflective of the character of the prior service of the accused.

An accused may only be punished for the offenses of which he or she was convicted in that same court-martial.

The Discussion following R.C.M. 1001(b)(3)(C) reads as follows:

Discussion

Normally, previous convictions may be proved by use of the personnel records of the accused, by the record of the conviction, or by the judgment. *See* R.C.M. 1111 or DD Form 493 (Extract of Military Records of Previous Convictions).

The Discussion following R.C.M. 1001(b)(4) reads as follows:

Discussion

See also R.C.M. 1004 concerning aggravating factors in capital cases.

The Discussion following R.C.M. 1001(b)(5)(B) reads as follows:

Discussion

See Mil. R. Evid. 701. See also Mil. R. Evid. 703 if the witness or deponent is testifying as an expert. The types of information and knowledge reflected in this subparagraph are illustrative only.

The Discussion following R.C.M. 1001(b)(5)(D) reads as follows:

Discussion

On direct examination, a witness or deponent may respond affirmatively or negatively regarding whether the accused has rehabilitative potential. The witness or deponent may also opine succinctly regarding the magnitude or quality of the accused's rehabilitative potential; for example, the witness or deponent may opine that the accused has "great" or "little" rehabilitative potential. The witness or deponent, however, generally may not further elaborate on the accused's rehabilitative potential, such as describing the particular reasons for forming the opinion.

The Discussion following R.C.M. 1001(b)(5)(F) reads as follows:

Discussion

For example, on redirect a witness or deponent may testify regarding specific instances of conduct when the cross-examination of the witness or deponent concerned specific instances of misconduct. Similarly, for example, on redirect a witness or deponent may offer an opinion on matters beyond the scope of the accused's rehabilitative potential if an opinion about such matters was elicited during cross-examination of the witness or deponent and is otherwise admissible.

The Discussion following R.C.M. 1001(c)(1) reads as follows:

Discussion

If there are numerous victims, the military judge may reasonably limit the form of the statements provided. *See* R.C.M. 801(a)(3).

The method by which the opportunity to be reasonably heard was provided to any crime victim present at the proceedings should be included in the record orally or in writing.

The Discussion following R.C.M. 1001(c)(5)(B) reads as follows:

Discussion

A victim's statement should not exceed what is permitted under R.C.M. 1001(c)(3). A crime victim may also testify as a witness during presentencing proceedings in order to present evidence admissible under a rule other than R.C.M. 1001(c)(3). Upon objection by either party or *sua sponte*, a military judge may stop or interrupt a victim's statement that includes matters outside the scope of R.C.M. 1001(c)(3). A victim, victim's counsel, or designee has no separate right to present argument under R.C.M. 1001(h).

When the military judge waives the notice requirement under this rule, the military judge may conduct a session under Article 39(a) to ascertain the content of the victim's anticipated unsworn statement.

If the victim intends to submit a written statement, a copy of the statement satisfies the requirement for a written proffer.

The Discussion following R.C.M. 1001(d)(2)(C) reads as follows:

Discussion

An unsworn statement ordinarily should not include what is properly argument, but inclusion of such matter by the accused when personally making an oral statement normally should not be grounds for stopping the statement.

The Discussion following R.C.M. 1001(f)(1) reads as follows:

Discussion

See R.C.M. 703 concerning the procedures for production of witnesses for presentencing proceedings.

The Discussion following R.C.M. 1001(f)(2)(E) reads as follows:

Discussion

The procedures for receiving testimony via remote means and the definition thereof are contained in R.C.M. 914B.

The Discussion following R.C.M. 1001(g)(2)(B) reads as follows:

Discussion

The fact that the accused is of low intelligence or that, because of a mental or neurological condition, the accused's ability to adhere to the right is diminished, may be extenuating. On the other hand, in determining the severity of a sentence, the court-martial may consider evidence tending to show that an accused has little regard for the rights of others.

The Discussion following R.C.M. 1001(h) reads as follows:

Discussion

A victim, victims' counsel, or designee has no right to present argument under this rule. A forfeited matter may be subject to review for plain error.

The Analysis following R.C.M. 1001 reads as follows:

Analysis

This rule is taken from Rule 1001 of the MCM (2016 edition) with the following amendments:

2018 Amendment: R.C.M. 1001 is amended and implements Articles 25, 53 and 56, as amended by Sections 5182, 5236, and 5301 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016). Article 56 was further amended by Section 531(e) of the National Defense Authorization Act for Fiscal Year 2018, Pub. Law. No. 115-91, 131 Stat. 1283 (2017). R.C.M. 1001(b)(1), (b)(2), and (h) set forth the consequences for failure to object to matters presented by the prosecution or argument on sentence.

The Discussion following R.C.M. 1001(b)(3)(C) is amended and reflects the new requirement for the entry of judgment in R.C.M. 1111.

R.C.M. 1001(c) is new and incorporates R.C.M. 1001A of the MCM (2016 edition).

The Discussion following R.C.M. 1002(a)(1) reads as follows:

Discussion

See Article 56(a) and R.C.M. 1003.

The Discussion following R.C.M. 1002(b)(2) reads as follows:

Discussion

Under Article 53, the military judge sentences the accused for all charges and specifications for which the death penalty may not be imposed unless the accused elects sentencing by members for such charges and specifications in accordance with Article 25.

The Discussion following R.C.M. 1002(d)(2)(A) reads as follows:

Discussion

The military judge should determine the appropriate amount of confinement or fine, if any, for each specification separately. The appropriate amount of confinement or fine that may be adjudged, if any, is at the discretion of the military judge subject to these rules.

The Discussion following R.C.M. 1002(d)(2)(B)(iv) reads as follows:

Discussion

Whether a term of confinement should run concurrently with another term of confinement should be determined only after determining the appropriate amount of confinement for each charge and specification. A military judge may exercise broad discretion in determining whether terms of confinement will run concurrently or consecutively consistent with R.C.M. 1002(f).

See R.C.M. 705(c)(2)(F) and 910(f)(5) regarding sentence limitations in plea agreements.

The Analysis following R.C.M 1002 reads as follows:

Analysis

2018 Amendment: This rule and its accompanying Discussions amend R.C.M. 1002 of the MCM (2016 edition) in its entirety and implement Articles 25, 53, 53a, and 56, as amended by Sections 5182, 5236, 5237, and 5301 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016), which provides an accused the option to elect sentencing by members in lieu of sentencing by military judge in a general or special court-martial with a military judge and members; reflects that sentences adjudged by a military judge shall provide for segmented sentences of confinement and fines; and sets forth statutory guidance for determining an appropriate sentence. Article 53a was further amended by Sections 531(d) and 1081(c)(1)(H) of the National Defense Authorization Act for Fiscal Year 2018, Pub. Law. No. 115-91, 131 Stat. 1283 (2017).

Article 56 was further amended by Section 531(e) of the National Defense Authorization Act for Fiscal Year 2018, Pub. Law. No. 115-91, 131 Stat. 1283 (2017).

The Discussion following R.C.M. 1003(a) reads as follows:

Discussion

“Any person” includes officers, enlisted persons, person in custody of the armed forces serving a sentence imposed by a court-martial, and, insofar as the punishments are applicable, any other person subject to the UCMJ. *See* R.C.M. 202.

The Discussion following R.C.M. 1003(b)(1) reads as follows:

Discussion

A reprimand adjudged by a court-martial is a punitive censure. Only the convening authority may specify the terms of the reprimand. When a court-martial adjudges a reprimand, the convening authority shall issue the reprimand in writing or may disapprove, reduce, commute, or suspend the reprimand in accordance with R.C.M. 1109 or R.C.M. 1110.

The Discussion following R.C.M. 1003(b)(2) reads as follows:

Discussion

A forfeiture deprives the accused of the amount of pay (and allowances) specified as it accrues. Forfeitures accrue to the United States.

Forfeitures of pay and allowances adjudged as part of a court-martial sentence, or occurring by operation of Article 58b, are effective 14 days after the sentence is adjudged or when the sentence of a summary court-martial is approved by the convening authority, whichever is earlier.

“Basic pay” does not include pay for special qualifications, such as diving pay, or incentive pay such as flying, parachuting, or duty on board a submarine.

Forfeiture of pay and allowances under Article 58b is not a part of the sentence, but is an administrative result thereof.

At a general court-martial, if both a punitive discharge and confinement are adjudged, then the operation of Article 58b results in total forfeiture of pay and allowances during that period of confinement. If only confinement is adjudged, and that confinement exceeds six months, the operation of Article 58b results in total forfeiture of pay and allowances during that period of confinement. If only a punitive discharge is adjudged,

Article 58b has no effect on pay and allowances. A death sentence results in total forfeiture of pay and allowances.

At a special court-martial, if a bad-conduct discharge and confinement are adjudged, then the operation of Article 58b results in a forfeiture of two-thirds of pay only (not allowances) during that period of confinement. If only confinement is adjudged, and that confinement exceeds six months, then the operation of Article 58b results in a forfeiture of two-thirds of pay only (not allowances) during the period of confinement. If only a bad-conduct discharge is adjudged, Article 58b has no effect on pay.

If the sentence does not result in forfeitures by the operation of Article 58b, then only adjudged forfeitures are effective.

Article 58b has no effect on summary courts-martial.

The Discussion following R.C.M. 1003(b)(3) reads as follows:

Discussion

A fine is in the nature of a judgment and, upon entry of judgment, makes the accused immediately liable to the United States for the entire amount of money specified in the sentence. A fine normally should not be adjudged against a member of the armed forces unless the accused was unjustly enriched as a result of the offense of which convicted. In the case of a civilian subject to military law, a fine, rather than a forfeiture, is the proper monetary penalty to be adjudged, regardless of whether unjust enrichment is present.

The Discussion following R.C.M. 1003(b)(4) reads as follows:

Discussion

Reduction under Article 58a is not a part of the sentence but is an administrative result thereof.

The Discussion following R.C.M. 1003(b)(5) reads as follows:

Discussion

Restriction does not exempt the person on whom it is imposed from any military duty. Restriction and hard labor without confinement may be adjudged in the same case provided they do not exceed the maximum limits for each. *See* R.C.M. 1003(c)(1)(A)(ii). The sentence adjudged should specify the limits of the restriction.

The Discussion following R.C.M. 1003(b)(6) reads as follows:

Discussion

Hard labor without confinement is performed in addition to other regular duties and does not excuse or relieve a person from performing regular duties. Ordinarily, the immediate commander of the accused will designate the amount and character of the labor to be performed. Upon completion of the daily assignment, the accused should be permitted to take leave or liberty to which entitled.

See R.C.M. 1301(d) concerning limitations on hard labor without confinement in summary courts-martial.

The Discussion following R.C.M. 1003(b)(7) reads as follows:

Discussion

The authority executing a sentence to confinement may require hard labor whether or not the words “at hard labor” are included in the sentence. *See* Article 58(b). To promote uniformity, the words “at hard labor” should be omitted in a sentence to confinement.

The Discussion following R.C.M. 1003(b)(8)(B) reads as follows:

Discussion

See also R.C.M. 1003(d)(1) regarding when a dishonorable discharge is authorized as an additional punishment.

The Discussion following R.C.M. 1003(b)(8)(C) reads as follows:

Discussion

See also R.C.M. 1003(d)(2) and (3) regarding when a bad-conduct discharge is authorized as an additional punishment.

The Discussion following R.C.M. 1003(c)(1)(C) reads as follows:

Discussion

R.C.M. 906(b)(12) provides the available remedies for cases in which a military judge finds an unreasonable multiplication of charges.

The Discussion following R.C.M. 1003(c)(3)(B) reads as follows:

Discussion

See R.C.M. 204. At the conclusion of nonjudicial punishment proceedings or final adjournment of the court-martial, the reserve component member who was ordered to active duty for the purpose of conducting disciplinary proceedings should be released from active duty within one working day unless the order to active duty was approved by the Secretary concerned and confinement or other restriction on liberty was adjudged. Unserved punishments may be carried over to subsequent periods of inactive-duty training or active duty.

The Discussion following R.C.M. 1003(c)(5) reads as follows:

Discussion

The maximum punishment may be limited by: the jurisdictional limits of the court-martial (*see* R.C.M. 201(f) and 1301(d)); the nature of the proceedings (*see* R.C.M. 810(d) (sentence limitations in rehearings, new trials, and other trials)); and by instructions by a convening authority (*see* R.C.M. 601(e)(1)).

The Discussion following R.C.M. 1003(d)(3) reads as follows:

Discussion

All of these increased punishments are subject to all other limitations on punishments set forth elsewhere in this rule. Convictions by summary court-martial may not be used to increase the maximum punishment under this rule. However they may be admitted and considered under R.C.M. 1001.

The Analysis following R.C.M 1003 reads as follows:

Analysis

This rule is taken from Rule 1003 of the MCM (2016 edition) with the following amendments:

2018 Amendment: R.C.M. 1003(b)(2) is amended by adding the last sentence, which is consistent with *United States v. Warner*, 25 M.J. 64 (C.M.A. 1987).

R.C.M. 1003(c)(1)(C) is amended and removes discussion of the available remedies for Multiplicity and Unreasonable Multiplication of Charges. Such remedies are addressed in R.C.M. 906(b)(12).

The discussion immediately following R.C.M. 1003(c)(1)(C) is replaced with language directing practitioners to R.C.M. 906(b)(12).

The Discussion following R.C.M. 1004(b)(2) reads as follows:

Discussion

See also R.C.M. 1004(b)(5).

The Discussion following R.C.M. 1004(b)(3) reads as follows:

Discussion

See R.C.M. 1001(d).

The Discussion following R.C.M. 1004(b)(6) reads as follows:

Discussion

If the accused elects sentencing by members in lieu of sentencing by military judge under R.C.M. 1002(b)(2), the military judge should instruct the members that they are to determine a single unitary sentence for all charges and specifications for which the accused was found guilty. If the accused does not elect sentencing by members in lieu of sentencing by military judge under R.C.M. 1002(b)(2), the military judge should instruct the members on the charge(s) and specification(s) for which the members shall determine a sentence and the charge(s) and specifications(s) for which the military judge shall determine a sentence.

The Discussion following R.C.M. 1004(c)(1) reads as follows:

Discussion

See paragraph 27, Part IV, for an explanation of “before or in the presence of the enemy.”

The Discussion following R.C.M. 1004(c)(8) reads as follows:

Discussion

Conduct amounts to “reckless indifference” when it evinces a wanton disregard of consequences under circumstances involving grave danger to the life of another, although no harm is necessarily intended. The accused must have had actual knowledge of the grave danger to others or knowledge of circumstances that would cause a reasonable person to realize the highly dangerous character of such conduct. In determining whether participation in the offense was major, the accused’s presence at the scene and the extent to which the accused aided, abetted, assisted, encouraged, or advised the other participants should be considered. *See United States v. Berg*, 31 M.J. 38 (C.M.A. 1990); *United States v. McMonagle* 38 M.J. 53 (C.M.A. 1993).

The Discussion following R.C.M. 1004(c)(11)(B) reads as follows:

Discussion

Examples of substantial damage to the national security of the United States include: impeding the performance of a combat mission or operation; impeding the performance of an important mission in a hostile fire or imminent danger pay area (*see* 37 U.S.C. § 310(a)); and disclosing military plans, capabilities, or intelligence such as to jeopardize any combat mission or operation of the armed services of the United States or its allies or to materially aid an enemy of the United States.

The Discussion following R.C.M. 1004(d) reads as follows:

Discussion

A sentence of death may not be ordered executed until approved by the President. *See* R.C.M. 1207. A sentence of death which has been finally ordered executed will be carried out in the manner prescribed by the Secretary concerned. *See* R.C.M. 1102(b)(5).

The Analysis following R.C.M. 1004 reads as follows:

Analysis

This rule is taken from Rule 1004 of the MCM (2016 edition) with the following amendments:

2018 Amendment: R.C.M. 1004(a)(2) is amended and implements Articles 45 and 52, as amended by Sections 5227 and 5235 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016).

R.C.M. 1004(b)(4) is amended and clarifies that the members must find unanimously that at least one of the aggravating factors under subsection (c) existed beyond a reasonable doubt before death may be adjudged.

R.C.M. 1004(b)(6) is amended and requires that the military judge instruct the members of the charges and specifications for which they shall determine a sentence, because the accused has the option to choose sentencing by members, rather than the military judge, for those charges and specifications for which death may not be adjudged, in accordance with R.C.M. 1002(b)(2).

A Discussion is added after R.C.M. 1004(b)(6) and addresses an accused's right to elect sentencing by members in lieu of sentencing by military judge. *See* Articles 25 and 53 as amended by Sections 5182 and 5236 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016).

R.C.M. 1004(b)(7) is amended and reflects the requirement that members must unanimously concur in a finding of the existence of at least one aggravating factor and unanimously find that the extenuating and mitigating circumstances are substantially outweighed by any aggravating circumstances before a sentence of death may be considered.

R.C.M. 1004(c)(3) is amended and deletes the reference to Article 120.

R.C.M. 1004(c)(4) is amended and deletes the reference to Article 120 and reflects the reorganization of the punitive articles. *See* Articles 79-134, as amended by Sections 5401-5452 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016), as further amended by Section 1081(c) of the National Defense Authorization Act for Fiscal Year 2018, Pub. Law. No. 115-91, 131 Stat. 1283 (2017).

R.C.M. 1004(c)(6) is amended and deletes the reference to Article 120.

R.C.M. 1004(c)(7)(B) is amended and adds the phrase "a separate murder, or" and deletes the reference to forcible sodomy and reflects the reorganization of the punitive articles. *See* Articles 79-134, as amended by Sections 5401-5452 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016), as further amended by Section 1081(c) of the National Defense Authorization Act for Fiscal Year 2018, Pub. Law. No. 115-91, 131 Stat. 1283 (2017).

R.C.M. 1004(c)(8) is amended and deletes the reference to forcible sodomy and reflects the reorganization of the punitive articles. *See* Articles 79-134, as amended by Sections 5401-5452 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016), as further amended by Section 1081(c) of the National Defense Authorization Act for Fiscal Year 2018, Pub. Law. No. 115-91, 131 Stat. 1283 (2017).

R.C.M. 1004(c)(9) is deleted.

R.C.M. 1004(c)(11) is amended and reflects the reorganization of the punitive articles. *See* Articles 79-134, as amended by Sections 5401-5452 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016), as further amended by Section 1081(c) of the National Defense Authorization Act for Fiscal Year 2018, Pub. Law. No. 115-91, 131 Stat. 1283 (2017).

R.C.M. 1004(d) is deleted and subsection “(e)” is redesignated as subsection “(d)” and reflects the reorganization of the punitive articles and the removal of the mandatory death penalty for spying. *See* Section 5414 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016)(eliminating mandatory death penalty for spying). *See* Articles 79-134, as amended by Sections 5401-5452 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016), as further amended by Section 1081(c) of the National Defense Authorization Act for Fiscal Year 2018, Pub. Law. No. 115-91, 131 Stat. 1283 (2017).

The Discussion following R.C.M. 1005(a) reads as follows:

Discussion

Instructions should be tailored to the facts and circumstances of the individual case.

The Discussion following R.C.M. 1005(c) reads as follows:

Discussion

Requests for and objections to instructions should be resolved at an Article 39(a) session. *See* R.C.M. 801(e)(1)(C), 803.

The military judge is not required to give the specific instruction requested by counsel if the matter is adequately covered in the instructions.

The military judge should not identify the source of any instruction when addressing the members.

All written requests for instructions should be marked as appellate exhibits, whether or not they are given.

The Discussion following R.C.M. 1005(d) reads as follows:

Discussion

A copy of any written instructions delivered to the members should be marked as an appellate exhibit.

The Discussion following R.C.M. 1005(e)(1) reads as follows:

Discussion

The maximum punishment that may be adjudged is the lowest of the total permitted by the applicable paragraph(s) in Part IV for each separate offense of which the accused was convicted (see also R.C.M. 1003 concerning additional limits on punishments and additional punishments which may be adjudged) or the jurisdictional limit of the court-martial (*see* R.C.M. 201(f) and R.C.M. 1301(d)). In a case involving a plea agreement, the instruction should be tailored to reflect the available range of permissible punishment as set forth in the sentencing limitation, if any. *See* R.C.M. 705. The military judge may upon request or when otherwise appropriate instruct on lesser

punishments. *See* R.C.M. 1003. If an increased punishment is authorized under R.C.M. 1003(d), the members must be informed of the basis for the increased punishment.

A carefully drafted sentence worksheet ordinarily should be used and should include reference to all authorized punishments in the case.

The Discussion following R.C.M. 1005(e)(3) reads as follows:

Discussion

See also R.C.M. 1004 concerning additional instructions required in capital cases.

The Discussion following R.C.M. 1005(e)(4) reads as follows:

Discussion

See also R.C.M. 1002.

The Discussion following R.C.M. 1005(e)(5) reads as follows:

Discussion

For example, tailored instructions on sentencing should reflect the considerations set forth in Article 56(c), including the reputation or record of the accused in the service for good conduct, efficiency, fidelity, courage, bravery, or other traits of good character, and any pretrial restraint imposed on the accused.

The Analysis following R.C.M. 1005 reads as follows:

Analysis

This rule is taken from Rule 1005 of the MCM (2016 edition) with the following amendments:

2018 Amendment: The Discussion after R.C.M. 1005(e)(1) is amended and includes instructions to the members regarding the available range of permissible punishments when a plea agreement contains sentencing limitations.

The discussion after R.C.M. 1005(e)(5) is amended and reflects the terms of Article 56(c), as amended by Section 5301 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016), as further amended by Section 531(e) of the National Defense Authorization Act for Fiscal Year 2018, Pub. Law. No. 115-91, 131 Stat. 1283 (2017).

R.C.M. 1005(e)(6) is new and implements Article 56(c), as amended by Section 5301 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016), as further amended by Section 531(e) of the National Defense Authorization Act for Fiscal Year 2018, Pub. Law. No. 115-91, 131 Stat. 1283 (2017).

R.C.M. 1005(e)(7) is new and allows a military judge to provide additional instructions as may be required.

R.C.M. 1005(f) is amended and changes “waiver” to “forfeiture” when a party fails to object to an instruction or to omission of an instruction before the members close to deliberate on the sentence.

The Discussion following R.C.M. 1006(c) reads as follows:

Discussion

A proposal should state completely each kind and, where appropriate, amount of authorized punishment proposed by that member. For example, a proposal of confinement for life would state whether it is with or is without the eligibility for parole. *See* R.C.M.1003(b)(7).

The Discussion following R.C.M. 1006(d)(3)(B) reads as follows:

Discussion

A sentence adopted by the required number of members may be reconsidered only in accordance with R.C.M. 1009.

The Discussion following R.C.M. 1006(d)(4)(A) reads as follows:

Discussion

See R.C.M. 1004.

The Discussion following R.C.M. 1006(d)(4)(B) reads as follows:

Discussion

In computing the number of votes required to adopt a sentence, any fraction of a vote is rounded up to the next whole number. For example, if there are seven members in a general court-martial because a member has been excused under Article 29, at least six would have to concur to impose a sentence requiring a three-fourths vote.

The Discussion following R.C.M. 1006(e) reads as follows:

Discussion

Ordinarily a sentence worksheet should be provided to the members as an aid to putting the sentence in proper form. If a sentence worksheet has been provided, the military judge should examine it before announcing the sentence. If the military judge intends to instruct the members after such examination, counsel should be permitted to examine the worksheet and to be heard on any instructions the military judge may give.

The president should not disclose any specific number of votes for or against any sentence.

If the sentence is ambiguous or apparently illegal, see R.C.M. 1009.

If the members voted unanimously for a sentence of death, the sentence worksheet shall indicate which aggravating factors under R.C.M. 1004(c) the members unanimously found to exist beyond a reasonable doubt. *See* R.C.M. 1004(b)(8).

The Analysis following R.C.M. 1006 reads as follows:

Analysis

This rule is taken from Rule 1006 of the MCM (2016 edition) with the following amendments:

2018 Amendment: R.C.M. 1006(a) is amended and implements Articles 25 and 53 as amended by Sections 5182 and 5236 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016).

R.C.M. 1006(d)(4)(B) of the MCM (2016 edition) is deleted and R.C.M. 1006(d)(4)(C) is redesignated as (d)(4)(B). This provision and its accompanying Discussion are amended and implement Article 52 as amended by Section 5235 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016).

R.C.M. 1006(d)(6) is new and implements Art 53a, as added by Section 5237 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016), amended by Sections 531(d) and 1081(c)(1)(H) of the National Defense Authorization Act for Fiscal Year 2018, Pub. Law. No. 115-91, 131 Stat. 1283 (2017).

R.C.M. 1006(e) is amended and implements Articles 52, 53, and 56 as amended by Sections 5235, 5236, and

5301 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016). Article 56 was further amended by Section 531(e) of the National Defense Authorization Act for Fiscal Year 2018, Pub. Law. No. 115-91, 131 Stat. 1283 (2017).

The Discussion following R.C.M. 1007(a) reads as follows:

Discussion

The date that the sentence is announced is the date a sentence is adjudged. *See* Articles 53 and 57.

The Discussion following R.C.M. 1007(b)(2)(C) reads as follows:

Discussion

If the sentence announced by the military judge includes death, the military judge must also announce which aggravating factors under R.C.M. 1004(c) the members unanimously found to exist beyond a reasonable doubt. *See* R.C.M. 1004(b)(8).

The Analysis following R.C.M. 1007 reads as follows:

Analysis

This rule is taken from Rule 1007 of the MCM (2016 edition) with the following amendments:

2018 Amendment: R.C.M. 1007(a) and its accompanying Discussion are amended and implement Article 53 as amended by Section 5236 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016), as further amended by Section 1081(c)(1)(G) of the National Defense Authorization Act for Fiscal Year 2018, Pub. Law. No. 115-91, 131 Stat. 1283 (2017).

R.C.M. 1007(b) and its accompanying Discussion are amended and conform with changes made to R.C.M. 1002. This rule reflects the accused's right to elect member sentencing in lieu of military judge sentencing for non-capital offenses and the requirement for the military judge to announce the sentence promptly after it has been determined.

The Discussion following R.C.M. 1008 reads as follows:

Discussion

See R.C.M. 923 Discussion concerning impeachment of findings.

The Analysis following R.C.M. 1008 reads as follows:

Analysis

This rule is taken from Rule 1008 of the MCM (2016 edition) without substantive amendment.

The Discussion following R.C.M. 1009(e)(3)(B)(ii)(II) reads as follows:

Discussion

After a sentence has been adopted by secret ballot in closed session, no other vote may be taken on the sentence unless a vote to reconsider succeeds.

The Analysis following R.C.M. 1009 reads as follows:

Analysis

This rule is taken from Rule 1009 of the MCM (2016 edition) with the following amendments:

2018 Amendment: R.C.M. 1009 and its accompanying Discussion are amended and implement Articles 52 and 53, as amended by Sections 5235 and 5236 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016), regarding reconsideration of the sentence, including in a capital sentencing proceeding.

R.C.M. 1009(b)(3) is new and reflects the addition of Article 53a, as added by Section 5237 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016), as amended by Section 531(d) and 1081(c)(1)(H) of the National Defense Authorization Act for Fiscal Year 2018, Pub. L. No. 115-91, 131 Stat. 1283 (2017).

The Discussion following R.C.M. 1010(d) reads as follows:

Discussion

The post-trial duties of the defense counsel concerning the appellate rights of the accused are set forth in paragraph (E)(iv) of the Discussion accompanying R.C.M. 502(d)(5). The defense counsel shall explain the appellate rights to the accused and prepare the written document of such advisement prior to or during trial.

The Analysis following R.C.M. 1010 reads as follows:

Analysis

This rule is taken from Rule 1010 of the MCM (2016 edition) with the following amendments:

2018 Amendment: R.C.M. 1010 is amended and implements Articles 60a, 60b, 61, 64-67, and 69, as amended by Sections 5322, 5323, 5325, 5328, 5329, 5330, 5331, and 5333 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016), regarding appellate procedure.

The Discussion following R.C.M. 1010(d) is amended and corrects a cross-reference.

The Discussion following R.C.M. 1011 reads as follows:

Discussion

A court-martial and its personnel have certain powers and responsibilities following the trial. *See, e.g.*, R.C.M. 502(d)(4) Discussion (G), 502(d)(5) Discussion (E), 808, 1007, 1009, Chapter XI.

The Analysis following R.C.M. 1011 reads as follows:

Analysis

This rule is taken from Rule 1011 of the MCM (2016 edition) without substantive amendment. The Discussion accompanying R.C.M. 1011 is amended and corrects a cross-reference.

CHAPTER XI. POST-TRIAL PROCEDURE

The Discussion following R.C.M. 1101(a)(2)(C) reads as follows:

Discussion

The date that the sentence is adjudged is the date the sentence was announced. *See* Articles 53 and 57. The adjudged sentence may be modified by the convening authority or the military judge. *See generally* R.C.M. 1104, R.C.M. 1109, and R.C.M. 1110.

See R.C.M. 1002(d)(2) for military judge alone sentencing and R.C.M. 1002(e)(2) for sentencing in capital cases by military judge and members.

The Discussion following R.C.M. 1101(a)(5)(C) reads as follows:

Discussion

The convening authority may only suspend a sentence of dishonorable discharge, bad-conduct discharge, or confinement in excess of six months if the military judge includes a recommendation for suspension in the Statement of Trial Results. *See* R.C.M. 1109(f). When the accused is sentenced by members, the members may recommend suspension of punitive discharge or confinement in excess of six months, but the convening authority may only act to suspend these punishments if the military judge adopts the suspension recommendation and includes it in the Statement of Trial Results.

The Discussion following R.C.M. 1101(c) reads as follows:

Discussion

The issuance of an explanation of the reasons for abatement does not prevent a later termination of the abatement.

The Discussion following R.C.M. 1101(d) reads as follows:

Discussion

See R.C.M. 1104(b) addressing post-trial motions and proceedings to resolve allegations of error in a Statement of Trial Results.

For the definition of “crime victim,” see R.C.M. 1001(c)(2)(A). However, in this provision, a copy of the Statement of Trial Results shall be provided to any crime victim without regard to whether the accused was convicted or acquitted of any offense.

The Analysis following R.C.M. 1101 reads as follows:

Analysis

2018 Amendment: R.C.M. 1101 (“Report of result of trial; post-trial restraint; deferment of confinement, forfeitures and reduction in grade; waiver of Article 58b forfeitures”) of the MCM (2016 edition) is deleted.

R.C.M. 1101 (“Statement of trial results”) and its accompanying Discussion are new. R.C.M. 1101 implements Article 60, as amended by Section 5321 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016), regarding the requirement that the military judge of a general or special court-martial enter into the record of trial a document entitled “Statement of Trial Results.”

The Discussion following R.C.M. 1102(a)(1) reads as follows:

Discussion

Except for a punishment of death or dismissal, the sentence of a general or special court-martial is not required to be approved or ordered executed in order to take effect.

The Discussion following R.C.M. 1102(b)(1)(A)(ii) reads as follows:

Discussion

The date that the sentence is adjudged is the date the sentence was announced. *See* Articles 53 and 57.

The Discussion following R.C.M. 1102(b)(1)(B) reads as follows:

Discussion

An accused who is required to perform duties may not, as a result of a court-martial sentence, be deprived of more than two-thirds of pay while in such a status. This rule does not prohibit other deductions or withholdings from an accused's pay and allowances.

The Discussion following R.C.M. 1102(b)(2)(D) reads as follows:

Discussion

When an accused is convicted of two or more charges or specifications and sentencing is conducted in accordance with R.C.M. 1002(d)(2) or (e)(2), the military judge must specifically state whether multiple terms of confinement for such offenses are to run concurrently or consecutively. *See* R.C.M. 1101.

Whether two or more terms of confinement should run concurrently is a matter of judicial discretion. *See* R.C.M. 1002.

The Analysis following R.C.M. 1102 reads as follows:

Analysis

2018 Amendment: R.C.M. 1102 ("Post-trial Sessions") of the MCM (2016 edition) is deleted.

R.C.M. 1102 ("Execution and effective date of sentences") and its accompanying Discussion are new. R.C.M. 1102 implements Articles 57 and 60-60c, as amended by Sections 5302, 5321, 5322, 5323 and 5324 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016), regarding the execution and effective date of sentences.

The Discussion following R.C.M. 1103(f)(3) reads as follows:

Discussion

Forfeitures resulting by operation of law, rather than those adjudged as part of a sentence, may be waived for six months or for the duration of the period of confinement, whichever is less. The waived forfeitures are paid as support to dependent(s) designated by the convening authority. When directing waiver and payment, the convening authority should identify by name the dependent(s) to whom the payments will be made and state the number of months for which the waiver and payment shall apply. In cases where the amount to be waived and paid is less than the jurisdictional limit of the court, the monthly dollar amount of the waiver and payment should be stated.

Reductions in grade resulting by operation of law may not be deferred.

The Analysis following R.C.M. 1103 reads as follows:

Analysis

2018 Amendment: R.C.M. 1103 (“Preparation of record of trial”) of the MCM (2016 edition) as amended by Exec. Order No. 13825, 83 Fed. Reg. 9889 (March 1, 2018), is deleted.

R.C.M. 1103 (“Deferment of confinement, forfeitures, and reduction in grade; waiver of Article 58b forfeitures”) and its accompanying Discussion are new. R.C.M. 1103 implements Article 57(b), as amended by Section 5302 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016).

R.C.M. 1103 also incorporates portions of R.C.M. 1101 and 1107 of the MCM (2016 edition), regarding deferment of confinement, forfeitures, and reduction in grade, as well as waiver of Article 58b forfeitures.

The Analysis following Rule 1103A. [Deleted] reads as follows:

Analysis

2018 Amendment: R.C.M. 1103A (“Sealed exhibits and proceedings”) of the MCM (2016 edition) as amended by Exec. Order No. 13825, 83 Fed. Reg. 9889 (March 1, 2018), and its accompanying Discussion are deleted and its provisions are incorporated into R.C.M. 1113.

The Discussion following R.C.M. 1104(a)(1) reads as follows:

Discussion

A post-trial session with members requires calling the court to order, and is not a post-trial Article 39(a) session.

The Analysis following R.C.M. 1104 reads as follows:

Analysis

2018 Amendment: R.C.M. 1104 (“Records of trial: Authentication; service; loss; correction; forwarding”) of the MCM (2016 edition) and its accompanying Discussion are deleted.

R.C.M. 1104 (“Post-trial motions and proceedings”) and its accompanying Discussion are new. R.C.M. 1104 implements the provisions of Articles 60-60c, as amended by Sections 5321, 5322, 5323, and 5324 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016), and authorizes the filing of post-trial motions before entry of judgment.

R.C.M. 1104 also incorporates portions of R.C.M. 1102 of the MCM (2016 edition).

The Analysis following R.C.M. 1105 reads as follows:

Analysis

2018 Amendment: RCM 1105 (“Matters submitted by the accused”) of the MCM (2016 edition) and its accompanying Discussion are deleted.

R.C.M. 1105 (“Post-trial hearing for person found not guilty only by reason of lack of mental responsibility”) is new and incorporates R.C.M. 1102A of the MCM (2016 edition) regarding a post-trial hearing for a person found not guilty only by reason of lack of mental responsibility without substantive amendments.

The Discussion following R.C.M. 1106(b)(2) reads as follows:

Discussion

See also R.C.M. 1109(d)(3)(C)(ii). For purposes of this provision, the term “crime victim” has the same meaning as the term “victim of an offense under this chapter” in Article 6b.

The Discussion following R.C.M. 1106(c) reads as follows:

Discussion

The record of trial is not certified until after entry of judgment. This rule allows the defense to have access to the court-martial recordings and evidence in a timely manner in order to submit matters to the convening authority for consideration in deciding whether to take action on either the findings or sentence. *See* R.C.M. 1109 and 1110.

The Discussion following R.C.M. 1106(d)(4)(B) reads as follows:

Discussion

If at the time a victim makes a submission under R.C.M. 1106A the accused has not yet made a submission, the accused’s submission may include any matters permitted by R.C.M. 1106(b) in addition to matters in rebuttal under R.C.M. 1106(d)(1)(3).

The Analysis following R.C.M. 1106 reads as follows:

Analysis

2018 Amendment: R.C.M. 1106 (“Recommendation of the staff judge advocate or legal officer”) of the MCM (2016 edition) and its accompanying Discussion are deleted.

R.C.M. 1106 (“Matters submitted by the accused”) and its accompanying Discussion are new and incorporate portions of R.C.M. 1105 of the MCM (2016 edition) addressing the post-trial submission of matters to the convening authority by the accused.

The Discussion following R.C.M. 1106A(c)(2)(A) reads as follows:

Discussion

See R.C.M. 1109(d)(3)(C)(i).

The Discussion following R.C.M. 1106A(c)(2)(B) reads as follows:

Discussion

A convening authority is not required to consider matters submitted outside the single submission or outside the prescribed time limitations, and may not consider matters adverse to the accused without providing the accused an opportunity to respond. *See* R.C.M. 1109(d)(3)(C)(i).

The Discussion following R.C.M. 1106A(c)(3) reads as follows:

Discussion

See R.C.M. 1106(d)(3).

The Discussion following R.C.M. 1106A(d) reads as follows:

Discussion

The record of trial is not certified until after entry of judgment. This rule allows the victim to have access to the court-martial recordings and evidence in a timely manner in order to submit matters to the convening authority for consideration.

The Analysis following R.C.M. 1106A reads as follows:

Analysis

2018 Amendment: R.C.M. 1106A and its accompanying Discussion are new and incorporate portions of R.C.M. 1105A of the MCM (2016 edition) addressing the post-trial submission of matters by the crime victim to the convening authority.

The Analysis following R.C.M. 1107 reads as follows:

Analysis

2018 Amendment: R.C.M. 1107 (“Action by convening authority”) of the MCM (2016 edition) and its accompanying Discussion are deleted.

R.C.M. 1107 (“Suspension of execution of sentence; remission”) is new and implements Articles 60-60c, as amended by Sections 5321, 5322, 5323, and 5324 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016), regarding suspension of a sentence and the remission of a sentence in limited circumstances.

The rule incorporates portions of R.C.M. 1108 of the MCM (2016 edition).

The Discussion following R.C.M. 1108(d)(3)(C) reads as follows:

Discussion

A hearing officer may not order the production of any privileged matters.

The Discussion following R.C.M. 1108(d)(3)(D) reads as follows:

Discussion

See R.C.M. 807. The hearing officer is required to include in the record of the hearing, at a minimum, a summary of the substance of all testimony.

The Discussion following R.C.M. 1108(d)(3)(J) reads as follows:

Discussion

The term “victim” has the same meaning as the term “victim of an offense under this chapter” in Article 6b.

The Analysis following R.C.M. 1108 reads as follows:

Analysis

2018 Amendment: R.C.M. 1108 (“Suspension of execution of sentence; remission”) of the MCM (2016 edition) and its accompanying Discussion are deleted.

R.C.M. 1108 (“Vacation of suspension of sentence”) and its accompanying Discussion are new, R.C.M. 1108 implements Articles 60-60c and 72 as amended by Sections 5321, 5322, 5323, 5324, and 5335 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016), regarding procedures for the vacation of a suspension of a sentence.

R.C.M. 1108 incorporates portions of R.C.M. 1109 of the MCM (2016 edition).

The Discussion following R.C.M. 1109(a)(2)(B) reads as follows:

Discussion

The applicability of R.C.M. 1109(a)(2)(B) is determined by assessing the total amount of confinement that is to be served. In a case where the military judge determined the sentence of the accused, the total amount of confinement is based upon the military judge’s determination as to whether any terms of confinement are to run concurrently or consecutively. For instance, if the military judge determines that all terms of confinement are to be served concurrently and the total amount of confinement is six months or less, R.C.M. 1109(a)(2)(B) does not apply. If, however, the military judge determines that two or more terms of confinement are to be served consecutively and the total amount of confinement is more than six months, R.C.M. 1109(a)(2)(B) applies.

The Discussion following R.C.M. 1109(c)(2) reads as follows:

Discussion

See the Discussion following R.C.M. 1109(a)(2)(B).

The Discussion following R.C.M. 1109(c)(5)(A) reads as follows:

Discussion

See the Discussion following R.C.M. 1109(a)(2)(B).

The Discussion following R.C.M. 1109(d)(3)(B)(i) reads as follows:

Discussion

See R.C.M. 1104(b) addressing post-trial motions and proceedings to resolve allegations of error in a Statement of Trial Results.

The Discussion following R.C.M. 1109(d)(3)(C)(ii) reads as follows:

Discussion

For purposes of this provision, the term “crime victim” has the same meaning as “victim of an offense under this

chapter” in Article 6b.

The Discussion following R.C.M. 1109(h) reads as follows:

Discussion

See R.C.M. 1104(b) addressing post-trial motions and proceedings to resolve allegations of error in the convening authority’s action under R.C.M. 1109. For purposes of this provision, the term “crime victim” has the same meaning as in R.C.M. 1106A(b)(2).

The Analysis following R.C.M. 1109 reads as follows:

Analysis

2018 Amendment: R.C.M. 1109 (“Vacation of suspension of sentence”) of the MCM (2016 edition), as amended by Exec. Order No. 13825, 83 Fed. Reg. 9889 (March 1, 2018), and its accompanying Discussion, are deleted.

R.C.M. 1109 (“Reduction of Sentence, general and special courts-martial”) and its accompanying Discussion are new. R.C.M. 1109 implements Articles 60-60c, as amended by Sections 5321, 5322, 5323, and 5324 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016), regarding the reduction of a sentence in specified general or special court-martials.

R.C.M. 1109 incorporates portions of R.C.M. 1107 of the MCM (2016 edition).

The Discussion following R.C.M. 1110(e)(3) reads as follows:

Discussion

See R.C.M. 1104(b) addressing post-trial motions and proceedings to resolve allegations of error in the convening authority’s action under R.C.M. 1110.

The Analysis following R.C.M. 1110 reads as follows:

Analysis

2018 Amendment: R.C.M. 1110 (“Waiver or withdrawal of appellate review”) of the MCM (2016 edition) and its accompanying Discussion are deleted.

R.C.M. 1110 (“Action by convening authority in certain general and special courts-martial”) and its accompanying Discussion are new. R.C.M. 1110 implements Articles 60-60c, as amended by Sections 5321, 5322, 5323, and 5324 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016), regarding the action that the convening authority may take in certain general and special courts-martial.

R.C.M. 1110 incorporates portions of R.C.M. 1107 of the MCM (2016 edition).

The Discussion following R.C.M. 1111(b)(2)(C)(ii) reads as follows:

Discussion

The date that the sentence is adjudged is the date the sentence was announced. *See* Articles 53 and 57. The adjudged sentence may be modified by the convening authority or the military judge. *See generally* R.C.M. 1104, R.C.M. 1107, R.C.M. 1109, and R.C.M. 1110.

See R.C.M. 1002(d)(2) for military judge alone sentencing and R.C.M. 1002(e)(2) for sentencing in capital cases by military judge and members.

The Discussion following R.C.M. 1111(b)(4) reads as follows:

Discussion

See Article 60 and R.C.M. 1101. The judgment of the court entered under this rule should provide a complete statement of the findings and the sentence reflecting the effect of any post-trial modifications. The judgment of the court should avoid using phrases such as “exceptions” and “substitutions” to reflect post-trial actions. Such a formulation is not an appropriate substitute for a complete statement of the findings and sentence.

The Discussion following R.C.M. 1111(f)(3) reads as follows:

Discussion

For the definition of “crime victim,” see R.C.M. 1001(c)(2)(A). However, in this provision, a copy of the Statement of Trial Results shall be provided to any crime victim without regard to whether the accused was convicted or acquitted of any offense.

The Analysis following R.C.M. 1111 reads as follows:

Analysis

2018 Amendment: R.C.M. 1111 (“Disposition of the record of trial after action”) of the MCM (2016 edition) and its accompanying Discussion are deleted.

R.C.M. 1111 (“Entry of judgment”)) and its accompanying Discussion are new. R.C.M. 1111 implements Articles 60c and 63, as added by Sections 5324 and 5327 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016). Article 63 was amended by Section 531(i) of the National Defense Authorization Act for Fiscal Year 2018, Pub. L. No. 115-91, 131Stat. 1283 (2017).

The entry of judgment replaces the action by the convening authority as the means by which the trial proceedings terminate and the appellate process begins. The judgment replaces the promulgating order as the document that reflects the outcome of the court-martial.

The Discussion following R.C.M. 1112(a) reads as follows:

Discussion

Video and audio recording and the taking of photographs in the courtroom are permitted only for the purpose of preparing the record of trial or as permitted by R.C.M. 806(c). Spectators, witnesses, counsel for the accused and counsel for victims are not permitted to make video or audio recordings or to take photographs in the courtroom.

The Discussion following R.C.M. 1112(d)(3)(D) reads as follows:

Discussion

Where there is an electronic or digital recording failure or loss of court reporter notes, the record should be reconstructed as completely as possible. If the interruption is discovered during trial, the military judge should summarize or reconstruct the portion of the proceedings which has not been recorded. If both parties agree to the summary or reconstruction of the proceedings, the proceedings may continue. If either party objects to the summary or reconstruction, the trial should proceed anew, and the proceedings repeated from the point where the interruption began.

The Discussion following R.C.M. 1112(e)(1)(C) reads as follows:

Discussion

The term “victim” has the same meaning as the term “victim of an offense under this chapter” in Article 6b. The record of trial includes only those items listed in R.C.M. 1112(b).

The Discussion following R.C.M. 1112(e)(3)(B)(ii) reads as follows:

Discussion

Once classified information, sealed exhibits, and closed sessions are removed, the record of trial should ordinarily consist of the public proceedings of a court-martial, and should ordinarily contain public matters not subject to further redaction. In all cases, redactions should be in compliance with R.C.M. 1112(e)(4). If the terms of the sealing order permit, the court reporter may disclose to the individual being provided the record of trial those portions that the military judge has deemed appropriate for such disclosure in the sealing order.

The Discussion following R.C.M. 1112(f)(9) reads as follows:

Discussion

The record of trial and attachments may include electronic versions of any matters.

The Analysis following R.C.M. 1112 reads as follows:

Analysis

2018 Amendment: R.C.M. 1112 (“Review by a judge advocate”) of the MCM (2016 edition) and its accompanying Discussion are deleted.

R.C.M. 1112 (“Certification of record of trial; general and special courts-martial”) and its accompanying Discussion are new. R.C.M. 1112 implements Articles 54 and 60-60c, as amended by Sections 5238, 5321, 5322, 5323, and 5324 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016), providing for the certification and contents of records of trial in general and special courts-martial.

R.C.M. 1112 incorporates portions of R.C.M. 1103 of the MCM (2016 edition).

The Discussion following R.C.M. 1112(e)(3)(B)(iii) reflects that the terms of a sealing order may authorize listed persons or entities to examine or receive disclosure of sealed materials outside of the procedures set forth in R.C.M. 1113(b).

The Discussion following R.C.M. 1113(a) reads as follows:

Discussion

Upon request or otherwise for good cause, a military judge may seal matters at his or her discretion. The terms “examination” and “disclosure” are defined in R.C.M. 1113(b)(4) and (5).

The Discussion following R.C.M. 1113(b) reads as follows:

Discussion

The terms of the sealing order may provide parameters for examination by or disclosure to those persons or entities whose interests are being protected.

The Discussion following R.C.M. 1113(b)(2) reads as follows:

Discussion

A convening authority who has granted clemency based upon review of sealed materials in the record of trial is not permitted to disclose the contents of the sealed materials when providing a written explanation of the reason for such action, as directed under R.C.M. 1109 or 1110.

The Discussion following R.C.M. 1113(b)(3)(B)(ii) reads as follows:

Discussion

For disclosure procedures, see R.C.M. 1113(b)(3)(C).

The Discussion following R.C.M. 1113(b)(3)(C)(ii) reads as follows:

Discussion

In general, the Judge Advocate General or an appellate court should authorize disclosure of sealed material when such disclosure is necessary for review. Authorizations may place conditions on disclosure.

The Analysis following R.C.M. 1113 reads as follows:

Analysis

2018 Amendment: R.C.M. 1113 (“Execution of sentences”) of the MCM (2016 edition) and its accompanying Discussion are deleted.

R.C.M. 1113 (“Sealed exhibits and proceedings”) and its accompanying Discussion are new and incorporate R.C.M. 1103A of the MCM (2016 edition) as amended by Exec. Order No. 13825, 83 Fed. Reg. 9889 (March 1, 2018). R.C.M. 1113(b) conforms to changes in R.C.M. 1112(c) regarding certification of records of trial.

The Discussion following R.C.M. 1113(b) is new and reflects that the terms of a sealing order may authorize listed persons or entities to examine or receive disclosure of sealed materials outside of the procedures set forth in R.C.M. 1113(b).

The Discussion following R.C.M. 1114(a)(2) reads as follows:

Discussion

See R.C.M. 1116(b) regarding transcription of the record when a case is forwarded to appellate defense counsel.

The Discussion following R.C.M. 1114(b)(2) reads as follows:

Discussion

See R.C.M. 1106 and 1106A regarding providing the record to the accused, a victim, or their counsel. When a

certified transcript is prepared, the accused, counsel, or victim may request or be provided a copy to the same extent and under the same criteria as the applicable portion of the record.

The Analysis following R.C.M. 1114 reads as follows:

Analysis

2018 Amendment: R.C.M. 1114 (“Promulgating orders”) of MCM (2016 edition) and its accompanying Discussion are deleted.

R.C.M. 1114 (“Transcription of proceedings”) and its accompanying Discussion are new. R.C.M. 1114 implements Article 54(c), as amended by Section 5238 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016), regarding the contents of a record of trial.

The Discussion following R.C.M. 1115(a) reads as follows:

Discussion

Unless an accused affirmatively waives or withdraws an appeal in accordance with this rule, all general and special courts-martial in which the judgment entered into the record includes a sentence of death; dismissal of a commissioned officer, cadet, or midshipman; dishonorable discharge; bad-conduct discharge; or confinement for two or more years receive automatic appellate review by a Court of Criminal Appeals. *See* Article 66(b)(3). All other general and special courts-martial not subject to automatic appellate review are eligible for direct appellate review by a Court of Criminal Appeals upon the appeal of the accused if the judgment entered into the record includes confinement for more than six months. *See* Article 66(b)(1). General and special courts-martial not eligible for appellate review by a Court of Criminal Appeals, or in which appellate review is waived, withdrawn, or an appeal is not filed under Article 66(b)(1), are reviewed by an attorney under R.C.M. 1201. After the attorney’s review under R.C.M. 1201, such cases may also be submitted to the Judge Advocate General by application of the accused for post-final review. *See* R.C.M. 1201(h).

The Discussion following R.C.M. 1115(b)(5) reads as follows:

Discussion

See R.C.M. 1112(f) for required attachments to the record of trial.

The Discussion following R.C.M. 1115(d)(4) reads as follows:

Discussion

See Appendix 13 or Appendix 14 for samples of forms.

The Analysis following R.C.M. 1115 reads as follows:

Analysis

R.C.M. 1115 (“Waiver or withdrawal of appellate review”) and its accompanying Discussion are new and are taken from Rule 1110 of the MCM (2016 edition) with the following amendments:

2018 Amendment: R.C.M. 1115 and its accompanying Discussion are new. R.C.M. 1115 implements Article 61, as amended by Section 5325 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016), regarding waiver or withdrawal of appellate review.

The Discussion following R.C.M. 1116(b)(1) reads as follows:

Discussion

See R.C.M. 1203(b).

The Discussion following R.C.M. 1116(b)(1)(C) reads as follows:

Discussion

An accused may not waive or withdraw the right to appellate review before the Court of Criminal Appeals of any general court-martial in which the judgment includes a sentence of death. *See* Article 61, R.C.M. 1115.

See R.C.M. 1114 regarding the procedure for preparing and obtaining certified transcripts of all or a portion of the record. If a transcription is provided in digital format, the Government shall ensure that the recipient has an appropriate means of reading the transcription.

See R.C.M. 1112 and 1113 regarding access to classified and sealed matters. See R.C.M. 1201(a)(2) for review by an attorney of those cases eligible for appellate review by the Court of Criminal Appeals, but where the accused waives the right to appeal, withdraws an appeal, or fails to file a timely appeal. See R.C.M. 1202 concerning representation of the accused by appellate counsel before the appellate courts. See R.C.M. 1203 concerning review by the Court of Criminal Appeals and the powers and responsibilities of the Judge Advocate General after such review.

The Discussion following R.C.M. 1116(b)(2) reads as follows:

Discussion

See R.C.M. 1115 for rules regarding the waiver or withdrawal of appellate review. See R.C.M. 1203 for rules concerning appellate review by a Court of Criminal Appeals.

The Discussion following R.C.M. 1116(c) reads as follows:

Discussion

See R.C.M. 1201(a)(1); and R.C.M. 1203(b) and (c).

The Discussion following R.C.M. 1116(d) reads as follows:

Discussion

See R.C.M. 1115, R.C.M. 1201(a)(2), and R.C.M. 1203(c).

The Analysis following R.C.M. 1116 reads as follows:

Analysis

2018 Amendment: R.C.M. 1116 (“Transmittal of records of trial for general and special courts-martial”) and its accompanying Discussion are new. R.C.M. 1116 implements Articles 65 and 66, as amended by Sections 5329 and 5330 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016), regarding the transmittal of records of trial in general and special courts-martial to the Judge Advocate General and the Courts of Criminal Appeals. Article 66 was further amended by Sections 531(j) and 1081(c)(1)(K) of the National Defense Authorization Act for Fiscal Year 2018, Pub. Law. No. 115-91, 131 Stat. 1283 (2017).

The Discussion following R.C.M. 1117(d)(3)) reads as follows:

Discussion

For Appellant's right to counsel in cases reviewed by a Court of Criminal Appeals, see R.C.M. 1202. For action on cases following review by a Court of Criminal Appeals, see R.C.M. 1203(e).

The Analysis following R.C.M. 1117 reads as follows:

Analysis

2018 Amendment. R.C.M. 1117 ("Appeal of sentence by the United States") and its accompanying Discussion are new. R.C.M. 1117 implements Article 56(d), as added by Section 5301 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016), as amended by Section 531(e) of the National Defense Authorization Act for Fiscal Year 2018, Pub. Law. No. 115-91, 131 Stat. 1283 (2017).

CHAPTER XII. APPEALS AND REVIEW

The Discussion following R.C.M. 1201(a)(1) reads as follows:

Discussion

See R.C.M. 1203(b) and (c).

The Discussion following R.C.M. 1201(a)(2)(A) reads as follows:

Discussion

See R.C.M. 1203(b).

The Discussion following R.C.M. 1201(a)(2)(B) reads as follows:

Discussion

See R.C.M. 1307 for judge advocate review of summary courts-martial.

The Discussion following R.C.M. 1201(f)(4) reads as follows:

Discussion

See R.C.M. 1111 for modification of the judgment to reflect any action by the Judge Advocate General or convening authority under this rule.

The Discussion following R.C.M. 1201(h)(4)(B) reads as follows:

Discussion

If the Judge Advocate General determines that the waiver, withdrawal, or failure to file an appeal was invalid, the Judge Advocate General may order any corrective action, including forwarding the case to the Court of Criminal Appeals for appropriate appellate review.

See also R.C.M. 1210 concerning a petition for a new trial in any case, including a case where the accused waived or withdrew from appellate review, or failed to file an appeal.

Review of a case by a Judge Advocate General under this subsection is not part of appellate review within the meaning of Article 76 or R.C.M. 1209.

Review of a finding of not guilty only by reason of lack of mental responsibility under this rule may not extend to the determination of lack of mental responsibility. Thus, modification of a finding of not guilty only by reason of lack of mental responsibility under this rule is limited to changing the finding to not guilty or not guilty only by reason of lack of mental responsibility of a lesser included offense.

The Discussion following R.C.M. 1201(k)(1)(B)(ii) reads as follows:

Discussion

See R.C.M. 1203.

The Analysis following R.C.M. 1201 reads as follows:

Analysis

This rule is taken from Rule 1201 of the MCM (2016 edition) with the following amendments:

2018 Amendment: R.C.M. 1201 and its accompanying Discussion are amended. R.C.M. 1201 implements Articles 65, 66, and 69, as amended by Sections 5329, 5330, and 5333 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016), regarding the post-trial review of certain records of trial by the Judge Advocate General. Article 66 was further amended by Sections 531(j) of and 1081(c)(1)(K) of the National Defense Authorization Act for Fiscal Year 2018, Pub. Law. No. 115-91, 131 Stat. 1283 (2017).

The Discussion following R.C.M. 1202(b)(2)(A) reads as follows:

Discussion

See R.C.M. 1203(c) and R.C.M. 1115.

The Discussion following R.C.M. 1202(b)(2)(B)(i) reads as follows:

Discussion

See Article 65(b) and Article 61.

The Discussion following R.C.M. 1202(b)(2)(B)(iii) reads as follows:

Discussion

For a discussion of the accused's right to detailed appellate defense counsel in any case eligible for review at the Court of Criminal Appeals, see R.C.M. 1202. See R.C.M. 1204(b)(1) concerning detailing counsel with respect to the right to appeal to the Court of Appeals for the Armed Forces for review. For a discussion of the duties of the trial defense counsel concerning post-trial and appellate matters, see R.C.M. 502(d)(5) Discussion (E). Appellate defense counsel may communicate with trial defense counsel concerning the case. *See also* Mil. R. Evid. 502 (privileges).

If all or part of the findings and sentence are affirmed by the Court of Criminal Appeals, appellate defense counsel should advise the accused whether the accused should petition for further review in the United States Court of Appeals for the Armed Forces and concerning which issues should be raised.

The accused may be represented by civilian counsel before the Court of Criminal Appeals, the Court of Appeals for the Armed Forces, and the Supreme Court. Civilian counsel may represent the accused before these courts in addition to or instead of military counsel.

If, after any decision of the Court of Appeals for the Armed Forces, the accused may apply for a writ of certiorari (*see* R.C.M. 1205), appellate defense counsel should advise the accused whether to apply for review by the Supreme Court and which issues might be raised. If authorized to do so by the accused, appellate defense counsel may prepare and file a petition for a writ of certiorari on behalf of the accused.

The accused has no right to select appellate defense counsel. Under some circumstances, however, the accused may be entitled to request that the detailed appellate defense counsel be replaced by another appellate defense counsel.

The Discussion following R.C.M. 1202(c) reads as follows:

Discussion

See R.C.M. 502(d)(2)(C) concerning the qualifications for counsel learned in the law applicable to capital cases.

The Analysis following R.C.M. 1202 reads as follows:

Analysis

This rule is taken from Rule 1202 of the MCM (2016 edition) with the following amendments:

2018 Amendment: R.C.M. 1202(b)(2)(A) is amended and implements Article 65, as amended by Section 5329 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016), as further amended by Section 1081(c)(1)(J) of the National Defense Authorization Act for Fiscal Year 2018, Pub. Law. No. 115-91, 131 Stat. 1283 (2017), addressing the requirement to detail appellate defense counsel to review cases eligible for direct appeal.

R.C.M. 1202(c) and its accompanying Discussion are new. R.C.M. 1202(c) implements Article 70, as amended by Section 5334 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016), addressing the requirements regarding counsel learned in the law applicable to capital cases.

The Discussion following R.C.M. 1203(a) reads as follows:

Discussion

See Article 66 concerning the composition of the Courts of Criminal Appeals, the qualifications of appellate military judges, the grounds for their ineligibility, and restrictions upon the official relationship of the members of the court to other members. Uniform rules of court for the Courts of Criminal Appeals are prescribed by the Judge Advocates General.

The Discussion following R.C.M. 1203(b) reads as follows:

Discussion

See R.C.M. 1116(b)(1).

Except for when an accused waives or withdraws the right to appellate review, a Court of Criminal Appeals automatically reviews cases in which the judgment entered into the record includes a sentence of death; dismissal of a commissioned officer, cadet, or midshipman; dishonorable discharge; bad-conduct discharge; or confinement for 2 years or more. *See* Article 65(b)(1), Article 66(b)(3), R.C.M. 1116(b)(1).

An accused may not waive the right to appellate review or withdraw an appeal before the Court of Criminal Appeals in any general court-martial in which the judgment includes a sentence of death. *See* R.C.M. 1115.

The Discussion following R.C.M. 1203(c) reads as follows:

Discussion

The Court of Criminal Appeals may specify additional issues for briefing, argument, and decision, and may review eligible cases for plain error. See R.C.M. 1115 for waiver of appellate review or withdrawal of an appeal. In those cases in which an accused chooses not to file an appeal, the case will be reviewed by an attorney under R.C.M. 1201(a)(2).

If a Court of Criminal Appeals sets aside any findings of guilty or the sentence, it may, except as to findings set aside for lack of sufficient evidence in the record to support the findings, order an appropriate type of rehearing or reassess the sentence as appropriate. See R.C.M. 810 concerning rehearings. If the Court of Criminal Appeals sets aside all the findings and the sentence and does not order a rehearing, it must order the charges dismissed. *See* Article 59(a) and Article 66.

A Court of Criminal Appeals may on petition for extraordinary relief issue all writs necessary or appropriate in aid of its jurisdiction and agreeable to the usages and principles of law. Any party may petition a Court of Criminal Appeals for extraordinary relief.

See R.C.M. 908 concerning procedures for interlocutory appeals by the Government. See R.C.M. 1117 concerning Government appeals of certain sentences.

The Discussion following R.C.M. 1203(e)(1) reads as follows:

Discussion

Prior to forwarding a case to the Court of Appeals for the Armed Forces for review, the Judge Advocate General concerned is required to provide appropriate notification to the other Judge Advocates General and the Staff Judge Advocate to the Commandant of the Marine Corps. *See* Article 67(a)(2) and R.C.M. 1204(a)(2).

When a decision of the Court of Criminal Appeals has the effect of setting aside confinement the appellant is serving, and the Judge Advocate General has decided to forward the decision of the Court of Criminal Appeals to the Court of Appeals for the Armed Forces for review under this rule, a new R.C.M. 305 review may be required if continued confinement is sought.

The Discussion following R.C.M. 1203(e)(2) reads as follows:

Discussion

If charges are dismissed, see R.C.M. 1208 concerning restoration of rights, privileges, and property. See R.C.M. 1111 concerning the entry of judgment.

The Discussion following R.C.M. 1203(e)(4) reads as follows:

Discussion

If charges are dismissed, see R.C.M. 1208 concerning restoration of rights, privileges, and property. See R.C.M. 1111 concerning the entry of judgment.

The Discussion following R.C.M. 1203(f)(1) reads as follows:

Discussion

The accused may be notified personally, or a copy of the decision may be sent, after service on appellate counsel of record, if any, by first class certified mail to the accused at an address provided by the accused or, if no such address has been provided by the accused, at the latest address listed for the accused in the accused's official service record.

If the Judge Advocate General has forwarded the case to the Court of Appeals for the Armed Forces, the accused should be so notified.

The Discussion following R.C.M. 1203(f)(2)(B) reads as follows:

Discussion

See Article 67(c); *see also* R.C.M. 1204(b).

The Discussion following R.C.M. 1203(g)(2) reads as follows:

Discussion

See R.C.M. 1102, 1206, and Article 74(a) concerning the authority of the Secretary and others to take action.

The Analysis following R.C.M. 1203 reads as follows:

Analysis

This rule is taken from Rule 1203 of the MCM (2016 edition) with the following amendments:

2018 Amendment: R.C.M. 1203 and its accompanying Discussion are amended. R.C.M. 1203 implements Articles 65, 66, and 69, as amended by Sections 5329, 5330, and 5333 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016), regarding review by a Court of Criminal Appeals and minimum tour lengths for appellate military judges. Article 66 was further amended by Sections 531(j) of and 1081(c)(1)(K) of the National Defense Authorization Act for Fiscal Year 2018, Pub. Law. No. 115-91, 131 Stat. 1283 (2017).

The Discussion following R.C.M. 1204(a)(3) reads as follows:

Discussion

See Article 67(a)(2) on the notification requirement when the Judge Advocate General orders a case sent to the Court under R.C.M. 1204(a)(2). Notification ensures that the views of each of the Judge Advocates General and the Staff Judge Advocate to the Commandant of the Marine Corps are taken into consideration before the certification process is used to present a case to the Court of Appeals for the Armed Forces.

The Discussion following R.C.M. 1204(b)(1) reads as follows:

Discussion

See R.C.M. 1202 for duties of appellate defense counsel.

The Discussion following R.C.M. 1204(b)(2) reads as follows:

Discussion

See Article 67(b) and R.C.M. 1203(f)(2) concerning notifying the accused of the right to petition the Court of Appeals for the Armed Forces for review and the time limits for submitting a petition. *See also* the rules of the Court of Appeals for the Armed Forces concerning when the time for filing a petition begins to run and when a petition is now timely.

The Discussion following R.C.M. 1204(c)(1) reads as follows:

Discussion

See R.C.M. 1111 concerning modification of the judgment in the case. *See also* R.C.M. 1206 and Article 74(a).

The Discussion following R.C.M. 1204(c)(2)(C) reads as follows:

Discussion

See Article 57(a)(3) and R.C.M. 1207.

The Discussion following R.C.M. 1204(c)(3) reads as follows:

Discussion

See Article 57(a)(4) and R.C.M. 1206.

The Analysis following R.C.M. 1204 reads as follows:

Analysis

This rule is taken from Rule 1204 of the MCM (2016 edition) with the following amendments:

2018 Amendment: R.C.M. 1204(a)(2) is amended and implements Article 67, as amended by Section 5331 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016), which requires that the Judge Advocate General provide appropriate notification to all other Judge Advocates General and the Staff Judge Advocate to the Commandant of the Marine Corps before certifying a case to the Court of Appeals for the Armed Forces.

The Analysis following R.C.M. 1205 reads as follows:

Analysis

This rule is taken from Rule 1205 of the MCM (2016 edition) with the following amendments.

2018 Amendment: R.C.M. 1205(a) is amended and changes the reference to “Article 67(h)” and replaces it with “Article 67a.” Technical corrections are made to references to Article 67(a)(1), (2), and (3).

The Discussion following R.C.M. 1206(a) reads as follows:

Discussion

See Article 57(a)(4).

The Analysis following R.C.M. 1206 reads as follows:

Analysis

This rule is taken from Rule 1206 of the MCM (2016 edition) with the following amendments:

2018 Amendment: The Discussion to R.C.M. 1206(a) is amended and changes the reference to “Article 71(b)” and replaces it with “Article 57(a)(4).”

The Discussion following R.C.M. 1207 reads as follows:

Discussion

See Article 57(a)(3). See also R.C.M. 1203 and 1204 concerning review by the Court of Criminal Appeals and Court of Appeals for the Armed Forces in capital cases.

The Analysis following R.C.M. 1207 reads as follows:

Analysis

This rule is taken from Rule 1207 of the MCM (2016 edition) with the following amendments:

2018 Amendment: The Discussion to R.C.M. 1207 is amended and changes the reference to “Article 71(a)” and replaces it with “Article 57(a)(3).”

The Discussion following R.C.M. 1208(a) reads as follows:

Discussion

See Article 75(b) and (c) concerning the action to be taken on an executed dismissal or discharge which is not imposed at a new trial.

The Discussion following R.C.M. 1208(b) reads as follows:

Discussion

See R.C.M. 1111 concerning entry of a new judgment in the case.

The Analysis following R.C.M. 1208 reads as follows:

Analysis

This rule is taken from Rule 1208 of the MCM (2016 edition) with the following amendments:

2018 Amendment: R.C.M. 1208(b) is amended and implements Article 75, as amended by Section 5337 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016). R.C.M. 1208 now requires that in certain cases where an executed part of a court-martial sentence is set aside pending a rehearing, new trial, or other trial, that those punishments shall not be enforced from the effective date of the order setting aside that punishment.

R.C.M. 1208(a), 1208(b), and the Discussion to R.C.M. 1208(b) are amended and insert a reference to entry of a new judgment in the case.

The Discussion following R.C.M. 1209(a)(1)(B)(iii)(III) reads as follows:

Discussion

See R.C.M. 1201, 1203, 1204, and 1205 concerning cases subject to review by a Court of Criminal Appeals, the Court of Appeals for the Armed Forces, and the Supreme Court. See also R.C.M. 1115 for waiver or withdrawal of appellate review.

The Discussion following R.C.M. 1209(a)(2) reads as follows:

Discussion

Although a summary court-martial conviction is final under R.C.M. 1209(a)(2), an accused may petition for post-final review pursuant to R.C.M. 1307(h). *See also* R.C.M. 1201(h).

The Analysis following R.C.M. 1209 reads as follows:

Analysis

This rule is taken from Rule 1209 of the MCM (2016 edition) with the following amendments:

2018 Amendment: R.C.M. 1209 and its Discussion are amended and implement Articles 64, 65, and 69, as amended by Sections 5328, 5329, and 5333 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016), regarding the finality of courts-martial.

The Discussion following R.C.M. 1210(f)(3) reads as follows:

Discussion

Examples of fraud on a court-martial which may warrant granting a new trial are: confessed or proved perjury in testimony or forgery of documentary evidence which clearly had a substantial contributing effect on a finding of guilty and without which there probably would not have been a finding of guilty of the offense; willful concealment by the prosecution from the defense of evidence favorable to the defense which, if presented to the court-martial, would probably have resulted in a finding of not guilty; and willful concealment of a material ground for challenge of the military judge or any member or of the disqualification of counsel or the convening authority, when the basis for challenge or disqualification was not known to the defense at the time of trial (*see* R.C.M. 912).

The Discussion following R.C.M. 1210(g)(3) reads as follows:

Discussion

See also R.C.M. 1201(h).

The Discussion following R.C.M. 1210(h)(5) reads as follows:

Discussion

See Article 75 and R.C.M. 1208.

The Analysis following R.C.M. 1210 reads as follows:

Analysis

This rule is taken from Rule 1210 of the MCM (2016 edition) with the following amendments:

2018 Amendment: R.C.M. 1210 is amended and implements Article 73, as amended by Section 5336 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016), which increases the time in which an accused must file a petition for a new trial from two years to three years after entry of judgment. R.C.M. 1210 is amended and includes references to the entry of judgment in accordance with the addition of Article 60c, as reflected in Section 5324 of the Military Justice Act

of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016).

The Discussion accompanying R.C.M. 1210(f)(3) is amended and corrects a cross-reference.

CHAPTER XIII. SUMMARY COURTS-MARTIAL

The Discussion following R.C.M. 1301(b) reads as follows:

Discussion

For a definition of “minor offenses,” see subparagraph 1.e, Part V. See R.C.M. 1209(a)(2) for the finality of a finding of guilty at a summary court-martial.

The Discussion following R.C.M. 1301(c)(1) reads as follows:

Discussion

See R.C.M. 103(4) for the definition of the term “capital offense.”

The Discussion following R.C.M. 1301(c)(2) reads as follows:

Discussion

Only a general court-martial has jurisdiction to try penetrative sex offenses under subsections (a) and (b) of Article 120, subsections (a) and (b) of Article 120b, and attempts to commit such penetrative sex offenses under Article 80.

The Discussion following R.C.M. 1301(d)(1) reads as follows:

Discussion

The maximum penalty that can be adjudged in a summary court-martial is confinement for 30 days, forfeiture of two-thirds pay per month for one month, and reduction to the lowest pay grade. See R.C.M. 1301(d)(2) for additional limits on sentences that may be adjudged where the accused is serving in a pay grade above the fourth enlisted pay grade.

A summary court-martial may not suspend all or part of a sentence, although the summary court-martial may recommend to the convening authority that all or part of a sentence be suspended. If a sentence includes both reduction in grade and forfeitures, the maximum forfeiture is calculated at the reduced pay grade. See also R.C.M. 1003 concerning other punishments which may be imposed, the effects of certain types of punishment, and the combination of certain types of punishment.

The Discussion following R.C.M. 1301(d)(2) reads as follows:

Discussion

The provisions of this subsection apply to an accused in the fifth enlisted pay grade who is reduced to the fourth enlisted pay grade by the summary court-martial.

The Discussion following R.C.M. 1301(e) reads as follows:

Discussion

Neither the Constitution nor any statute establishes any right to counsel at summary courts-martial. Therefore, it is not error to deny an accused the opportunity to be represented by counsel at a summary court-martial. However, appearance of counsel is not prohibited. The detailing authority may, as a matter of discretion, detail, or otherwise make available, a military attorney to represent the accused at a summary court-martial.

The Discussion following R.C.M. 1301(f) reads as follows:

Discussion

The summary court-martial must obtain witnesses for the prosecution and the defense pursuant to the standards in R.C.M. 703. The summary court-martial rules on any request by the accused for witnesses or evidence in accordance with the procedure in R.C.M. 703(c) and (e).

The Analysis following R.C.M. 1301 reads as follows:

Analysis

This rule is taken from Rule 1301 of the MCM (2016 edition) with the following amendments:

2018 Amendment: R.C.M. 1301(b) is amended and implements Article 20, as amended by Section 5164 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016), which clarifies that a summary court-martial is not a criminal forum and a finding of guilt does not constitute a criminal conviction. This change does not deprive an accused at a summary court-martial of the protections previously applicable at a summary court-martial, to include the right to confront witnesses.

R.C.M. 1301(c) and the Discussion to R.C.M. 1301(c) are amended and align with the prohibition against trying certain offenses at a summary court-martial and the elimination of the discrete offense of forcible sodomy in accordance with Sections 5162 and 5439 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016).

The Discussion following R.C.M. 1302(c) reads as follows:

Discussion

When the convening authority is the summary court-martial because the convening authority is the only commissioned officer present with the command or detachment, see R.C.M. 1301(a), that fact should be noted on the charge sheet.

The Analysis following R.C.M. 1302 reads as follows:

Analysis

This rule is taken from Rule 1302 of the MCM (2016 edition) without substantive amendment.

The Discussion following R.C.M. 1303 reads as follows:

Discussion

If the accused objects to trial by summary court-martial, the convening authority may dispose of the case in accordance with R.C.M. 401.

The Analysis following R.C.M. 1303 reads as follows:

Analysis

This rule is taken from Rule 1303 of the MCM (2016 edition) without substantive amendment.

The Discussion following R.C.M. 1304(a)(1) reads as follows:

Discussion

“Personnel records” are those personnel records of the accused that are maintained locally and are immediately available. “Allied papers” in a summary court-martial include convening orders, investigative reports, correspondence relating to the case, and witness statements.

The Discussion following R.C.M. 1304(a)(2) reads as follows:

Discussion

The summary court-martial should examine the charge sheet, allied papers, and personnel records to ensure that they are complete and free from errors or omissions which might affect admissibility. The summary court-martial should check the charges and specifications to ensure that each alleges personal jurisdiction over the accused (*see* R.C.M. 202) and an offense under the UCMJ (*see* R.C.M. 203 and Part IV). Substantial defects or errors in the charges and specifications must be reported to the convening authority, because such defects cannot be corrected except by preferring and referring the affected charge and specification anew in proper form. A defect or error is substantial if correcting it would state an offense not otherwise stated, or include an offense, person, or matter not fairly included in the specification as preferred. *See* R.C.M. 1304(a)(3) concerning minor errors.

The Discussion following R.C.M. 1304(a)(4)(E) reads as follows:

Discussion

The term “victim” has the same meaning as the term “victim of an offense under this chapter” in Article 6b.

The Discussion following R.C.M. 1304(b) reads as follows:

Discussion

A sample guide is at Appendix 8. The summary court-martial should review and become familiar with the guide before proceeding.

The Discussion following R.C.M. 1304(b)(2)(E)(ii) reads as follows:

Discussion

See R.C.M. 703. Ordinarily witnesses should be excluded from the courtroom until called to testify. *See* Mil. R. Evid. 615.

The Discussion following R.C.M. 1304(b)(3)(E)(iv) reads as follows:

Discussion

See R.C.M. 703 and 1001.

The Discussion following R.C.M. 1304(b)(2)(F)(vi) reads as follows:

Discussion

If the accused's immediate commanding officer is not the convening authority, the summary court-martial should ensure that the immediate commanding officer is informed of the findings, sentence, and any recommendations pertaining thereto. *See* R.C.M. 1102 concerning post-trial confinement.

The Analysis following R.C.M. 1304 reads as follows:

Analysis

This rule is taken from Rule 1304 of the MCM (2016 edition) with the following amendments:

2018 Amendment: R.C.M. 1304(a)(4) and the accompanying Discussion are new and address the rights of a victim at summary courts-martial in accordance with Article 6b as amended by Section 5105 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016), as further amended by Sections 531(a), 1081(a)(22) and 1081(c)(1)(B) of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 115-91, 131 Stat. 1283 (2017). The Discussion accompanying R.C.M. 1304(a)(4)(E) clarifies the meaning of the term "victim" as it pertains to this provision. R.C.M. 1304(b)(2)(F)(ii) is amended and directs the summary court-martial to use the procedures in R.C.M. 1001 and 1002 and the principles in the remainder of Chapter X in determining a sentence, with some exceptions.

The Discussion following R.C.M. 1305(a) reads as follows:

Discussion

See Appendix 9 for a sample of a Record of Trial by Summary Court-Martial .

Any matters submitted under R.C.M. 1306(a) should be appended to the record of trial.

The Discussion following R.C.M. 1305(c) reads as follows:

Discussion

Certification means attesting that the record accurately reports the proceedings and includes any matters prescribed by the Secretary concerned.

The Discussion following R.C.M. 1305(e)(2) reads as follows:

Discussion

The type of opportunity to respond depends on the nature and scope of the proposed correction. In many instances an adequate opportunity can be provided by allowing the parties to present affidavits and other documentary evidence to the person issuing the certificate of correction or by a conference telephone call among the summary

court-martial, the parties, and the reporter, if any. In other instances, an evidentiary hearing with witnesses may be required. The accused need not be present at any hearing on a certificate of correction.

The Analysis following R.C.M. 1305 reads as follows:

Analysis

This rule is taken from Rule 1305 of the MCM (2016 edition) with the following amendments:

2018 Amendment: R.C.M. 1305(c) and (d) and the Discussion accompanying R.C.M. 1305(c), (d), and (e) are amended and reflect Article 54, as amended by Section 5238 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016), which requires a certified record of trial in a summary court-martial.

R.C.M. 1305(d) is amended to include a cross-reference to procedures for classified information in the record of trial, and conforms with changes to Article 54 to provide procedures for the correction of a record of trial in a summary court-martial.

The Discussion following R.C.M. 1306(a) reads as follows:

Discussion

For the definition of “crime victim,” see R.C.M. 1106A(b)(2).

The Discussion following R.C.M. 1306(b)(3) reads as follows:

Discussion

In determining what sentence should be approved, the convening authority should consider the sentencing guidance in R.C.M. 1002(f) and all matters relating to clemency, such as pretrial confinement.

See R.C.M. 910(f)(5) on the effect of a plea agreement on the sentence of a summary court-martial.

A sentence adjudged by a court-martial may be approved if it was within the jurisdiction of the court-martial to adjudge (*see* R.C.M. 201(f)) and did not exceed the maximum limits prescribed in Part IV and Chapter X of this Part for the offense(s) of which the accused legally has been found guilty.

See also R.C.M. 1003(b).

See R.C.M. 1103(c) for the convening authority’s ability to defer service of a sentence to confinement in a summary court-martial where the accused is in the custody of a state or foreign country.

The Discussion following R.C.M. 1306(b)(5)(B) reads as follows:

Discussion

See R.C.M. 909 regarding presumptions and standards governing issues of mental competence.

The Discussion following R.C.M. 1306(c) reads as follows:

Discussion

See R.C.M. 810 regarding procedures for rehearings and limitations on sentence at rehearings.

The Discussion following R.C.M. 1306(f) reads as follows:

Discussion

The term “victim” has the same meaning as “crime victim” in R.C.M. 1106A(b)(2).

The Analysis following R.C.M. 1306 reads as follows:

Analysis

2018 Amendment: This rule is taken from Rule 1306 of the MCM (2016 edition) with the following amendments:

R.C.M. 1306 and its accompanying Discussion are amended and consolidate the post-trial process for summary courts-martial into one rule and remove most of the prior cross references to the post-trial process prescribed for general and special courts-martial. The rule is further amended to reflect the changes to post-trial and appellate procedures in summary courts-martial required by the changes to Articles 60b, 64, and 69 as amended by Sections 5323, 5328, and 5333 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016).

The Discussion following R.C.M. 1307(f)(1)(D) reads as follows:

Discussion

See R.C.M. 1102(a) concerning when the officer exercising general court-martial jurisdiction may order parts of the sentence executed. *See* R.C.M. 1111(a)(3) explaining that the findings and sentence of the court-martial, as modified or approved by the convening authority, constitute the judgment in summary courts-martial.

The Analysis following R.C.M. 1307 reads as follows:

Analysis

2018 Amendment: R.C.M. 1307 and its accompanying Discussion are new. R.C.M. 1307 implements Articles 64 and 69, as amended by Sections 5328 and 5333 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016), which provide for review of the record of trial of a summary court-martial by a judge advocate and permit an accused to apply for appellate review for correction of legal error.

PART III
MILITARY RULES OF EVIDENCE:
SECTION I
GENERAL PROVISIONS

The Discussion following Mil. R. Evid. 101(c)(2) reads as follows:

Discussion

Discussion was added to these Rules in 2013. The Discussion itself does not have the force of law, even though it may describe legal requirements derived from other sources. It is in the nature of a treatise, and may be used as secondary authority. If a matter is included in a rule, it is intended that the matter be binding, unless it is clearly expressed as precatory. The Discussion will be revised from time to time as warranted by changes in applicable law. *See* Composition of the Manual for Courts-Martial in Appendix 15.

Practitioners should also refer to the Analysis of the Military Rules of Evidence contained in Appendix 16 of this Manual. The Analysis is similar to Committee Notes accompanying the Federal Rules of Evidence and is intended to address the basis of the rule, deviation from the Federal Rules of Evidence, relevant precedent, and drafters' intent.

The Analysis following Mil. R. Evid. 101 reads as follows:

Analysis

This rule is taken from Rule 101 of the MCM (2016 edition) with the following amendments:

2018 Amendment: Mil. R. Evid. 101(c)(1) is amended and reflects the elimination of special courts-martial without a military judge and includes within the definition of military judge a military magistrate who has been designated to preside at a special court-martial or pre-referral proceedings under Article 30a. *See* Articles 16 and 30a, as amended and added, respectively, by Sections 5161 and 5202 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016), as further amended by Sections 1081(c)(1) and 531(b), respectively, of the National Defense Authorization Act for Fiscal Year 2018, Pub. L. No. 115-91, 131 Stat. 1283 (2017).

Mil. R. Evid. 101(c)(2) is amended and aligns military rules regarding electronically stored information with Federal civilian practice and the broader definitions of "writing" contained in R.C.M. 103 and Mil. R. Evid. 1001. The new language is based on Fed. R. Evid. 101(b)(6).

The Analysis following Mil. R. Evid. 102 reads as follows:

Analysis

This rule is taken from Rule 102 of the MCM (2016 edition) without amendment.

The Analysis following Mil. R. Evid. 103 reads as follows:

Analysis

This rule is taken from Rule 103 of the MCM (2016 edition) without amendment.

The Analysis following Mil. R. Evid. 104 reads as follows:

Analysis

This rule is taken from Rule 104 of the MCM (2016 edition) with the following amendments:

2018 Amendment: Mil. R. Evid. 104(c) is amended and reflects the elimination of special courts-martial without a military judge. *See* Article 16, as amended by Section 5161 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016), as further amended by Section 1081(c)(1)(C) of the National Defense Authorization Act for Fiscal Year 2018, Pub. Law. No. 115-91, 131 Stat. 1283 (2017).

The Analysis following Mil. R. Evid. 105 reads as follows:

Analysis

This rule is taken from Rule 105 of the MCM (2016 edition) without amendment.

The Analysis following Mil. R. Evid. 106 reads as follows:

Analysis

This rule is taken from Rule 106 of the MCM (2016 edition) without amendment.

**SECTION II
JUDICIAL NOTICE**

The Analysis following Mil. R. Evid. 201 reads as follows:

Analysis

This rule is taken from Rule 201 of the MCM (2016 edition) without amendment.

The Analysis following Mil. R. Evid. 202 reads as follows:

Analysis

This rule is taken from Rule 202 of the MCM (2016 edition) without amendment.

**SECTION III
EXCLUSIONARY RULES AND RELATED MATTERS CONCERNING SELF-
INCRIMINATION, SEARCH AND SEIZURE, AND EYEWITNESS IDENTIFICATION**

The Discussion following Mil. R. Evid. 301(c) reads as follows:

Discussion

A military judge is not required to provide Article 31 warnings. If a witness who seems uninformed of the privileges under this rule appears likely to incriminate himself or herself, the military judge may advise the witness of the right to decline to make any answer that might tend to incriminate the witness and that any self-incriminating answer the witness might make can later be used as evidence against the witness. Counsel for any party or for the witness may ask the military judge to so advise a witness if such a request is made out of the hearing of the witness and the members, if present. Failure to so advise a witness does not make the testimony of the witness inadmissible.

The Analysis following Mil. R. Evid. 301 reads as follows:

Analysis

This rule is taken from Rule 301 of the MCM (2016 edition) without amendment.

The Analysis following Mil. R. Evid. 302 reads as follows:

Analysis

This rule is taken from Rule 302 of the MCM (2016 edition) without amendment.

The Analysis following Mil. R. Evid. 303 reads as follows:

Analysis

This rule is taken from Rule 303 of the MCM (2016 edition) without amendment.

The Analysis following Mil. R. Evid. 304 reads as follows:

Analysis

This rule is taken from Rule 304 of the MCM (2016 edition) with the following amendments:

2018 Amendment: Mil. R. Evid. 304(f)(7) is amended and reflects the elimination of special courts-martial without a military judge. *See* Article 16, as amended by Section 5161 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016), as further amended by Section 1081(c)(1)(C) of the National Defense Authorization Act for Fiscal Year 2018, Pub. Law. No. 115-91, 131 Stat. 1283 (2017).

The Analysis following Mil. R. Evid. 305 reads as follows:

Analysis

This rule is taken from Rule 305 of the MCM (2016 edition) without amendment.

The Analysis following Mil. R. Evid. 306 reads as follows:

Analysis

This rule is taken from Rule 306 of the MCM (2016 edition) without amendment.

The Analysis following Mil. R. Evid. 311 reads as follows:

Analysis

This rule is taken from Rule 311 of the MCM (2016 edition), as amended by Exec. Order No. 13825, 83 Fed. Reg. 9889 (March 1, 2018), without further amendment.

The Discussion following Mil. R. Evid. 312(b)(2)(F) reads as follows:

Discussion

An examination of the unclothed body under this rule should be conducted whenever practicable by a person of the same sex as that of the person being examined; however, failure to comply with this requirement does not make an examination an unlawful search within the meaning of Mil. R. Evid. 311.

The Discussion following Mil. R. Evid. 312(f) reads as follows:

Discussion

Nothing in this rule will be deemed to interfere with the lawful authority of the Armed Forces to take whatever action may be necessary to preserve the health of a service member.

Compelling a person to ingest substances for the purposes of locating the property described above or to compel the bodily elimination of such property is a search within the meaning of this section.

The Analysis following Mil. R. Evid. 312 reads as follows:

Analysis

This rule is taken from Rule 312 of the MCM (2016 edition) without amendment. The Discussion following Mil. R. Evid. 312(f) has been updated.

The Analysis following Mil. R. Evid. 313 reads as follows:

Analysis

This rule is taken from Rule 313 of the MCM (2016 edition) without amendment.

The Discussion following Mil. R. Evid. 314(c) reads as follows:

Discussion

Searches under subdivision (c) may not be conducted at a time or in a manner contrary to an express provision of a treaty or agreement to which the United States is a party; however, failure to comply with a treaty or agreement does not render a search unlawful within the meaning of Mil. R. Evid. 311.

The Discussion following Mil. R. Evid. 314(f)(2) reads as follows:

Discussion

Mil. R. Evid. 314(f)(2) requires that the official making the stop have a reasonable suspicion based on specific and articulable facts that the person being frisked is armed and dangerous. Officer safety is a factor, and the officer need not be absolutely certain that the individual detained is armed for the purposes of frisking or patting down that person's outer clothing for weapons. The test is whether a reasonably prudent person in similar circumstances would be warranted in a belief that his or her safety was in danger. The purpose of a frisk is to search for weapons or other dangerous items, including but not limited to: firearms, knives, needles, or razor blades. A limited search of outer clothing for weapons serves to protect both the officer and the public; therefore, a frisk is reasonable under the Fourth Amendment.

The Discussion following Mil. R. Evid. 314(f)(3) reads as follows:

Discussion

The scope of the search is similar to the "stop and frisk" defined in Mil. R. Evid. 314(f)(2). During the search for weapons, the official may seize any item that is immediately apparent as contraband or as evidence related to the offense serving as the basis for the stop. As a matter of safety, the official may, after conducting a lawful stop of a vehicle, order the driver and any passengers out of the car without any additional suspicion or justification.

The Discussion following Mil. R. Evid. 314(g)(2) reads as follows:

Discussion

The scope of the search for weapons is limited to that which is necessary to protect the arresting official. The official may not search a vehicle for weapons if there is no possibility that the arrestee could reach into the searched area, for example, after the arrestee is handcuffed and removed from the vehicle. The scope of the search is broader for destructible evidence related to the offense for which the individual is being arrested. Unlike a search for weapons, the search for destructible offense-related evidence may take place after the arrestee is handcuffed and removed

from a vehicle. If, however, the official cannot expect to find destructible offense-related evidence, this exception does not apply.

The Analysis following Mil. R. Evid. 314 reads as follows:

Analysis

This rule is taken from Rule 314 of the MCM (2016 edition) without amendment. The Discussion following Rule 314(e)(2) has been deleted.

The Discussion following Mil. R. Evid. 315(c)(4) reads as follows:

Discussion

If nonmilitary property within a foreign country is owned, used, occupied by, or in the possession of an agency of the United States other than the Department of Defense, a search should be conducted in coordination with an appropriate representative of the agency concerned, although failure to obtain such coordination would not render a search unlawful within the meaning of Mil. R. Evid. 311. If other nonmilitary property within a foreign country is to be searched, the search should be conducted in accordance with any relevant treaty or agreement or in coordination with an appropriate representative of the foreign country, although failure to obtain such coordination or noncompliance with a treaty or agreement would not render a search unlawful within the meaning of Mil. R. Evid. 311.

The Analysis following Mil. R. Evid. 315 reads as follows:

Analysis

This rule is taken from Rule 315 of the MCM (2016 edition) without amendment. The Discussion following Mil. R. Evid. 315(a) has been deleted.

The Analysis following Mil. R. Evid. 316 reads as follows:

Analysis

This rule is taken from Rule 316 of the MCM (2016 edition) without amendment.

The Discussion following Mil. R. Evid. 317(b) reads as follows:

Discussion

Pursuant to 18 U.S.C. § 2516(1), the Attorney General, Deputy Attorney General, Associate Attorney General, or any Assistant Attorney General, any acting Assistant Attorney General, or any Deputy Assistant Attorney General or acting Deputy Assistant Attorney General in the Criminal Division or National Security Division specially designated by the Attorney General, may authorize an application to a Federal judge of competent jurisdiction for, and such judge may grant in conformity with 18 U.S.C. § 2518, an order authorizing or approving the interception of wire or oral communications by the Federal Bureau of Investigation, or a Federal agency having responsibility for the investigation of the offense as to which the application is made, for purposes of obtaining evidence concerning the offenses enumerated in 18 U.S.C. § 2516(1), to the extent such offenses are punishable under the Uniform Code of Military Justice.

The Analysis following Mil. R. Evid. 317 reads as follows:

Analysis

This rule is taken from Rule 317 of the MCM (2016 edition) without amendment.

The Analysis following Mil. R. Evid. 321 reads as follows:

Analysis

This rule is taken from Rule 321 of the MCM (2016 edition) without amendment.

**SECTION IV
RELEVANCY AND ITS LIMITS**

The Analysis following Mil. R. Evid. 401 reads as follows:

Analysis

This rule is taken from Rule 401 of the MCM (2016 edition) without amendment.

The Analysis following Mil. R. Evid. 402 reads as follows:

Analysis

This rule is taken from Rule 402 of the MCM (2016 edition) without amendment.

The Analysis following Mil. R. Evid. 403 reads as follows:

Analysis

This rule is taken from Rule 403 of the MCM (2016 edition) without amendment.

The Analysis following Mil. R. Evid. 404 reads as follows:

Analysis

This rule is taken from Rule 404 of the MCM (2016 edition) with the following amendments:

2018 Amendment: Mil. R. Evid. 404(a)(2)(A) is amended and reflects the reorganization of the punitive articles in the Military Justice Act of 2016. *See* Articles 79-134, as amended by Sections 5401-5452 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016), as amended by Section 1081(c) of the National Defense Authorization Act for Fiscal Year 2018, Pub. Law. No. 115-91, 131 Stat. 1283 (2017).

The Analysis following Mil. R. Evid. 405 reads as follows:

Analysis

This rule is taken from Rule 405 of the MCM (2016 edition) without amendment.

The Analysis following Mil. R. Evid. 406 reads as follows:

Analysis

This rule is taken from Rule 406 of the MCM (2016 edition) without amendment.

The Analysis following Mil. R. Evid. 407 reads as follows:

Analysis

This rule is taken from Rule 407 of the MCM (2016 edition) without amendment.

The Analysis following Mil. R. Evid. 408 reads as follows:

Analysis

This rule is taken from Rule 408 of the MCM (2016 edition) without amendment.

The Analysis following Mil. R. Evid. 409 reads as follows:

Analysis

This rule is taken from Rule 409 of the MCM (2016 edition) without amendment.

The Analysis following Mil. R. Evid. 410 reads as follows:

Analysis

This rule is taken from Rule 410 of the MCM (2016 edition) without amendment.

The Analysis following Mil. R. Evid. 411 reads as follows:

Analysis

This rule is taken from Rule 411 of the MCM (2016 edition) without amendment.

The Analysis following Mil. R. Evid. 412 reads as follows:

Analysis

This rule is taken from Rule 412 of the MCM (2016 edition) with the following amendments:

2018 Amendment: Mil. R. Evid. 412(b) is amended and more closely aligns with Federal Rule of Evidence 412. The amendment also addresses the Court of Appeals for the Armed Forces' opinion in *United States v. Gaddis*, 70 M.J. 248 (C.A.A.F. 2011), with regard to evidence the admission of which is required by the United States Constitution. As amended, the rule requires consideration of the danger of unfair prejudice to the victim's privacy for purposes of the exceptions established by Mil. R. Evid. 412(b)(1) and (2), but does not mandate such consideration for purposes of the exception established by Mil. R. Evid. 412(b)(3).

Mil. R. Evid. 412(c)(2) is amended and updates a cross-reference to R.C.M. 1103A, which is deleted and redesignated as R.C.M. 1113.

The Analysis following Mil. R. Evid. 413 reads as follows:

Analysis

This rule is taken from Rule 413 of the MCM (2016 edition) without amendment.

The Analysis following Mil. R. Evid. 414 reads as follows:

Analysis

This rule is taken from Rule 414 of the MCM (2016 edition) without amendment.

**SECTION V
PRIVILEGES**

The Analysis following Mil. R. Evid. 501 reads as follows:

Analysis

This rule is taken from Rule 501 of the MCM (2016 edition) without amendment.

The Analysis following Mil. R. Evid. 502 reads as follows:

Analysis

This rule is taken from Rule 502 of the MCM (2016 edition) without amendment.

The Analysis following Mil. R. Evid. 503 reads as follows:

Analysis

This rule is taken from Rule 503 of the MCM (2016 edition) without amendment.

The Analysis following Mil. R. Evid. 504 reads as follows:

Analysis

This rule is taken from Rule 504 of the MCM (2016 edition) without amendment.

The Discussion following Mil. R. Evid. 505(l) reads as follows:

Discussion

In addition to the Sixth Amendment right of an accused to a public trial, the Supreme Court has held that the press and general public have a constitutional right under the First Amendment to access to criminal trials. *United States v. Hershey*, 20 M.J. 433, 436 (C.M.A. 1985) (citing *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980)). The test that must be met before closure of a criminal trial to the public is set out in *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501 (1984), to wit: the presumption of openness “may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest.” *Id.* at 510.

The military judge must consider reasonable alternatives to closure and must make adequate findings supporting the closure to aid in review.

The Analysis following Mil. R. Evid. 505 reads as follows:

Analysis

This rule is taken from Rule 505 of the MCM (2016 edition) with the following amendments:

2018 Amendment: Exec. Order No. 13825, 83 Fed. Reg. 9889 (March 1, 2018), amends Mil. R. Evid. 505(j)(3), 505(k)(1)(B), and 505(l) by updating cross-references to R.C.M. 701(g)(2) and R.C.M. 1103A (which is deleted and redesignated as R.C.M. 1113), and R.C.M. 1103(h) and 1104(b)(1)(D), which are deleted and redesignated as R.C.M. 1112(e)(3).

The Discussion following Mil. R. Evid. 506(b) reads as follows:

Discussion

For additional procedures concerning information contained in safety investigations, consult Service regulations and DoD Instruction 6055.07, “Mishap Notification, Investigation, Reporting, and Record Keeping.”

The Analysis following Mil. R. Evid. 506 reads as follows:

Analysis

This rule is taken from Rule 506 of the MCM (2016 edition) with the following amendments:

2018 Amendment: As amended by Exec. Order No. 13825, 83 Fed. Reg. 9889 (March 1, 2018), Mil. R. Evid. 506(b)’s scope is broadened to include declassified information. The government may now claim a privilege with respect to classified information under either Mil. R. Evid. 505 or Mil. R. Evid. 506, or both.

The Discussion accompanying Mil. R. Evid. 506(b) is new.

Mil. R. Evid. 506(j)(3), 506(l)(2), and 506(m) are amended by updating cross-references to R.C.M. 1103A, which is deleted and redesignated as R.C.M. 1113.

The Analysis following Mil. R. Evid. 507 reads as follows:

Analysis

This rule is taken from Rule 507 of the MCM (2016 edition) without amendment.

The Analysis following Mil. R. Evid. 508 reads as follows:

Analysis

This rule is taken from Rule 508 of the MCM (2016 edition) without amendment.

The Analysis following Mil. R. Evid. 509 reads as follows:

Analysis

This rule is taken from Rule 509 of the MCM (2016 edition) without amendment.

The Analysis following Mil. R. Evid. 510 reads as follows:

Analysis

This rule is taken from Rule 510 of the MCM (2016 edition) without amendment.

The Analysis following Mil. R. Evid. 511 reads as follows:

Analysis

This rule is taken from Rule 511 of the MCM (2016 edition) without amendment.

The Analysis following Mil. R. Evid. 512 reads as follows:

Analysis

This rule is taken from Rule 512 of the MCM (2016 edition) with the following amendments:

2018 Amendment: Mil. R. Evid. 512(b) is amended and reflects the elimination of special courts-martial without a military judge. *See* Article 16, as amended by Section 5161 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016), as further amended by Section 1081(c)(1)(C) of the National Defense Authorization Act for Fiscal Year 2018, Pub. Law. No. 115-91, 131 Stat. 1283 (2017).

The Analysis following Mil. R. Evid. 513 reads as follows:

Analysis

This rule is taken from Rule 513 of the MCM (2016 edition) with the following amendments:

2018 Amendment: Mil. R. Evid. 513, as amended by Exec. Order No. 13825, 83 Fed. Reg. 9889 (March 1, 2018), amends Mil. R. Evid. 513(c) and provides that a patient may authorize trial counsel or any counsel representing the patient to claim the privilege on his or her behalf.

Mil. R. Evid. 513(e)(3)(A) is amended and clarifies the required findings of a military judge prior to conducting an in-camera review of protected records or communications to determine whether the records or communications must be produced or admitted into evidence.

Mil. R. Evid. 513(e)(6) is amended by updating cross-references to R.C.M. 701(g)(2) and R.C.M. 1103A (which is deleted and redesignated as R.C.M. 1113).

The Analysis following Mil. R. Evid. 514 reads as follows:

Analysis

This rule is taken from Rule 514 of the MCM (2016 edition) with the following amendments:

2018 Amendment: Mil. R. Evid. 514, as amended by Exec. Order No. 13825, 83 Fed. Reg. 9889 (March 1, 2018), amends Mil. R. Evid. 514(b)(2) and clarifies the definition of a “victim advocate” in this rule as a person, other than a prosecutor, trial counsel, any victim’s counsel, law enforcement officer, or military criminal investigator in the case.

Mil. R. Evid. 514(e)(3)(A) is amended and clarifies the required findings of a military judge prior to conducting an in-camera review of protected records or communications to determine whether the records or communications must be produced or admitted into evidence.

Mil. R. Evid. 514(e)(6) is amended by updating cross-references to R.C.M. 701(g)(2) and R.C.M. 1103A (which is deleted and redesignated as R.C.M. 1113).

SECTION VI WITNESSES

The Analysis following Mil. R. Evid. 601 reads as follows:

Analysis

This rule is taken from Rule 601 of the MCM (2016 edition) without amendment.

The Analysis following Mil. R. Evid. 602 reads as follows:

Analysis

This rule is taken from Rule 602 of the MCM (2016 edition) without amendment.

The Analysis following Mil. R. Evid. 603 reads as follows:

Analysis

This rule is taken from Rule 603 of the MCM (2016 edition) without amendment.

The Analysis following Mil. R. Evid. 604 reads as follows:

Analysis

This rule is taken from Rule 604 of the MCM (2016 edition) without amendment.

The Analysis following Mil. R. Evid. 605 reads as follows:

Analysis

This rule is taken from Rule 605 of the MCM (2016 edition) without amendment.

The Analysis following Mil. R. Evid. 606 reads as follows:

Analysis

This rule is taken from Rule 606 of the MCM (2016 edition) with the following amendments:

2018 Amendment: Mil. R. Evid. 606(a) is amended and reflects the elimination of special courts-martial without a military judge. *See* Article 16, as amended by Section 5161 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016), as further amended by Section 1081(c)(1)(C) of the National Defense Authorization Act for Fiscal Year 2018, Pub. Law. No. 115-91, 131 Stat. 1283 (2017).

The Analysis following Mil. R. Evid. 607 reads as follows:

Analysis

This rule is taken from Rule 607 of the MCM (2016 edition) without amendment.

The Analysis following Mil. R. Evid. 608 reads as follows:

Analysis

This rule is taken from Rule 608 of the MCM (2016 edition) without amendment.

The Analysis following Mil. R. Evid. 609 reads as follows:

Analysis

This rule is taken from Rule 609 of the MCM (2016 edition) with the following amendments:

2018 Amendment: Mil. R. Evid. 609 is amended throughout and reflects changes to Article 20, UCMJ, implementing the Supreme Court’s ruling in *Middendorf v. Henry*, 425 U.S. 25 (1976) (summary court-martial is not a “criminal prosecution” within the meaning of the Sixth Amendment). *See* Article 20, as amended by Section 5164 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016).

The Analysis following Mil. R. Evid. 610 reads as follows:

Analysis

This rule is taken from Rule 610 of the MCM (2016 edition) without amendment.

The Analysis following Mil. R. Evid. 611 reads as follows:

Analysis

This rule is taken from Rule 611 of the MCM (2016 edition) without amendment.

The Analysis following Mil. R. Evid. 612 reads as follows:

Analysis

This rule is taken from Rule 612 of the MCM (2016 edition) without amendment.

The Analysis following Mil. R. Evid. 613 reads as follows:

Analysis

This rule is taken from Rule 613 of the MCM (2016 edition) without amendment.

The Analysis following Mil. R. Evid. 614 reads as follows:

Analysis

This rule is taken from Rule 614 of the MCM (2016 edition) without amendment.

The Analysis following Mil. R. Evid. 615 reads as follows:

Analysis

This rule is taken from Rule 615 of the MCM (2016 edition) without amendment.

SECTION VII
OPINIONS AND EXPERT TESTIMONY

The Analysis following Mil. R. Evid. 701 reads as follows:

Analysis

This rule is taken from Rule 701 of the MCM (2016 edition) without amendment.

The Analysis following Mil. R. Evid. 702 reads as follows:

Analysis

This rule is taken from Rule 702 of the MCM (2016 edition) without amendment.

The Analysis following Mil. R. Evid. 703 reads as follows:

Analysis

This rule is taken from Rule 703 of the MCM (2016 edition) without amendment.

The Analysis following Mil. R. Evid. 704 reads as follows:

Analysis

This rule is taken from Rule 704 of the MCM (2016 edition) without amendment.

The Analysis following Mil. R. Evid. 705 reads as follows:

Analysis

This rule is taken from Rule 705 of the MCM (2016 edition) without amendment.

The Analysis following Mil. R. Evid. 706 reads as follows:

Analysis

This rule is taken from Rule 706 of the MCM (2016 edition) without amendment.

The Analysis following Mil. R. Evid. 707 reads as follows:

Analysis

This rule is taken from Rule 707 of the MCM (2016 edition) without amendment.

SECTION VIII HEARSAY

The Analysis following Mil. R. Evid. 801 reads as follows:

Analysis

This rule is taken from Rule 801 of the MCM (2016 edition) without amendment.

The Analysis following Mil. R. Evid. 802 reads as follows:

Analysis

This rule is taken from Rule 802 of the MCM (2016 edition) without amendment.

The Analysis following Mil. R. Evid. 803 reads as follows:

Analysis

This rule is taken from Rule 803 of the MCM (2016 edition) without amendment.

The Analysis following Mil. R. Evid. 804 reads as follows:

Analysis

This rule is taken from Rule 804 of the MCM (2016 edition) with the following amendments:

2018 Amendment: Mil. R. Evid. 804(a)(6) is amended and reflects amendments to Article 49 and deletes the cross-reference to Article 49(d)(2). *See* Article 49, as amended by Section 532, Carl Levin and Howard P. “Buck” McKeon National Defense Authorization Act for Fiscal Year 2015, Pub. L. No. 113-291, 128 Stat. 3292 (2014).

The Analysis following Mil. R. Evid. 805 reads as follows:

Analysis

This rule is taken from Rule 805 of the MCM (2016 edition) without amendment.

The Analysis following Mil. R. Evid. 806 reads as follows:

Analysis

This rule is taken from Rule 806 of the MCM (2016 edition) without amendment.

The Analysis following Mil. R. Evid. 807 reads as follows:

Analysis

This rule is taken from Rule 807 of the MCM (2016 edition) without amendment.

SECTION IX

Authentication And Identification

The Analysis following Mil. R. Evid. 901 reads as follows:

Analysis

This rule is taken from Rule 901 of the MCM (2016 edition) without amendment.

The Analysis following Mil. R. Evid. 902 reads as follows:

Analysis

This rule is taken from Rule 902 of the MCM (2016 edition) without amendment.

The Analysis following Mil. R. Evid. 903 reads as follows:

Analysis

This rule is taken from Rule 903 of the MCM (2016 edition) without amendment.

SECTION X

Contents Of Writings, Recordings, And Photographs

The Analysis following Mil. R. Evid. 1001 reads as follows:

Analysis

This rule is taken from Rule 1001 of the MCM (2016 edition) without amendment.

The Analysis following Mil. R. Evid. 1002 reads as follows:

Analysis

This rule is taken from Rule 1002 of the MCM (2016 edition) without amendment.

The Analysis following Mil. R. Evid. 1003 reads as follows:

Analysis

This rule is taken from Rule 1003 of the MCM (2016 edition) without amendment.

The Analysis following Mil. R. Evid. 1004 reads as follows:

Analysis

This rule is taken from Rule 1004 of the MCM (2016 edition) without amendment.

The Analysis following Mil. R. Evid. 1005 reads as follows:

Analysis

This rule is taken from Rule 1005 of the MCM (2016 edition) without amendment.

The Analysis following Mil. R. Evid. 1006 reads as follows:

Analysis

This rule is taken from Rule 1006 of the MCM (2016 edition) without amendment.

The Analysis following Mil. R. Evid. 1007 reads as follows:

Analysis

This rule is taken from Rule 1007 of the MCM (2016 edition) without amendment.

The Analysis following Mil. R. Evid. 1008 reads as follows:

Analysis

This rule is taken from Rule 1008 of the MCM (2016 edition) without amendment.

SECTION XI
Miscellaneous Rules

The Analysis following Mil. R. Evid. 1101 reads as follows:

Analysis

This rule is taken from Rule 1101 of the MCM (2016 edition) with the following amendments:

2018 Amendment: Mil. R. Evid. 1101(a) is amended and reflects that the Military Rules of Evidence also apply to pre-referral proceedings under Article 30a. *See* Article 30a, as added by Section 5202 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016), as amended by Section 531(b) of the National Defense Authorization Act for Fiscal Year 2018, Pub. L. No. 155-91, 131 Stat. 1283 (2017).

The Analysis following Mil. R. Evid. 1102 reads as follows:

Analysis

This rule is taken from Rule 1102 of the MCM (2016 edition) without amendment.

The Analysis following Mil. R. Evid. 1103 reads as follows:

Analysis

This rule is taken from Rule 1103 of the MCM (2016 edition) without amendment.

PART IV PUNITIVE ARTICLES

The Discussion preceding paragraph 1. Article 77 - Principals reads as follows:

Discussion

Part IV of the Manual addresses the punitive articles, 10 U.S.C. §§ 877-934. Part IV is organized by paragraph beginning with Article 77; therefore, each paragraph number is associated with an article. For example, paragraph 60 addresses Article 120, Rape and sexual assault generally. Article 77, Principals, and Article 79, Lesser included offenses, are located in the punitive article subchapter of Title 10 but are not chargeable offenses as such.

Other than Articles 77 and 79, the punitive articles of the code are discussed using the following sequence:

- a. Text of the article
- b. Elements of the offense or offenses
- c. Explanation
- d. Maximum punishment
- e. Sample specifications

Presidentially prescribed lesser included offenses, as authorized under Article 79(b)(2), are established in Appendix 12A. For offenses not listed in Appendix 12A that may or may not be lesser included offenses, see R.C.M. 307(c)(3) and its accompanying Discussion regarding charging in the alternative. Practitioners are advised to read and comply with *United States v. Jones*, 68 M.J. 465 (C.A.A.F. 2010).

Sample specifications are provided in subparagraph e of each paragraph in Part IV and are meant to serve as a guide. The specifications may be varied in form and content as necessary.

R.C.M. 307 prescribes rules for preferral of charges and for drafting specifications. The discussion under that rule explains how to allege violations under the code using the format of charge and specification; however, practitioners are advised to read and comply with *United States v. Fosler*, 70 M.J. 225 (C.A.A.F. 2011), and *United States v. Jones*, 68 M.J. 465 (C.A.A.F. 2010).

The term “elements,” as used in Part IV, includes both the statutory elements of the offense and any aggravating factors listed under the President’s authority which increase the maximum permissible punishment when specified aggravating factors are pled and proven.

The prescriptions of maximum punishments in subparagraph d of each paragraph of Part IV must be read in conjunction with R.C.M. 1003, which prescribes additional punishments that may be available and additional limitations on punishments.

The Analysis for paragraph 1. Article 77 - Principals reads as follows:

Analysis

1. Art. 77—Principals

This paragraph is taken, without change, from paragraph 1 (Article 77—Principals) of the MCM (2016 edition).

The Analysis for paragraph 2. Article 78 - Accessory after the fact reads as follows:

Analysis

2. Art. 78—Accessory after the fact

This paragraph is taken from paragraph 2 (Article 78—Accessory after the fact) of the MCM (2016 edition), with the following amendments:

2018 Amendment: c. Explanation. (2) Failure to report offense. This subparagraph is amended and reflects that the offense of misprision of a serious offense has been relocated from Article 134 to Article 131c as part of the Military

Justice Act of 2016’s realignment of the punitive articles. The substance of the offense remains the same. *See* Article 131c, as added by Section 5446 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016).

Subparagraph d. *Lesser included offenses* from the MCM (2016 edition) has been deleted. Subparagraphs e. *Maximum punishment* and f. *Sample specification* from the MCM (2016 edition) have been redesignated as subparagraphs d. and e. respectively. For lesser included offenses, see Appendix 12A.

The Discussion following paragraph 3.b.(3)(c) of part IV of the Manual for Courts-Martial reads as follows:

Discussion

For offenses that may or may not be lesser included offenses, see R.C.M. 307(c)(3) and its accompanying Discussion regarding charging in the alternative.

The Analysis for paragraph 3. Article 79 - Conviction of offense charged, lesser included offenses, and attempts reads as follows:

Analysis

3. Art. 79—Conviction of offense charged, lesser included offenses, and attempts

This paragraph is taken from paragraph 3 (Article 79—Conviction of lesser included offenses) of the MCM (2016 edition) with the following amendments:

2018 Amendment: a. Text of statute. Article 79 is amended and provides two statutory grounds for identifying “lesser included offenses.” Under the first, the lesser offense must be “necessarily included” in the greater offense. *See, e.g.,* the elements test articulated in *United States v. Jones*, 68 M.J. 465, 470 (C.A.A.F. 2010); *United States v. Alston*, 69 M.J. 214, 216 (C.A.A.F. 2010). Under the second, the offense must be expressly designated by the President as a lesser included offense. The President’s authority extends only to an offense “reasonably included” in the greater offense. The President has done so in Appendix 12A. *See* Article 79 as amended by Section 5402 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016).

b. *Explanation.* Subparagraph b.2. sets forth an explanation of “necessarily included offenses.” Subparagraph b.3. explains the President’s express authority under Article 79 to designate certain closely related offenses as “reasonably included” lesser offenses of greater ones, including offenses that do not strictly meet the “necessarily included” elements test. Whether “necessarily included” or “reasonably included,” a lesser included offense must be raised by the evidence at trial. That is, while all presidentially designated lesser included offenses (*see* Appendix 12A) qualify as lesser included offenses, a party is not entitled to an instruction on a lesser included offense if the evidence at trial does not reasonably raise it. *See United States v. Bean*, 62 M.J. 264, 265 (C.A.A.F. 2005).

The Analysis for paragraph 4. Article 80 - Attempts reads as follows:

Analysis

4. Article 80—Attempts

This paragraph is taken from paragraph 4 (Article 80—Attempts), of the MCM (2016 edition) with the following amendments:

2018 Amendment: c. Explanation. (6) *Attempts not under Article 80.* This subparagraph is amended and reflects that the offenses of Article 104—Aiding the enemy and Article 106a—Espionage are renumbered Articles 103b and 103a respectively, under Section 5401 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016).

Subparagraph d. *Lesser included offenses* from the MCM (2016 edition) has been deleted. Subparagraphs e. *Maximum punishment* and f. *Sample specification* from the MCM (2016 edition) have been redesignated as subparagraphs d. and e. respectively. For lesser included offenses, see Appendix 12A.

d. *Maximum punishment*. This subparagraph is amended and reflects that the elimination of the discrete offense of forcible sodomy under Article 125. *See* Section 5439 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016).

The Analysis for paragraph 5. Article 81 - Conspiracy reads as follows:

Analysis

5. Article 81—Conspiracy

This paragraph is taken from paragraph 5 (Article 81—Conspiracy) of the MCM (2016 edition) with the following amendment:

2018 Amendment: Subparagraph d. *Lesser included offenses* from the MCM (2016 edition) has been deleted. Subparagraphs e. *Maximum punishment* and f. *Sample specification* from the MCM (2016 edition) have been redesignated as subparagraphs d. and e. respectively. For lesser included offenses, see Appendix 12A.

The Analysis for paragraph 6. Article 82 - Soliciting commission of offenses reads as follows:

Analysis

6. Article 82—Soliciting commission of offenses

This paragraph is taken from paragraphs 6 (Article 82—Solicitation) and 105 (Article 134—Soliciting another to commit an offense) of the MCM (2016 edition) with the following amendments:

2018 Amendment a. Text of Statute. Article 82 is revised and incorporates the solicitation of any offense under the UCMJ in one consolidated statute. Specifically, the former Article 134—Soliciting another to commit an offense, MCM (2016 edition), is relocated to Article 82 pursuant to Section 5403 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016), as amended by Section 1081(c)(1)(M) of the National Defense Authorization Act for Fiscal Year 2018, Pub. Law. No. 115-91, 131 Stat. 1283 (2017). Soliciting another to commit a criminal offense is a well-recognized concept in criminal law that does not rely upon the “terminal element” of Article 134 as the basis for its criminality. Accordingly, the newly consolidated Article 82 does not require proof of the Article 134 “terminal element.”

Subparagraph d. *Lesser included offenses* from the MCM (2016 edition) has been deleted. Subparagraphs e. *Maximum punishment* and f. *Sample specification* from the MCM (2016 edition) have been redesignated as subparagraphs d. and e. respectively. For lesser included offenses, see Appendix 12A.

d. *Maximum Punishment*. The maximum authorized confinement for solicitation to commit desertion, mutiny or sedition, or misbehavior before the enemy where the offense is not committed or attempted is changed to confinement for 15 years or the maximum confinement for the underlying offense, whichever is lesser. The maximum authorized punishment for solicitation to commit unspecified offenses is changed to a dishonorable discharge, forfeiture of all pay and allowances, and confinement for 10 years, or the maximum punishment for the underlying offense, whichever is lesser.

The Discussion following paragraph 7.c.(2) of Part IV of the Manual for Courts-Martial, reads as follows:

Discussion

Bona fide suicide attempts should not be charged as criminal offenses. When making a determination whether the injury by the Servicemember was a bona fide suicide attempt, the convening authority should consider factors including, but not limited to, health conditions, personal stressors, and DoD policy related to suicide prevention.

The Analysis for paragraph 7. Article 83 - Malingering reads as follows:

Analysis

7. Article 83—Malingering

This paragraph is taken from paragraph 40 (Article 115—Malingering) of the MCM (2016 edition) with the following amendments:

This offense is relocated to its current position, without substantive change, pursuant to Section 5404 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016).

2018 Amendment: Subparagraph d. *Lesser included offenses* from the MCM (2016 edition) has been deleted. Subparagraphs e. *Maximum punishment* and f. *Sample specification* from the MCM (2016 edition) have been redesignated as subparagraphs d. and e. respectively. For lesser included offenses, see Appendix 12A.

The Analysis for paragraph 8. Article 84 – Breach of medical quarantine reads as follows:

Analysis

8. Article 84—Breach of medical quarantine

The Article 134 offense of Quarantine: medical, breaking is relocated from paragraph 100 of the MCM (2016 edition) to Article 84 pursuant to Section 5405 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016). Proof of the Article 134 “terminal element” is no longer required.

2018 Amendment: c. Explanation. Formal medical quarantines are addressed in DoDI 6200.03, Public Health Emergency Management within the Department of Defense, March 5, 2010 (Change 2, effective October 2, 2013). This instruction provides an example of a commander’s power to institute medical quarantines as an incidence of command, but the commander’s power generally to institute a medical quarantine is not limited to the situations discussed in DoDI 6200.03. Quarantines may include, but are not limited to, orders to remain within a restricted area and to submit to diagnostic or medical treatment. *See id.* at Enclosure 3, ¶2(c)–(e), (h), 4a(7)(a)–(i).

Subparagraph d. *Lesser included offenses* from the MCM (2016 edition) has been deleted. Subparagraphs e. *Maximum punishment* and f. *Sample specification* from the MCM (2016 edition) have been redesignated as subparagraphs d. and e. respectively. For lesser included offenses, see Appendix 12A.

d. *Maximum Punishment.* A new maximum punishment category is added and aligns this offense with federal law (*see* 42 U.S.C. § 271) by enhancing maximum punishments for breaking of medical quarantines declared in reference to a “quarantinable communicable disease.” Under 42 U.S.C. § 271, a “quarantinable communicable disease” extends to those diseases defined by the President by Executive Order. The President has done so in Executive Order 13295 (April 4, 2003, as amended July 3, 2014), now promulgated in 42 C.F.R. § 70.1.

The Analysis for paragraph 9. Article 85 - Desertion reads as follows:

Analysis

9. Article 85—Desertion

This paragraph is taken, without substantive change, from paragraph 9 (Article 85—Desertion) of the MCM (2016 edition).

2018 Amendment: Subparagraph d. *Lesser included offenses* from the MCM (2016 edition) has been deleted. Subparagraphs e. *Maximum punishment* and f. *Sample specification* from the MCM (2016 edition) have been redesignated as subparagraphs d. and e. respectively. For lesser included offenses, see Appendix 12A.

The Analysis for paragraph 10. Article 86 – Absence without leave reads as follows:

Analysis

10. Article 86—Absence without leave

This paragraph is taken, without substantive change, from paragraph 10 (Article 86—Absence without leave) of the MCM (2016 edition).

2018 Amendment: Subparagraph d. *Lesser included offenses* from the MCM (2016 edition) has been deleted. Subparagraphs e. *Maximum punishment* and f. *Sample specification* from the MCM (2016 edition) have been redesignated as subparagraphs d. and e. respectively. For lesser included offenses, see Appendix 12A.

The Discussion following paragraph 11.c.(2) reads as follows:

Discussion

Bona fide suicide attempts should not be charged as criminal offenses. When making a determination whether an action by the Servicemember was a bona fide suicide attempt, the convening authority should consider factors including, but not limited to, health conditions, personal stressors, and DoD policy related to suicide prevention.

The Analysis for paragraph 11. Article 87 – Missing movement, jumping from vessel reads as follows:

Analysis

11. Article 87—Missing movement; jumping from vessel

This paragraph is taken from paragraphs 11 (Article 87—Missing movement) and 91 (Article 134—Jumping from vessel into the water) of the MCM (2016 edition) with the following amendments:

2018 Amendment: a. *Text of Statute.* The Article 134 offense of jumping from a vessel into the water is relocated to Article 87 pursuant to Section 5406 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016). The substance of both offenses remains the same with the exception of the removal of the terminal element from the former Article 134 offense.

Subparagraph b. *Elements.* The two elements “that the accused missed the movement” and “through design or neglect” from paragraph 11.b.(3) and (4) of the MCM (2016 edition) are combined into a single sentence “that the accused missed the movement through design or neglect.”

A new Discussion is added following paragraph 11.c.(2).

Subparagraph d. *Lesser included offenses* from the MCM (2016 edition) has been deleted. Subparagraphs e. *Maximum punishment* and f. *Sample specification* from the MCM (2016 edition) have been redesignated as subparagraphs d. and e. respectively. For lesser included offenses, see Appendix 12A.

The Analysis for paragraph 12. Article 87a – Resistance, flight, breach of arrest, and escape reads as follows:

Analysis

12. Article 87a—Resistance, flight, breach of arrest, and escape

This paragraph is taken from paragraph 19 (Article 95—Resistance, flight, breach, of arrest, and escape) of the MCM (2016 edition). This offense is relocated to its current position, without substantive change, pursuant to Section 5401 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016).

2018 Amendment: Subparagraph d. *Lesser included offenses* from the MCM (2016 edition) has been deleted. Subparagraphs e. *Maximum punishment* and f. *Sample specification* from the MCM (2016 edition) have been redesignated as subparagraphs d. and e. respectively. For lesser included offenses, see Appendix 12A.

The Analysis for paragraph 13. Article 87b – Offenses against correctional custody and restriction reads as follows:

Analysis

13. Article 87b—Offenses against correctional custody and restriction

This paragraph is taken from paragraph 70 (Article 134—Correctional custody—offenses against) and paragraph 102 (Article 134—Restriction, breaking) of the MCM (2016 edition). These offenses are consolidated and relocated to Article 87b pursuant to Section 5407 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016). Proof of the Article 134 “terminal element” is no longer required.

2018 Amendment: Subparagraph d. *Lesser included offenses* from the MCM (2016 edition) has been deleted. Subparagraphs e. *Maximum punishment* and f. *Sample specification* from the MCM (2016 edition) have been redesignated as subparagraphs d. and e. respectively. For lesser included offenses, see Appendix 12A.

The Analysis for paragraph 14. Article 88 – Contempt toward officials reads as follows:

Analysis

14. Article 88—Contempt toward officials

This paragraph is taken, without substantive change, from paragraph 12 (Article 88—Contempt toward officials) of the MCM (2016 edition).

2018 Amendment: Subparagraph d. *Lesser included offenses* from the MCM (2016 edition) has been deleted. Subparagraphs e. *Maximum punishment* and f. *Sample specification* from the MCM (2016 edition) have been redesignated as subparagraphs d. and e. respectively. For lesser included offenses, see Appendix 12A.

The Analysis for paragraph 15. Article 89 – Disrespect toward superior commissioned officer; assault of superior commissioned officer reads as follows:

Analysis

15. Article 89—Disrespect toward superior commissioned officer; assault of superior commissioned officer

This paragraph is taken from paragraphs 13 (Article 89—Disrespect toward superior commissioned officer) and 14 (Article 90—Assaulting or willfully disobeying superior commissioned officer) of the MCM (2016 edition) with the following amendments:

2018 Amendment: a. *Text of Statute.* Article 89 is amended and incorporates the offense of willfully assaulting a superior commissioned officer, which is relocated from Article 90 MCM (2016 edition) pursuant to Section 5408 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016).

c. *Explanation.* (1) *Superior commissioned officer.* The definition of superior commissioned officer is changed from MCM (2016 edition), Part IV, subparagraph 13.c.(1). The definition of “superior commissioned officer,” as revised, removes the separate Service distinction.

Subparagraph d. *Lesser included offenses* from the MCM (2016 edition) has been deleted. Subparagraphs e. *Maximum punishment* and f. *Sample specification* from the MCM (2016 edition) have been redesignated as subparagraphs d. and e. respectively. For lesser included offenses, see Appendix 12A.

d. *Maximum punishment.* The maximum punishment is adjusted and differentiates situations where the disrespect is directed at a superior commissioned officer in command from situations where a commissioned officer is superior in rank.

The Analysis for paragraph 16. Article 90 – Willfully disobeying superior commissioned officer reads as follows:

Analysis

16. Article 90—Willfully disobeying superior commissioned officer

This paragraph is taken from paragraph 14 (Article 90—Assaulting or willfully disobeying superior commissioned officer) of the MCM (2016 edition) with the following amendments:

2018 Amendment: a. *Text of Statute.* Article 90 is amended by relocating the offense of “striking or assaulting superior commissioned officer” to Article 89 pursuant to Sections 5408 and 5409 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016).

c. *Explanation (1) Superior commissioned officer.* The definition of superior commissioned officer is changed from MCM (2016 edition), Part IV, subparagraph 13.c.(1). The definition of “superior commissioned officer,” as revised, removes the separate Service distinction. Subparagraph 16.c.(2)(a)(iii), as revised, explains the basis for the authority of the issuing officer.

Subparagraph d. *Lesser included offenses* from the MCM (2016 edition) has been deleted. Subparagraphs e. *Maximum punishment* and f. *Sample specification* from the MCM (2016 edition) have been redesignated as subparagraphs d. and e. respectively. For lesser included offenses, see Appendix 12A.

The Analysis for paragraph 17. Article 91 – Insubordinate conduct toward warrant officer, noncommissioned officer, or petty officer reads as follows:

Analysis

17. Article 91—Insubordinate conduct toward warrant officer, noncommissioned officer, or petty officer

This paragraph is taken from paragraph 15 (Article 91—Insubordinate conduct toward warrant officer, noncommissioned officer, or petty officer) of the MCM (2016 edition) without substantive change.

2018 Amendment: Subparagraph d. *Lesser included offenses* from the MCM (2016 edition) has been deleted. Subparagraphs e. *Maximum punishment* and f. *Sample specification* from the MCM (2016 edition) have been redesignated as subparagraphs d. and e. respectively. For lesser included offenses, see Appendix 12A.

The Analysis for paragraph 18. Article 92 – Failure to obey order or regulation reads as follows:

Analysis

18. Article 92—Failure to obey order or regulation

This paragraph is taken from paragraph 16, (Article 92—Failure to obey order or regulation) of the MCM (2016 edition) without substantive change.

2018 Amendment: Subparagraph d. *Lesser included offenses* from the MCM (2016 edition) has been deleted. Subparagraphs e. *Maximum punishment* and f. *Sample specification* from the MCM (2016 edition) have been redesignated as subparagraphs d. and e. respectively. For lesser included offenses, see Appendix 12A.

The Analysis for paragraph 19. Article 93 – Cruelty and maltreatment reads as follows:

Analysis

19. Article 93—Cruelty and maltreatment

This paragraph is taken from paragraph 17 (Article 93—Cruelty and maltreatment) of the MCM (2016 edition) with the following amendments:

2018 Amendment: Subparagraph d. *Lesser included offenses* from the MCM (2016 edition) has been deleted. Subparagraphs e. *Maximum punishment* and f. *Sample specification* from the MCM (2016 edition) have been redesignated as subparagraphs d. and e. respectively. For lesser included offenses, see Appendix 12A.

d. *Maximum punishment.* The maximum authorized confinement for a violation of Article 93 is increased from two years to three years.

The Analysis for paragraph 20. Article 93a – Prohibited activities with military recruit or trainee by person in position of special trust reads as follows:

Analysis

20. Article 93a—Prohibited activities with military recruit or trainee by person in position of special trust

2018 Amendment: This paragraph is a new enumerated provision and implements Article 93a, as added by Section 5410 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016), and criminalizes acts of “prohibited sexual activity” specified in regulations by the Secretary concerned, between those in positions of special trust and junior military members in initial active duty training, officer qualification programs, other training programs for initial career qualification, in a delayed entry program, or applicants for military service.

The Analysis for paragraph 21. Article 94 – Mutiny or sedition reads as follows:

Analysis

21. Article 94—Mutiny or sedition

This paragraph is taken from paragraph 18 (Article 94—Mutiny and sedition) of the MCM (2016 edition) without substantive change.

2018 Amendment: Subparagraph c.(4)(b) is amended and clarifies the definition of “superior commissioned officer.”

Subparagraph d. *Lesser included offenses* from the MCM (2016 edition) has been deleted. Subparagraphs e. *Maximum punishment* and f. *Sample specification* from the MCM (2016 edition) have been redesignated as subparagraphs d. and e. respectively. For lesser included offenses, see Appendix 12A.

The Analysis for paragraph 22. Article 95 – Offenses by sentinel or lookout reads as follows:

Analysis

22. Article 95—Offenses by sentinel or lookout

This paragraph is taken from paragraph 38 (Article 113—Misbehavior of sentinel or lookout) and the portions of paragraph 104 (Article 134—Sentinel or lookout: offenses against or by) relating to the offense of “Loitering or wrongfully sitting on post by a sentinel or lookout” of the MCM (2016 edition) with the following amendments: This offense is relocated from subparagraph 104.b.(2) of Article 134 of the MCM (2016 edition) pursuant to Section 5411 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016). Proof of the “terminal element” of Article 134 is no longer required.

2018 Amendment: Subparagraph d. *Lesser included offenses* from the MCM (2016 edition) has been deleted. Subparagraphs e. *Maximum punishment* and f. *Sample specification* from the MCM (2016 edition) have been redesignated as subparagraphs d. and e. respectively. For lesser included offenses, see Appendix 12A.

The Analysis for paragraph 23. Article 95a – Disrespect toward sentinel or lookout reads as follows:

Analysis

23. Article 95a—Disrespect toward sentinel or lookout

This paragraph is taken from the portions of paragraph 104 (Article 134—Sentinel or lookout: offenses against or by) of the MCM (2016 edition) relating to the offense of “Disrespect to a sentinel or lookout.” This offense is relocated to its current position pursuant to Section 5412 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016), with the following amendments: Proof of the Article 134 “terminal element” is no longer required.

2018 Amendment: Subparagraph d. *Lesser included offenses* from the MCM (2016 edition) has been deleted. Subparagraphs e. *Maximum punishment* and f. *Sample specification* from the MCM (2016 edition) have been redesignated as subparagraphs d. and e. respectively. For lesser included offenses, see Appendix 12A.

The Analysis for paragraph 24. Article 96 – Release of prisoner without authority; drinking with prisoner reads as follows:

Analysis

24. Article 96—Release of prisoner without authority; drinking with prisoner

This paragraph is taken from paragraphs 20 (Article 96—Releasing prisoner without authority) and 74 (Article 134—Drinking liquor with prisoner) of the MCM (2016 edition) with the following amendments: These offenses were relocated and consolidated pursuant to Section 5413 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016). The term “suffers” was stricken and replaced with “allows” and reflects modern usage of terminology; and in the case of the “drinking with prisoner” offense, the scope of the offense was extended to apply to any person who unlawfully drinks an alcoholic beverage with a prisoner. Proof of the “terminal element” of Article 134 is no longer required.

2018 Amendment: c. *Explanation (5) Drinking with prisoner.* This explanation clarifies that drinking with a prisoner is unlawful unless competent authority has granted the accused specific permission to consume alcohol with a prisoner.

Subparagraph d. *Lesser included offenses* from the MCM (2016 edition) has been deleted. Subparagraphs e. *Maximum punishment* and f. *Sample specification* from the MCM (2016 edition) have been redesignated as subparagraphs d. and e. respectively. For lesser included offenses, see Appendix 12A.

d. *Maximum punishment.* The maximum authorized confinement for allowing a prisoner to escape through neglect is increased from one to two years; the maximum authorized confinement for allowing a prisoner to escape through design is increased from two to five years. The maximum authorized confinement and period of forfeitures of two-thirds’ pay per month for drinking with a prisoner is increased from three months to one year.

The Analysis for paragraph 25. Article 97 – Unlawful detention reads as follows:

Analysis

25. Article 97—Unlawful detention

This paragraph is taken, without substantive change, from paragraph 21 (Article 97—Unlawful detention) of the MCM (2016 edition) with the following amendments:

2018 Amendment: Subparagraph d. *Lesser included offenses* from the MCM (2016 edition) has been deleted. Subparagraphs e. *Maximum punishment* and f. *Sample specification* from the MCM (2016 edition) have been redesignated as subparagraphs d. and e. respectively. For lesser included offenses, see Appendix 12A.

The Analysis for paragraph 26. Article 98 – Misconduct as prisoner reads as follows:

Analysis

26. Article 98—Misconduct as prisoner

This paragraph is taken from paragraph 29 (Article 105—Misconduct as a prisoner) of the MCM (2016 edition) with the following amendments: This offense is relocated to its current position, pursuant to Section 5401 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016).

2018 Amendment: Subparagraph d. *Lesser included offenses* from the MCM (2016 edition) has been deleted. Subparagraphs e. *Maximum punishment* and f. *Sample specification* from the MCM (2016 edition) have been redesignated as subparagraphs d. and e. respectively. For lesser included offenses, see Appendix 12A.

The Analysis for paragraph 27. Article 99 – Misbehavior before the enemy reads as follows:

Analysis

27. Article 99—Misbehavior before the enemy

This paragraph is taken, without substantive change, from paragraph 23 (Article 99—Misbehavior before the enemy) of the MCM (2016 edition) with the following amendments:

2018 Amendment: Subparagraph d. *Lesser included offenses* from the MCM (2016 edition) has been deleted. Subparagraphs e. *Maximum punishment* and f. *Sample specification* from the MCM (2016 edition) have been redesignated as subparagraphs d. and e. respectively. For lesser included offenses, see Appendix 12A.

The Analysis for paragraph 9. Article 85 - Desertion reads as follows:

Analysis

28. Article 100—Subordinate compelling surrender

This paragraph is taken from paragraph 24 (Article 100—Subordinate compelling surrender) of the MCM (2016 edition) with the following amendments:

2018 Amendment: Subparagraph d. *Lesser included offenses* from the MCM (2016 edition) has been deleted. Subparagraphs e. *Maximum punishment* and f. *Sample specification* from the MCM (2016 edition) have been redesignated as subparagraphs d. and e. respectively. For lesser included offenses, see Appendix 12A.

The Analysis for paragraph 29. Article 101 – Improper use of countersign reads as follows:

Analysis

29. Article 101—Improper use of countersign

This paragraph is taken from paragraph 25 (Article 101—Improper use of a countersign) of the MCM (2016 edition) with the following amendments:

2018 Amendment: Subparagraph d. *Lesser included offenses* from the MCM (2016 edition) has been deleted. Subparagraphs e. *Maximum punishment* and f. *Sample specification* from the MCM (2016 edition) have been redesignated as subparagraphs d. and e. respectively. For lesser included offenses, see Appendix 12A.

The Analysis for paragraph 30. Article 102 – Forcing a safeguard reads as follows:

Analysis

30. Article 102—Forcing a safeguard

This paragraph is taken from paragraph 26 (Article 102—Forcing a safeguard) of the MCM (2016 edition) with the following amendments:

2018 Amendment: Subparagraph d. *Lesser included offenses* from the MCM (2016 edition) has been deleted. Subparagraphs e. *Maximum punishment* and f. *Sample specification* from the MCM (2016 edition) have been redesignated as subparagraphs d. and e. respectively. For lesser included offenses, see Appendix 12A.

The Analysis for paragraph 31. Article 103 - Spies reads as follows:

Analysis

31. Article 103—Spies

This paragraph is taken from paragraph 30 (Article 106—Spies) of the MCM (2016 edition) with the following amendments: This offense is relocated to its current position pursuant to Section 5401 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016), and is amended to reflect the removal of the mandatory death penalty.

2018 Amendment: Subparagraph d. *Lesser included offenses* from the MCM (2016 edition) has been deleted. Subparagraphs e. *Maximum punishment* and f. *Sample specification* from the MCM (2016 edition) have been redesignated as subparagraphs d. and e. respectively. For lesser included offenses, see Appendix 12A.

d. *Maximum punishment.* As amended, death is the maximum authorized punishment for the offense, rather than a mandatory punishment.

The Analysis for paragraph 32. Article 103a - Espionage reads as follows:

Analysis

32. Article 103a—Espionage

This paragraph is taken from paragraph 30a (Article 106a—Espionage) of the MCM (2016 edition) with the following amendments: This offense is relocated to its current position pursuant to Section 5401 Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016).

2018 Amendment: Subparagraph d. *Lesser included offenses* from the MCM (2016 edition) has been deleted. Subparagraphs e. *Maximum punishment* and f. *Sample specification* from the MCM (2016 edition) have been redesignated as subparagraphs d. and e. respectively. For lesser included offenses, see Appendix 12A.

The Analysis for paragraph 33. Article 103b – Aiding the enemy reads as follows:

Analysis

33. Article 103b—Aiding the enemy

This paragraph is taken from paragraph 28 (Article 104—Aiding the enemy) of the MCM (2016 edition) with the following amendments: This offense is relocated to its current position pursuant to Section 5401 Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016).

2018 Amendment: Subparagraph d. *Lesser included offenses* from the MCM (2016 edition) has been deleted. Subparagraphs e. *Maximum punishment* and f. *Sample specification* from the MCM (2016 edition) have been redesignated as subparagraphs d. and e. respectively. For lesser included offenses, see Appendix 12A.

The Analysis for paragraph 34. Article 104 – Public Records offenses reads as follows:

Analysis

34. Article—Public records offenses

This paragraph is taken from paragraph 99 (Article 134—Public record: altering, concealing, removing, mutilating, obliterating, or destroying) of the MCM (2016 edition) and is relocated to Article 104 pursuant to Section 5415 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016), with the following amendments: Proof of the Article 134 “terminal element” is no longer required.

2018 Amendment: Subparagraph d. *Lesser included offenses* from the MCM (2016 edition) has been deleted. Subparagraphs e. *Maximum punishment* and f. *Sample specification* from the MCM (2016 edition) have been redesignated as subparagraphs d. and e. respectively. For lesser included offenses, see Appendix 12A.

The Analysis for paragraph 35. Article 104a – Fraudulent enlistment, appointment, or separation reads as follows:

Analysis

35. Article 104a—Fraudulent enlistment, appointment, or separation

This paragraph is taken from paragraph 7 (Article 83—Fraudulent enlistment, appointment, or separation) of the MCM (2016 edition) with the following amendments: This offense is relocated to Article 104a pursuant to Section 5452 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016).

2018 Amendment: Subparagraph d. *Lesser included offenses* from the MCM (2016 edition) has been deleted. Subparagraphs e. *Maximum punishment* and f. *Sample specification* from the MCM (2016 edition) have been redesignated as subparagraphs d. and e. respectively. For lesser included offenses, see Appendix 12A.

The Analysis for paragraph 36. Article 104b – Unlawful enlistment, appointment or separation reads as follows:

Analysis

36. Article 104b—Unlawful enlistment, appointment, or separation

This paragraph is taken from paragraph 8 (Article 84—Effecting unlawful enlistment, appointment, or separation) of the MCM (2016 edition) with the following amendments: This offense is relocated to Article 104b pursuant to Section 5452 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016).

2018 Amendment: Subparagraph d. *Lesser included offenses* from the MCM (2016 edition) has been deleted. Subparagraphs e. *Maximum punishment* and f. *Sample specification* from the MCM (2016 edition) have been redesignated as subparagraphs d. and e. respectively. For lesser included offenses, see Appendix 12A.

The Analysis for paragraph 37. Article 105 - Forgery reads as follows:

Analysis

37. Article 105—Forgery

This paragraph is taken from paragraph 48 (Article 123—Forgery) of the MCM (2016 edition) with the following amendments: This offense is relocated to Article 105 pursuant to Section 5401 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016).

2018 Amendment: Subparagraph d. *Lesser included offenses* from the MCM (2016 edition) has been deleted. Subparagraphs e. *Maximum punishment* and f. *Sample specification* from the MCM (2016 edition) have been redesignated as subparagraphs d. and e. respectively. For lesser included offenses, see Appendix 12A.

The Analysis for paragraph 38. Article 105a – False or unauthorized pass offenses reads as follows:

Analysis

38. Article 105a—False or unauthorized pass offenses

This paragraph is taken from paragraph 77 (Article 134—False pretenses, obtaining services under) of the MCM (2016 edition) pursuant to Section 5416 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016), with the following amendments: Proof of the Article 134 “terminal element” is no longer required.

2018 Amendment: Subparagraph d. *Lesser included offenses* from the MCM (2016 edition) has been deleted. Subparagraphs e. *Maximum punishment* and f. *Sample specification* from the MCM (2016 edition) have been redesignated as subparagraphs d. and e. respectively. For lesser included offenses, see Appendix 12A.

The Analysis for paragraph 39. Article 106 – Impersonation of officer, noncommissioned or petty officer, or agent or official reads as follows:

Analysis

39. Article 106—Impersonation of officer, noncommissioned or petty officer, or agent or official

This paragraph is taken from paragraph 86 (Article 134—Impersonating a commissioned, warrant, noncommissioned, or petty officer, or an agent or official) of the MCM (2016 edition) with the following amendments: This offense is relocated to Article 106 pursuant to Section 5417 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016). Proof of the Article 134 “terminal element” is no longer required.

2018 Amendment: a. *Text of statute.* The phrase “commissioned, warrant officer” is replaced with “officer.” This change aligns this offense with the definition of “officer” under 10 U.S.C. § 101(b)(1) which defines “officer” to mean a commissioned or warrant officer.

c. *Explanation (2) Officer.* This provision is added to the MCM and explains that the definition of “officer” for purposes of this statute is derived from the existing definition of that term in 10 U.S.C. § 101(b)(1).

Subparagraph d. *Lesser included offenses* from the MCM (2016 edition) has been deleted. Subparagraphs e. *Maximum punishment* and f. *Sample specification* from the MCM (2016 edition) have been redesignated as subparagraphs d. and e. respectively. For lesser included offenses, see Appendix 12A.

The Analysis for paragraph 40. Article 106a – Wearing unauthorized insignia, decoration, badge, ribbon, device, or lapel button reads as follows:

Analysis

40. Article 106a—Wearing unauthorized insignia, decoration, badge, ribbon, device, or lapel button

This paragraph is taken from paragraph 113 (Article 134—Wearing unauthorized insignia, decoration, badge, ribbon, device, or lapel button) of the MCM (2016 edition) with the following amendments: This offense is relocated to Article 106a pursuant to Section 5418 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016). Proof of the Article 134 “terminal element” is no longer required.

2018 Amendment: c. Explanation (1) In general. The MCM (2016 edition) did not provide an explanation for this provision. An explanation is added and clarifies the gravamen of this offense, the scope of unauthorized wear, and knowledge.

d. *Maximum punishment.* The maximum authorized confinement is increased from six months to a year for violations of the article involving specified medals and awards.

Subparagraph d. *Lesser included offenses* from the MCM (2016 edition) has been deleted. Subparagraphs e. *Maximum punishment* and f. *Sample specification* from the MCM (2016 edition) have been redesignated as subparagraphs d. and e. respectively. For lesser included offenses, see Appendix 12A.

The Analysis for paragraph 41. Article 107 – False official statements, false swearing reads as follows:

Analysis

41. Article 107—False official statements; false swearing

This paragraph is taken from paragraphs 31 (Article 107—False official statement) and 79 (Article 134—False swearing) of the MCM (2016 edition) with the following amendments: The offense of false swearing is relocated from Article 134, MCM (2016 edition), to Article 107 pursuant to Section 5419 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016). Proof of the Article 134 “terminal element” of Article 134 is no longer required.

2018 Amendment: c. Explanation. (1)(b) Official statements. This explanation is revised and clarifies whether a statement relates to the official duties of the speaker or hearer. *See United States v. Spicer*, 71 M.J. 470 (C.A.A.F. 2013). *See also United States v. Passut*, 73 M.J. 27 (C.A.A.F. 2014), and *United States v. Capel*, 71 M.J. 485 (C.A.A.F. 2013).

Subparagraph d. *Lesser included offenses* from the MCM (2016 edition) has been deleted. Subparagraphs e. *Maximum punishment* and f. *Sample specification* from the MCM (2016 edition) have been redesignated as subparagraphs d. and e. respectively. For lesser included offenses, see Appendix 12A.

The Analysis for paragraph 42. Article 107a – Parole violation reads as follows:

Analysis

42. Article 107a—Parole violation

This paragraph is taken from paragraph 97a (Article 134—Parole, violation of) of the MCM (2016 edition) with the following amendments: The offense is relocated from Article 134, MCM (2016 edition), to Article 107a pursuant to Section 5420 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016). Proof of the Article 134 “terminal element” of Article 134 is no longer required.

Subparagraph d. *Lesser included offenses* from the MCM (2016 edition) has been deleted. Subparagraphs e. *Maximum punishment* and f. *Sample specification* from the MCM (2016 edition) have been redesignated as subparagraphs d. and e. respectively. For lesser included offenses, see Appendix 12A.

The Analysis for paragraph 43. Article 108 – Military property of United States – Loss, damage, destruction, or wrongful disposition reads as follows:

Analysis

43. Article 108—Military property of United States—Loss, damage, destruction, or wrongful disposition

This paragraph is taken from paragraph 32 (Article 108—Military property of United States—Loss, damage, destruction, or wrongful disposition) of the MCM (2016 edition) with the following amendments:

2018 Amendment: c. Explanation. Subparagraph c.(4) *Firearms and Explosives* clarifies that the term “explosive” specifically includes ammunition.

Subparagraph d. *Lesser included offenses* from the MCM (2016 edition) has been deleted. Subparagraphs e. *Maximum punishment* and f. *Sample specification* from the MCM (2016 edition) have been redesignated as subparagraphs d. and e. respectively. For lesser included offenses, see Appendix 12A.

d. *Maximum punishment.* The threshold amount for purposes of the maximum punishment in relation to the qualifying value of property concerned is amended to \$1,000 and aligns with the division between felony and misdemeanor penalties for property offenses in federal civilian law for equivalent misconduct. *See* 18 U.S.C. § 1361.

The Analysis for paragraph 44. Article 108a – Captured or abandoned property reads as follows:

Analysis

44. Article 108a—Captured or abandoned property

This paragraph is taken from paragraph 27 (Article 103—Captured or abandoned property) of the MCM (2016 edition) and is relocated to Article 108a pursuant to Section 5401 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016), with the following amendments:

2018 Amendment: c. Explanation. Subparagraph c.(6) *Firearms and explosives* is added and aligns it with an identical provision in paragraph 43.

Subparagraph d. *Lesser included offenses* from the MCM (2016 edition) has been deleted. Subparagraphs e. *Maximum punishment* and f. *Sample specification* from the MCM (2016 edition) have been redesignated as subparagraphs d. and e. respectively. For lesser included offenses, see Appendix 12A.

d. *Maximum Punishment.* The threshold amount for purposes of the maximum punishment in relation to the qualifying value of the property concerned is amended to \$1,000 and aligns with the division between felony and misdemeanor penalties for property offenses in civilian jurisdictions. Maximum punishments focus on the amount of damage inflicted and the value of the property destroyed.

The Analysis for paragraph 45. Article 109 – Property other than military property of United States – Waste, spoilage, or destruction reads as follows:

Analysis

45. Article 109—Property other than military property of United States—Waste, spoilage, or destruction

This paragraph is taken from paragraph 33 (Article 109—Property other than military property of the United States—waste, spoilage, or destruction) of the MCM (2016 edition) with the following amendments:

2018 Amendments: b. Elements. The maximum punishment categories are reorganized into three separate categories reflecting the type of property involved and the type of action being taken against the property.

Subparagraph d. *Lesser included offenses* from the MCM (2016 edition) has been deleted. Subparagraphs e. *Maximum punishment* and f. *Sample specification* from the MCM (2016 edition) have been redesignated as subparagraphs d. and e. respectively. For lesser included offenses, see Appendix 12A.

d. *Maximum Punishment.* The threshold amount for purposes of the maximum punishment in relation to the qualifying value of the property concerned is amended to \$1,000 and aligns with the division between felony and misdemeanor penalties for property offenses in civilian jurisdictions. Maximum punishments focus on the amount of damage inflicted and the value of the property destroyed. The maximum punishments are also further divided based on the nature of the property and the extent of the damage.

The Analysis for paragraph 46. Article 109a – Mail matter: wrongful taking, opening, etc. reads as follows:

Analysis

46. Article 109a—Mail matter: wrongful taking, opening, etc.

This paragraph is taken from paragraph 93 (Article 134—Mail: taking, opening, secreting, destroying, or stealing) of the MCM (2016 edition) with the following amendments: The offense is relocated from Article 134, MCM (2016 edition), to Article 109a pursuant to Section 5421 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016). Proof of the Article 134 “terminal element” of Article 134 is no longer required.

Subparagraph d. *Lesser included offenses* from the MCM (2016 edition) has been deleted. Subparagraphs e. *Maximum punishment* and f. *Sample specification* from the MCM (2016 edition) have been redesignated as subparagraphs d. and e. respectively. For lesser included offenses, see Appendix 12A.

The Analysis for paragraph 47. Article 110 – Improper hazarding of a vessel or aircraft reads as follows:

Analysis

47. Article 110—Improper hazarding of vessel or aircraft

This paragraph is taken from paragraph 34 (Article 110—Improper hazarding of a vessel) of the MCM (2016 edition) with the following amendments:

2018 Amendment: a. *Text of statute.* This offense is amended and includes improper hazarding of an aircraft, and accordingly is retitled “Improper hazarding of vessel or aircraft.”

Subparagraph d. *Lesser included offenses* from the MCM (2016 edition) has been deleted. Subparagraphs e. *Maximum punishment* and f. *Sample specification* from the MCM (2016 edition) have been redesignated as subparagraphs d. and e. respectively. For lesser included offenses, see Appendix 12A.

The Analysis for paragraph 48. Article 111 – Leaving the scene of vehicle accident reads as follows:

Analysis

48. Article 111—Leaving scene of vehicle accident

This paragraph is taken from paragraph 82 (Article 134—Fleeing scene of accident) of the MCM (2016 edition) with the following amendments: The offense is relocated from Article 134, MCM (2016 edition), to Article 111 pursuant to Section 5423 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016). Proof of the Article 134 “terminal element” of Article 134 is no longer required.

2018 Amendment: Subparagraph d. *Lesser included offenses* from the MCM (2016 edition) has been deleted. Subparagraphs e. *Maximum punishment* and f. *Sample specification* from the MCM (2016 edition) have been redesignated as subparagraphs d. and e. respectively. For lesser included offenses, see Appendix 12A.

The Analysis for paragraph 49. Article 112 – Drunkenness and other incapacitation offenses reads as follows:

Analysis

49. Article 112—Drunkenness and other incapacitation offenses

This paragraph is taken from paragraphs 36 (Article 112—Drunk on duty), 75 (Article 134—Drunk Prisoner), and 76 (Article 134—Drunkenness—incapacitation for performance of duties through prior wrongful indulgence in intoxicating liquor or any drug) of the MCM (2016 edition) with the following amendments: The offense is now Article 112 pursuant to Section 5424 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016). Proof of the Article 134 “terminal element” of Article 134 is no longer required.

2018 Amendment: a. *Text of statute.* The new text reflects the migration of paragraphs 75 and 76 from Article 134 offenses in the MCM (2016 edition) to Article 112; proof of the terminal element of Article 134 is no longer required. This migration places the similar offenses of drunk on duty, drunk prisoner, and incapacitation for duty under the same UCMJ article.

(2) *Incapacitation for duty from drunkenness or drug use.* Under paragraph 76 of the MCM (2016 edition) wrongful indulgence in alcohol or drugs was required. The word wrongful has been removed from the incapacitation for duty from drunkenness or drug use offense; the act of being incapacitated for duty is itself wrongful in the military context. However, this offense retains the affirmative defense formerly utilized in paragraph 76 of the MCM (2016 edition) namely: that at the time of the offense the accused neither knew, nor reasonably should have known, that he or she was assigned to, or susceptible to recall for, military duties. *See* subparagraph 49.c.(2)(b). Likewise, the defenses of accident (*see* R.C.M. 916(f)) and mistake of fact (*see* R.C.M. 916(j)) continue to apply to instances where the accused accidentally or mistakenly consumed drugs or alcohol, not knowing them to be such at the time of ingestion.

c. *Explanation.* (1) *Drunk on Duty.* (a) *Drunk.* This definition is taken from subparagraph 35.c.(6), MCM (2016 edition).

(2) *Incapacitation for duty from drunkenness or drug use.* (a) *Incapacitated.* The cross-reference to the explanation of drunk is changed to reflect the relocation of that definition from subparagraph 35.c.(6), MCM (2016 edition) to subparagraph 49.c.(1)(a).

(3) *Drunk prisoner.* (a) *Prisoner.* The cross-reference to the explanation of prisoner is changed and reflects the Military Justice Act of 2016’s relocation of the former Article 134—Drinking liquor with prisoner offense from paragraph 74 of the MCM (2016 edition) to Article 96.

(b) *Drunk.* *See* subparagraph 51.c.(6). The definition of drunk is changed and reflects the lower blood alcohol content limits set forth in Article 113 pursuant to Section 5425, Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016), and the relocation of that definition from subparagraph 35.c.(6), MCM (2016 edition), to subparagraph 49.c.(1)(a).

Subparagraph d. *Lesser included offenses* from the MCM (2016 edition) has been deleted. Subparagraphs e. *Maximum punishment* and f. *Sample specification* from the MCM (2016 edition) have been redesignated as subparagraphs d. and e. respectively. For lesser included offenses, see Appendix 12A.

The Analysis for paragraph 50. Article 112a – Wrongful use, possession, etc., of controlled substances reads as follows:

Analysis

50. Article 112a—Wrongful use, possession, etc., of controlled substances

This paragraph is taken from paragraph 37 (Article 112a—Wrongful use, possession, etc., of controlled substances) of the MCM (2016 edition) with the following amendments:

2018 Amendment: Subparagraph d. *Lesser included offenses* from the MCM (2016 edition) has been deleted. Subparagraphs e. *Maximum punishment* and f. *Sample specification* from the MCM (2016 edition) have been redesignated as subparagraphs d. and e. respectively. For lesser included offenses, see Appendix 12A.

The Analysis for paragraph 51. Article 113 – Drunken or reckless operation of a vehicle, aircraft, or vessel reads as follows:

Analysis

51. Article 113—Drunken or reckless operation of a vehicle, aircraft, or vessel

This paragraph is taken from paragraph 35 (Article 111—Drunken or reckless operation of a vehicle, aircraft, or vessel) of the MCM (2016 edition). This offense is relocated to its current position pursuant to Section 5452 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016), with the following amendments:

2018 Amendment: a. *Text of statute.* The substance of the offense remains the same, except for a lower blood alcohol content limit with respect to alcohol concentration in a person’s blood pursuant to Section 5425 of the National Defense Authorization Act for Fiscal Year 2017. The Secretary may by regulation prescribe limits that are lower if such lower limits are based on scientific developments, as reflected in federal civilian law of general applicability.

Subparagraph d. *Lesser included offenses* from the MCM (2016 edition) has been deleted. Subparagraphs e. *Maximum punishment* and f. *Sample specification* from the MCM (2016 edition) have been redesignated as subparagraphs d. and e. respectively. For lesser included offenses, see Appendix 12A.

The Discussion following paragraph 52.b.(7)(c) of Part IV of the Manual for Courts-Martial, reads as follows:

Discussion

For negligent discharge of a firearm, see paragraph 100.

The Analysis for paragraph 52. Article 114 – Endangerment Offenses reads as follows:

Analysis

52. Article 114—Endangerment Offenses

This paragraph is taken from paragraphs 39 (Article 114—Dueling), 81 (Article 134—Firearm, discharging—willfully, under such circumstances as to endanger human life), 100a (Article 134—Reckless endangerment), and 112 (Article 134—Weapon: concealed, carrying) of the MCM (2016 edition) with the following amendments: These offenses are relocated and consolidated into the newly titled Article 114—Endangerment offenses pursuant to Section 5426 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016). Proof of the Article 134 “terminal element” is no longer required.

2018 Amendment: Subparagraph d. *Lesser included offenses* from the MCM (2016 edition) has been deleted. Subparagraphs e. *Maximum punishment* and f. *Sample specification* from the MCM (2016 edition) have been redesignated as subparagraphs d. and e. respectively. For lesser included offenses, see Appendix 12A.

d. *Maximum punishment.* By prescribing one maximum punishment for all of these offenses, the 2018 Amendments authorize the imposition of a dishonorable discharge for reckless endangerment and for carrying a concealed weapon. Previously, a bad-conduct discharge but not a dishonorable discharge was a portion of the maximum authorized punishment for those offenses.

The Analysis for paragraph 53. Article 115 – Communicating threats reads as follows:

Analysis

53. Article 115—Communicating threats

This paragraph is taken from paragraphs 109 (Article 134—Threat or hoax designed or intended to cause panic or public fear) and 110 (Article 134—Threat, communicating) of the MCM (2016 edition) with the following

amendments: These offenses are consolidated and relocated to their current position pursuant to Section 5427 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016). Proof of the Article 134 “terminal element” is no longer required. The explanations for threat and wrongful are amended and are consistent with *Elonis v. United States*, 135 S. Ct. 2001 (2015), and *United States v. Rapert*, 75 M.J. 164 (C.A.A.F. 2016).

2018 Amendment: Subparagraph d. *Lesser included offenses* from the MCM (2016 edition) has been deleted. Subparagraphs e. *Maximum punishment* and f. *Sample specification* from the MCM (2016 edition) have been redesignated as subparagraphs d. and e. respectively. For lesser included offenses, see Appendix 12A.

The Analysis for paragraph 54. Article 116 – Riot or breach of peace reads as follows:

Analysis

54. Article 116—Riot or breach of peace

This paragraph is taken from paragraph 41 (Article 116—Riot or breach of peace) of the MCM (2016 edition) and is relocated to Article 116 pursuant to Section 5452 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016), with the following amendments:

2018 Amendment: Subparagraph d. *Lesser included offenses* from the MCM (2016 edition) has been deleted. Subparagraphs e. *Maximum punishment* and f. *Sample specification* from the MCM (2016 edition) have been redesignated as subparagraphs d. and e. respectively. For lesser included offenses, see Appendix 12A.

The Analysis for paragraph 55. Article 117 – Provoking speeches or gestures reads as follows:

Analysis

55. Article 117—Provoking speeches or gestures

This paragraph is taken from paragraph 42 (Article 117—Provoking speeches or gestures) of the MCM (2016 edition) with the following amendments:

2018 Amendment: Subparagraph d. *Lesser included offenses* from the MCM (2016 edition) has been deleted. Subparagraphs e. *Maximum punishment* and f. *Sample specification* from the MCM (2016 edition) have been redesignated as subparagraphs d. and e. respectively. For lesser included offenses, see Appendix 12A.

The Analysis for paragraph 56. Article 118 – Murder reads as follows:

Analysis

56. Article 118—Murder

This paragraph is taken from paragraph 43 (Article 118—Murder) of the MCM (2016 edition) with the following amendments:

2018 Amendment: c. *Explanation (5)(b) Separate offenses.* This subparagraph is amended and conforms to the amendments to Articles 120 and 125 from Sections 5430 and 5439 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016). The specific listing of offenses that may be charged separately also is amended to reflect the list of felony-murder offenses contained at Article 118(4).

2018 Amendment: Subparagraph d. *Lesser included offenses* from the MCM (2016 edition) has been deleted. Subparagraphs e. *Maximum punishment* and f. *Sample specification* from the MCM (2016 edition) have been redesignated as subparagraphs d. and e. respectively. For lesser included offenses, see Appendix 12A.

The Analysis for paragraph 57. Article 119 – Manslaughter reads as follows:

Analysis

57. Article 119—Manslaughter

This paragraph is taken from paragraph 44 (Article 119—Manslaughter) of the MCM (2016 edition) with the following amendments:

2018 Amendment: b. *Elements* (2)(d) clarifies the relationship between involuntary manslaughter and murder perpetrated during the commission of certain offenses and conforms to the amendments to Articles 118 and 120 from Sections 5428 and 5430 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016).

Subparagraph d. *Lesser included offenses* from the MCM (2016 edition) has been deleted. Subparagraphs e. *Maximum punishment* and f. *Sample specification* from the MCM (2016 edition) have been redesignated as subparagraphs d. and e. respectively. For lesser included offenses, see Appendix 12A.

The Analysis for paragraph 58. Article 119a – Death or injury of an unborn child reads as follows:

Analysis

58. Article 119a—Death or injury of an unborn child

This paragraph is taken from paragraph 44a (Article 119a—Death or injury of an unborn child) of the MCM 2016, as amended by Section 1031(c)(1)(N) of the National Defense Authorization Act for Fiscal Year 2018, Pub. Law. No. 115-91, 131 Stat. 1283 (2017), with the following amendments:

2018 Amendment: a. *Text of statute.* The phrase “authorized by state or federal law to perform abortions” was removed from this subparagraph’s recital of the text of Article 119a because that phrase does not appear in the statute. *See* Pub. L. No. 1018-212, § 3; 118 Stat. 568 (April 1, 2004).

Subparagraph d. *Lesser included offenses* from the MCM (2016 edition) has been deleted. Subparagraphs e. *Maximum punishment* and f. *Sample specification* from the MCM (2016 edition) have been redesignated as subparagraphs d. and e. respectively. For lesser included offenses, see Appendix 12A.

The Analysis for paragraph 59. Article 119b – Child endangerment reads as follows:

Analysis

59. Article 119b—Child endangerment

This paragraph is taken from paragraph 68a (Article 134—Child endangerment) of the MCM (2016 edition) and is relocated to Article 116 pursuant to Section 5429 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016). Proof of the Article 134 “terminal element” is no longer required.

2018 Amendment: c. *Explanation.* (2) The phrase “even though such harm would not necessarily be the natural and probable consequences of such acts. In this regard,” was removed from this subparagraph.

Subparagraph d. *Lesser included offenses* from the MCM (2016 edition) has been deleted. Subparagraphs e. *Maximum punishment.* and f. *Sample specification.* from the MCM (2016 edition) have been redesignated as subparagraphs d. and e. respectively. For lesser included offenses, see Appendix 12A.

This Note should follow paragraph 60. Article 120 —Rape and sexual assault generally:

[Note: This statute applies to offenses committed on or after 1 January 2019. Previous versions of Article 120 are located as follows: for offenses committed on or before 30 September 2007, see Appendix 20; for offenses

committed during the period 1 October 2007 through 27 June 2012, see Appendix 21; for offenses committed during the period 28 June 2012 through 31 December 2018, see Appendix 22.]

The Analysis for paragraph 60 Article 120 – Rape and sexual assault generally reads as follows:

Analysis

60. Article 120—Rape and sexual assault generally

This paragraph is taken from paragraph 45 (Article 120—Rape and sexual assault generally) of MCM (2016 edition) with the following amendments that implement Article 120, as amended by Section 5430 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016), as amended by Section 1081(c)(1)(O) of the National Defense Authorization Act for Fiscal Year 2018, Pub. Law. No. 115-91, 131 Stat. 1283 (2017). *2018 Amendment: a. Text of statute.* The definition of sexual act is amended.

b. *Elements.* The elements are consolidated to eliminate redundancy in repeating the specific intent necessary to accomplish a sexual act and sexual contact because the definitions of sexual act and sexual contact already contain within them the mens rea element of specific intent.

c. *Explanation.* (4) Consent as an element was removed from the explanation. Section 5430 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016), amended Article 120 to include lack of consent as an element in Article 120(b)(2), Sexual Assault.

(5) Scope of threatening or placing that other person in fear emphasizes that threatening or placing that other person in fear explicitly includes, but is not limited to, abuse of military rank, position, or power, in order to engage in a sexual act or contact with a victim. *See United States v. Simpson*, 58 M.J. 368, 377 (C.A.A.F. 2003) (listing seven factors “demonstrating the relationship between the offenses at issue and Appellant’s superior rank and position” in a case involving “constructive force” under the pre-2007 version of Article 120).

Subparagraph d. *Lesser included offenses* from the MCM (2016 edition) has been deleted. Subparagraphs e. *Maximum punishment.* and f. *Sample specification.* from the MCM (2016 edition) have been redesignated as subparagraphs d. and e. respectively. For lesser included offenses, see Appendix 12A.

e. *Sample specifications.* The sample specifications are consolidated to include the various acts constituting: (a) rape; (b) sexual assault; (c) aggravated sexual contact; and (d) abusive sexual contact, by consolidating the descriptions of a sexual act or sexual contact within each overarching specification.

The Analysis for paragraph 61. Article 120a – Mail: deposit of obscene matter reads as follows:

Analysis

61. Article 120a—Mails: deposit of obscene matter

This paragraph is taken from paragraph 94 (Article 134—Mails: depositing or causing to be deposited obscene matters in) of the MCM (2016 edition) and is relocated to Article 120a pursuant to Section 5431 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016), with the following amendments. Proof of the Article 134 “terminal element” is no longer required. *See Miller v. United States*, 413 U.S. 15 (1973), for a discussion of the definition of obscenity.

2018 Amendment: Subparagraph d. *Lesser included offenses* from the MCM (2016 edition) has been deleted. Subparagraphs e. *Maximum punishment* and f. *Sample specification* from the MCM (2016 edition) have been redesignated as subparagraphs d. and e. respectively. For lesser included offenses, see Appendix 12A.

This Note should follow paragraph 62. Article 120b—Rape and sexual assault of a child:

[Note: This statute applies to offenses committed on or after 1 January 2019. Previous versions of child sexual offenses are located as follows: for offenses committed on or before 30 September 2007, see Appendix 20; for offenses committed during the period 1 October 2007 through 27 June 2012, see Appendix 21; for offenses committed during the period 28 June 2012 through 31 December 2018, the previous version of Article 120b applies, see Appendix 22.]

The Analysis for paragraph 62. Article 120b – Rape and sexual assault of a child reads as follows:

Analysis

62. Article 120b—Rape and sexual assault of a child

This paragraph is taken from paragraph 47 (Article 120b—Rape and sexual assault of a child) of the MCM (2016 edition) with the following amendments:

2018 Amendment: a. Text of statute. The definition of sexual act conforms to Article 120(g) as amended by Section 5430 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016). Consistent with federal civilian law, sexual acts with children under Article 120b include the intentional touching of the genitalia of a child under the age of 16 (committed by a person over the age of 16), when accomplished with either the intent to abuse, humiliate, harass, or degrade the victim, or to arouse or gratify the sexual desire of any person.

b. *Elements.* The elements are consolidated and eliminate redundancy in repeating the specific intent necessary to accomplish a sexual act and sexual contact. The definitions of sexual act and sexual contact already contain the mens rea element of specific intent.

Subparagraph d. *Lesser included offenses* from the MCM (2016 edition) has been deleted. Subparagraphs e. *Maximum punishment* and f. *Sample specification* from the MCM (2016 edition) have been redesignated as subparagraphs d. and e. respectively. For lesser included offenses, see Appendix 12A.

e. *Sample specifications.* The sample specifications are consolidated and include the various acts constituting rape of a child and sexual assault of a child, by consolidating the descriptions of a sexual act or sexual contact within each overarching specification.

This Note should follow paragraph 63. Article 120c—Other sexual misconduct:

[Previous versions of offenses included in Article 120c are located as follows: for the offense of indecent exposure committed on or before 30 September 2007, a previous version of Article 134, Indecent exposure, applies and is located at Appendix 20; for the offense of forcible pandering committed on or before 30 September 2007, a previous version of Article 134, Pandering and prostitution, applies and is located at Appendix 20; for Article 120c offenses committed during the period 1 October 2007 through 27 June 2012, see Appendix 21; for Article 120c offenses committed during the period 28 June 2012 through 31 December 2018, the previous version of Article 120c applies and is located at Appendix 22.]

The Analysis for paragraph 63. Article 120c – Other sexual misconduct reads as follows:

Analysis

63. Article 120c—Other sexual misconduct

This paragraph is taken from paragraph 45c (Article 120c—Other sexual misconduct) of the MCM (2016 edition) with the following amendments:

2018 Amendment: Subparagraph d. *Lesser included offenses* from the MCM (2016 edition) has been deleted. Subparagraphs e. *Maximum punishment* and f. *Sample specification* from the MCM (2016 edition) have been redesignated as subparagraphs d. and e. respectively. For lesser included offenses, see Appendix 12A.

d. *Maximum punishment.* The maximum punishment for forcible pandering is increased and aligns with federal civilian law. *See* 18 U.S.C. § 2422.

The Analysis for paragraph 64. Article 121 – Larceny and wrongful appropriation reads as follows:

Analysis

64. Article 121—Larceny and wrongful appropriation

This paragraph is amended and reflects the addition of Article 121a to the UCMJ by Section 5432 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016). Other than the deletion of portions of the explanation dealing with matters now covered by Article 121a, this section is taken from paragraph 46 of the MCM (2016 edition).

2018 Amendment: Subparagraph d. *Lesser included offenses* from the MCM (2016 edition) has been deleted. Subparagraphs e. *Maximum punishment* and f. *Sample specification* from the MCM (2016 edition) have been redesignated as subparagraphs d. and e. respectively. For lesser included offenses, see Appendix 12A.

d. *Maximum punishment.* The maximum punishments for Wrongful appropriation of property of a value more than \$1000 is increased and aligns with corresponding federal civilian practice under 18 U.S.C. § 661 (Theft within special maritime and territorial jurisdiction) and § 641 (Theft of public money, property, or records). The threshold amount for purposes of the maximum punishment in relation to the qualifying value of the property concerned is amended to \$1,000 and aligns with the division between felony and misdemeanor penalties for property offenses in federal civilian law. The difference in the maximum authorized confinement for larceny of military versus non-military property in the lower-value category is eliminated.

The Analysis for paragraph 65. Article 121a – Fraudulent use of credit cards, debit cards, and other access devices reads as follows:

Analysis

65. Article 121a—Fraudulent use of credit cards, debit cards, and other access devices

This offense is new and addresses misconduct previously charged as an obtaining-type larceny offense under paragraph 46 (Article 121—Larceny) of the MCM (2016 edition), and is similar to 18 U.S.C. § 1029. This offense is created pursuant to Section 5432 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016). The offense focuses on the intent of the accused and technology used. This punitive article applies to situations where an accused has no authorization to use the access device from a person whose authorization is required, as well as situations where an accused exceeds the authorization of a person whose authorization is required for such use. *See United States v. Simpson*, 77 M.J. 279 (C.A.A.F. 2018), and cases cited therein.

The Analysis for paragraph 66. Article 121b – False pretenses to obtain services reads as follows:

Analysis

66. Article 121b—False pretenses to obtain services

This paragraph is taken from paragraph 78 (Article 134—False pretenses: obtaining services under) of the MCM (2016 edition) pursuant to Section 5433 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016), with the following amendments. Proof of the Article 134 “terminal element” is no longer required.

2018 Amendment: Subparagraph d. *Lesser included offenses* from the MCM (2016 edition) has been deleted. Subparagraphs e. *Maximum punishment* and f. *Sample specification* from the MCM (2016 edition) have been redesignated as subparagraphs d. and e. respectively. For lesser included offenses, see Appendix 12A.

d. *Maximum punishment.* The maximum punishment for the lower-value category is increased, and aligns with federal civilian practice under 18 U.S.C. § 661 (Theft within special maritime and territorial jurisdiction). The threshold amount for purposes of the maximum punishment in relation to the qualifying value of the property concerned is amended to \$1,000 and aligns with the division between felony and misdemeanor penalties for property offenses in federal civilian law.

The Analysis for paragraph 67. Article 122 – Robbery reads as follows:

Analysis

67. Article 122—Robbery

This paragraph is taken from paragraph 47 (Article 122—Robbery) of the MCM (2016 edition) with the following amendments: This offense is relocated to its current position pursuant to Section 5434 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016).

2018 Amendment: a. *Statutory Text.* Consistent with equivalent misconduct under federal civilian law (see 18 U.S.C. § 2111), the element of “with the intent to deprive permanently” is removed from the offense of Article 122—Robbery. The gravamen of the offense is the forcible taking of a victim’s property in the presence of a victim.

Subparagraph d. *Lesser included offenses* from the MCM (2016 edition) has been deleted. Subparagraphs e. *Maximum punishment* and f. *Sample specification* from the MCM (2016 edition) have been redesignated as subparagraphs d. and e. respectively. For lesser included offenses, see Appendix 12A.

d. *Maximum Punishment.* The maximum punishment categories of robbery are aligned with federal civilian law to authorize a maximum period of confinement of 15 years for any robbery committed with a “dangerous weapon,” not limited to firearms.

The Analysis for paragraph 68. Article 122a – Receiving stolen property reads as follows:

Analysis

68. Article 122a—Receiving stolen property

This paragraph is taken from paragraph 106 (Article 134—Stolen property: knowingly receiving, buying, or concealing) of the MCM (2016 edition) with the following amendments. This offense is relocated from Article 134 to Article 122a pursuant to Section 5435 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016). Proof of the Article 134 “terminal element” is no longer required.

2018 Amendment: Subparagraph d. *Lesser included offenses* from the MCM (2016 edition) has been deleted. Subparagraphs e. *Maximum punishment* and f. *Sample specification* from the MCM (2016 edition) have been redesignated as subparagraphs d. and e. respectively. For lesser included offenses, see Appendix 12A.

d. *Maximum punishment.* The maximum punishments are increased, and align with corresponding federal civilian practice under 18 U.S.C. § 662 (Receiving stolen property within special maritime and territorial jurisdiction). The threshold amount for purposes of the maximum punishment in relation to the qualifying value of the property concerned is amended to \$1,000 and aligns with the division between felony and misdemeanor penalties for property offenses in federal civilian law.

The Analysis for paragraph 69 Article 123 –Offenses concerning Government computers reads as follows:

Analysis

69. Article 123—Offenses concerning Government computers

This offense is new pursuant to Section 5436 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016). The offense is similar to 18 U.S.C. § 1030, but does not supersede or preempt the charging of 18 U.S.C. § 1030 or other Title 18 offenses under Article 134, clause 3. Also, this offense does not supersede or preempt Department of Defense and Service regulations applicable to offenses concerning Government computers, applied via Article 92. This offense is directed at certain types of criminal conduct concerning Government computers. For other types of criminal conduct concerning computers, including private computers, persons subject to this chapter may also be subject to 18 U.S.C. § 1030, and other criminal statutes, via clause 3 of Article 134, as well as orders and regulations via Article 92. *See* Report of the Military Justice Review Group Part I: UCMJ Recommendations (December 22, 2015). For explanation of Controlled Unclassified Information, see DoDM 5200.01-V4 (February 24, 2012).

The Analysis for paragraph 70. Article 123a – Making, drawing, or uttering check, draft, or order without sufficient funds reads as follows:

Analysis

70. Article 123a—Making, drawing, or uttering check, draft, or order without sufficient funds

This paragraph is taken from paragraph 49 (Article 123a—Making, drawing, or uttering check, draft, or order without sufficient funds) of the MCM (2016 edition) with the following amendments:

2018 Amendment: Subparagraph d. *Lesser included offenses* from the MCM (2016 edition) has been deleted. Subparagraphs e. *Maximum punishment* and f. *Sample specification* from the MCM (2016 edition) have been redesignated as subparagraphs d. and e. respectively. For lesser included offenses, see Appendix 12A.

d. *Maximum punishment.* The threshold amount for purposes of the maximum punishment in relation to the qualifying value of the property concerned is amended to \$1,000 and aligns with the division between felony and misdemeanor penalties for property offenses in federal civilian law.

The Analysis for paragraph 71. Article 124– Frauds against the United States reads as follows:

Analysis

71. Article 124—Frauds against the United States

This paragraph is taken from paragraph 58 (Article 132—Frauds against the United States) of the MCM (2016 edition) with the following amendments. This offense is relocated to Article 124 pursuant to Section 5401 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016).

2018 Amendment: Subparagraph d. *Lesser included offenses* from the MCM (2016 edition) has been deleted. Subparagraphs e. *Maximum punishment* and f. *Sample specification* from the MCM (2016 edition) have been redesignated as subparagraphs d. and e. respectively. For lesser included offenses, see Appendix 12A.

d. *Maximum punishment.* The threshold amount for purposes of the maximum punishment in relation to the qualifying value of the property concerned is amended to \$1,000 and aligns with the division between felony and misdemeanor penalties for property offenses in federal civilian law.

The Analysis for paragraph 72. Article 124a – Bribery reads as follows:

Analysis

72. Article 124a—Bribery

This paragraph is taken from portions of paragraph 66 (Article 134—Bribery and graft) of the MCM (2016 edition), related to the offense of bribery pursuant to Section 5437 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016), with the following amendments. Proof of the Article 134 “terminal element” is no longer required.

2018 Amendment. Subparagraph d. *Lesser included offenses* from the MCM (2016 edition) has been deleted. Subparagraphs e. *Maximum punishment* and f. *Sample specification* from the MCM (2016 edition) have been redesignated as subparagraphs d. and e. respectively. For lesser included offenses, see Appendix 12A.

The Analysis for paragraph 73. Article 124b – Graft reads as follows:

Analysis

73. Article 124b—Graft

This paragraph is taken from portions of paragraph 66 (Article 134—Bribery and graft) of the MCM (2016 edition), related to the offense of graft; pursuant to Section 5437 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016), with the following amendments. Proof of the Article 134 “terminal element” is no longer required.

2018 Amendment. Subparagraph d. *Lesser included offenses* from the MCM (2016 edition) has been deleted. Subparagraphs e. *Maximum punishment* and f. *Sample specification* from the MCM (2016 edition) have been redesignated as subparagraphs d. and e. respectively. For lesser included offenses, see Appendix 12A.

The Analysis for paragraph 74. Article 125—Kidnapping reads as follows:

Analysis

74. Article 125—Kidnapping

This paragraph is taken from paragraph 92 (Article 134—Kidnapping) of the MCM (2016 edition) pursuant to Section 5439 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016), with the following amendments. Proof of the Article 134 “terminal element” is no longer required.

2018 Amendment. Subparagraph c.(5) has deleted the sentence from the MCM (2016 edition) that discussed kidnapping in the context of a parent or legal guardian.

Subparagraph d. *Lesser included offenses* from the MCM (2016 edition) has been deleted. Subparagraphs e. *Maximum punishment* and f. *Sample specification* from the MCM (2016 edition) have been redesignated as subparagraphs d. and e. respectively. For lesser included offenses, see Appendix 12A.

The Analysis for paragraph 75. Article 126 – Arson; burning property with intent to defraud reads as follows:

Analysis

75. Article 126—Arson; burning property with intent to defraud

This paragraph is taken from paragraphs 52 (Article 126—Arson) and 67 (Article 134—Burning with intent to defraud) of the MCM (2016 edition) pursuant to Section 5440 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016), with the following amendments. Proof of the Article 134 “terminal element” is not required.

2018 Amendment: Article 126 is amended and incorporates burning with intent to defraud in conjunction with the Military Justice Act of 2016's reorganization of the punitive articles. The offense of burning with intent to defraud remains substantively the same, except proof of the Article 134 terminal element is no longer required.

b.(1). The elements of aggravated arson were amended and proof that the property belonged to a certain person and was of a certain value is not required. *See United States v. Desha*, 23 M.J. 66 (C.A.A.F. 1986) (affirming an aggravated arson conviction holding that Congress eliminated the common-law requirement that the property burned be "of another").

b.(2). The element of simple arson that required that the dwelling or structure be of a certain value was removed. An enhanced punishment is available for property of a value of more than \$1,000.

c.(2)(a). The definition of "inhabited dwelling" aligns with *United States v. Duke*, 16 C.M.A. 460 (C.M.A. 1966).

Subparagraph d. *Lesser included offenses* from the MCM (2016 edition) has been deleted. Subparagraphs e. *Maximum punishment* and f. *Sample specification* from the MCM (2016 edition) have been redesignated as subparagraphs d. and e. respectively. For lesser included offenses, see Appendix 12A.

d. *Maximum punishment.* The maximum authorized confinement for both aggravated arson and simple arson are increased.

The Analysis for paragraph 76. Article 127 – Extortion reads as follows:

Analysis

76. Article 127—Extortion

This paragraph is taken from paragraph 53 (Article 127—Extortion) of the MCM (2016 edition) with the following amendments:

2018 Amendment: Subparagraph d. *Lesser included offenses* from the MCM (2016 edition) has been deleted. Subparagraphs e. *Maximum punishment* and f. *Sample specification* from the MCM (2016 edition) have been redesignated as subparagraphs d. and e. respectively. For lesser included offenses, see Appendix 12A.

This Note should follow paragraph 77.a(b)(2). Article 128—Assault:

[NOTE: For additional statutory language added as part of the FY19 National Defense Authorization Act, see Appendix 2, Article 128(b), UCMJ.]

The Analysis for paragraph 77. Article 128 – Assault reads as follows:

Analysis

77. Article 128—Assault

This paragraph is taken from paragraphs 54 (Article 128—Assault) and 64 (Article 134—Assault—with intent to commit murder, voluntary manslaughter, rape, robbery, sodomy, arson, burglary, or housebreaking) of the MCM (2016 edition) pursuant to Section 5441 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016), as further amended by Section 1081(c)(1)(P) of the National Defense Authorization Act for Fiscal Year 2018, Pub. Law. No. 115-91, 131 Stat. 1283 (2017). with the following amendments:

2018 Amendment: a. *Text of statute.* (b) *Aggravated Assault.* Two amendments to this statute align it more closely with federal civilian practice under 18 U.S.C. § 113. First, the phrase "or other means or force likely to result in death or grievous bodily harm" has been removed from the statutory definition of "aggravated assault," and replaced with the phrase "dangerous weapon." This eliminates the likelihood of harm analysis previously necessary under the MCM (2016 edition) for this offense, and allows the offense to focus solely on the intent of the accused. In turn, the phrase "dangerous weapon" focuses on the capability of any object to inflict death or grievous bodily harm. *See c. Explanation* (5)(a)(iii). Second, the intent necessary to complete an aggravated assault is modified to no longer

require the specific intent to commit substantial or grievous bodily harm. This change aligns the specific intent requirement to federal civilian law under 18 U.S.C. § 113.

(c) *Assault with intent to commit specified offenses.* The offense of assault with intent to commit specified offenses is taken from paragraph 64 (Article 134—Assault—with intent to commit murder, voluntary manslaughter, rape, robbery, forcible sodomy, arson, burglary, or housebreaking) of the MCM (2016 edition) in conjunction with the Military Justice Act of 2016’s reorganization of the punitive articles. *See* Appendix 23, subparagraph 64.c. *Explanation* of the MCM (2016 edition). The scope of the offense remains substantively the same with two exceptions: (1) the offense now lists rape of a child, sexual assault, sexual assault of a child, and kidnapping, as specified offenses; and (2) proof of the terminal element of Article 134 is no longer required.

c. *Explanation.* (1) *Substantial bodily harm.* The definition of substantial bodily harm aligns with 18 U.S.C. § 113(b)(1). It provides a middle tier of harm between bodily harm and grievous bodily harm. The definition of grievous bodily harm aligns with the definition of serious bodily injury under 18 U.S.C. § 113(b)(2), which is the highest tier of bodily injury.

(5)(a)(iii) *Dangerous weapon.* The definition of dangerous weapon focuses attention on the nature of the weapon involved and the accused’s intent to commit any bodily harm. To qualify as a dangerous weapon, it is sufficient that “an instrument [is] capable of inflicting death or serious bodily injury.” *United States v. Sturgis*, 48 F.3d 784, 787 (4th Cir. 1995). *See also United States v. Bey*, 667 F.2d 7, 11 (5th Cir. 1982) (citation and internal quotation omitted) (“[w]hat constitutes a dangerous weapon depends not on the nature of the object itself but on its capacity, given the manner of its use, to endanger life or inflict great bodily harm.”).

(5)(b)(i). Assault resulting in substantial or grievous bodily harm requires only a finding of general intent. *See United States v. Davis*, 237 F.3d 942, 944 (8th Cir. 2001).

Subparagraph d. *Lesser included offenses* from the MCM (2016 edition) has been deleted. Subparagraphs e. *Maximum punishment* and f. *Sample specification* from the MCM (2016 edition) have been redesignated as subparagraphs d. and e. respectively. For lesser included offenses, see Appendix 12A.

d. *Maximum punishment.* Two new maximum punishment categories were added: (1) infliction of substantial bodily harm and (2) assaulting a spouse, intimate partner, or an immediate family member.

The Analysis for paragraph 78. Article 128a – Maiming reads as follows:

Analysis

78. Article 128a—Maiming

This paragraph is taken from paragraph 50 (Article 124—Maiming) of the MCM (2016 edition) with the following amendments. This offense is relocated to its current position pursuant to Section 5401 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016).

2018 Amendment: Subparagraph d. *Lesser included offenses* from the MCM (2016 edition) has been deleted. Subparagraphs e. *Maximum punishment* and f. *Sample specification* from the MCM (2016 edition) have been redesignated as subparagraphs d. and e. respectively. For lesser included offenses, see Appendix 12A.

This Note should follow paragraph 78.e. Article 128a—Maiming:

[NOTE: For Article 128b, UCMJ, Domestic Violence, added as part of the FY19 National Defense Authorization Act, see Appendix 2, Article 128b, UCMJ.]

The Analysis for paragraph 79. Article 129 – Burglary; unlawful entry reads as follows:

Analysis

79. Article 129—Burglary; unlawful entry

This paragraph is taken from paragraphs 55 (Article 129—Burglary), 56 (Article 130—Housebreaking), and 111 (Article 134—Unlawful entry) of the MCM (2016 edition) and is consolidated pursuant to Section 5442 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016), with the following amendments:

2018 Amendment: a. *Text of statute.* The common law elements of nighttime and dwelling house are eliminated as elements of the offense of burglary.

b. *Elements.* The list of offenses that qualify for enhanced maximum punishment is amended to reflect the Military Justice Act of 2016’s reorganization of the punitive articles.

c. *Explanation.* The definition of “Building, structure” is taken, without change, from paragraph 56 of the MCM (2016 edition).

Subparagraph d. *Lesser included offenses* from the MCM (2016 edition) has been deleted. Subparagraphs e. *Maximum punishment* and f. *Sample specification* from the MCM (2016 edition) have been redesignated as subparagraphs d. and e. respectively. For lesser included offenses, see Appendix 12A.

f. *Sample specifications.* The sample specifications are modeled after those contained under paragraphs 55, 56, and 111 of the MCM (2016 edition).

The Analysis for paragraph 80. Article 130 – Stalking reads as follows:

Analysis

80. Article 130—Stalking

This offense is taken from paragraph 45a (Article 120a—Stalking) of the MCM (2016 edition) and is modified pursuant to Section 5443 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016), with the following amendments:

2018 Amendment: a. *Text of statute.* This statute is amended and extends the conduct covered to include cyberstalking and threats to intimate partners. This aligns the offense with similar misconduct under 18 U.S.C. § 2261A.

c. *Explanation.* The definition of bodily harm is based on subparagraph 77.c.(1)(a).

Subparagraph d. *Lesser included offenses* from the MCM (2016 edition) has been deleted. Subparagraphs e. *Maximum punishment* and f. *Sample specification* from the MCM (2016 edition) have been redesignated as subparagraphs d. and e. respectively. For lesser included offenses, see Appendix 12A.

The Analysis for paragraph 81. Article 131 – Perjury reads as follows:

Analysis

81. Article 131—Perjury

This paragraph is taken from paragraph 57 (Article 131—Perjury) of the MCM (2016 edition) with the following amendments:

2018 Amendment: Subparagraph d. *Lesser included offenses* from the MCM (2016 edition) has been deleted. Subparagraphs e. *Maximum punishment* and f. *Sample specification* from the MCM (2016 edition) have been redesignated as subparagraphs d. and e. respectively. For lesser included offenses, see Appendix 12A.

The Analysis for paragraph 82. Article 131a – Subornation of perjury reads as follows:

Analysis

82. Article 131a—Subornation of perjury

This paragraph is taken from paragraph 98 (Article 134—Perjury: subornation of) of the MCM (2016 edition) with the following amendments. The offense is relocated to Article 131a pursuant to Section 5444 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016). Proof of the Article 134 “terminal element” is no longer required.

2018 Amendment: Subparagraph d. *Lesser included offenses* from the MCM (2016 edition) has been deleted. Subparagraphs e. *Maximum punishment* and f. *Sample specification* from the MCM (2016 edition) have been redesignated as subparagraphs d. and e. respectively. For lesser included offenses, see Appendix 12A.

The Analysis for paragraph 83. Article 131b – Obstructing justice reads as follows:

Analysis

83. Article 131b—Obstructing justice

This paragraph is taken from paragraph 96 (Article 134—Obstructing justice) of the MCM (2016 edition) with the following amendments. The offense is relocated to Article 131b pursuant to Section 5445 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016). Proof of the Article 134 “terminal element” is no longer required.

2018 Amendment: Subparagraph c. *Explanation* has been updated and reflects Article 20, as amended by Section 5164 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016), which clarifies that a summary court-martial is not a criminal forum. The *Explanation* also reflects the reorganization of Article 98, Noncompliance with procedural rules, from paragraph 22 of MCM (2016 edition) to paragraph 87 (Article 131f), pursuant to Section 5201 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016).

Subparagraph d. *Lesser included offenses* from the MCM (2016 edition) has been deleted. Subparagraphs e. *Maximum punishment* and f. *Sample specification* from the MCM (2016 edition) have been redesignated as subparagraphs d. and e. respectively. For lesser included offenses, see Appendix 12A.

The Analysis for paragraph 84. Article 131c– Misprision of serious offense reads as follows:

Analysis

84. Article 131c—Misprision of serious offense

This paragraph is taken from paragraph 95 (Article 134—Misprision of a serious offense) of the MCM (2016 edition) with the following amendments. The offense is relocated to Article 131c pursuant to Section 5446 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016). Proof of the Article 134 “terminal element” is no longer required.

2018 Amendment: Subparagraph d. *Lesser included offenses* from the MCM (2016 edition) has been deleted. Subparagraphs e. *Maximum punishment* and f. *Sample specification* from the MCM (2016 edition) have been redesignated as subparagraphs d. and e. respectively. For lesser included offenses, see Appendix 12A.

The Analysis for paragraph 85. Article 131d – Wrongful refusal to testify reads as follows:

Analysis

85. Article 131d—Wrongful refusal to testify

This paragraph is taken from paragraph 108 (Article 134—Testify: wrongful refusal) of the MCM (2016 edition) with the following amendments. The offense is relocated to Article 131d pursuant to Section 5447 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016). Proof of the Article 134 “terminal element” is no longer required.

2018 Amendment: Subparagraph d. *Lesser included offenses* from the MCM (2016 edition) has been deleted. Subparagraphs e. *Maximum punishment* and f. *Sample specification* from the MCM (2016 edition) have been redesignated as subparagraphs d. and e. respectively. For lesser included offenses, see Appendix 12A.

The Analysis for paragraph 86 Article 131e – Prevention of authorized seizure of property reads as follows:

Analysis

86. Article 131e—Prevention of authorized seizure of property

This paragraph is taken from paragraph 103 (Article 134—Seizure: destruction, removal, or disposal of property to prevent) of the MCM (2016 edition) with the following amendments. The offense is relocated to Article 131e pursuant to Section 5448 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016). Proof of the Article 134 “terminal element” is no longer required.

2018 Amendment: Subparagraph d. *Lesser included offenses* from the MCM (2016 edition) has been deleted. Subparagraphs e. *Maximum punishment* and f. *Sample specification* from the MCM (2016 edition) have been redesignated as subparagraphs d. and e. respectively. For lesser included offenses, see Appendix 12A.

d. *Maximum punishment.* The authorized punishment for the offense is modified and aligns with federal civilian law for similar misconduct. *See* 18 U.S.C. § 2232.

The Analysis for paragraph 87. Article 131f – Noncompliance with procedural rules reads as follows:

Analysis

87. Article 131f—Noncompliance with procedural rules

This paragraph is taken from paragraph 22 (Article 98—Noncompliance with procedural rules) of the MCM (2016 edition) with the following amendments. This offense is relocated to its current position, pursuant to Section 5401 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016).

2018 Amendment: Subparagraph d. *Lesser included offenses* from the MCM (2016 edition) has been deleted. Subparagraphs e. *Maximum punishment* and f. *Sample specification* from the MCM (2016 edition) have been redesignated as subparagraphs d. and e. respectively. For lesser included offenses, see Appendix 12A.

The Analysis for paragraph 88. Article 131g – Wrongful interference with adverse administrative proceeding reads as follows:

Analysis

88. Article 131g—Wrongful interference with adverse administrative

This paragraph is taken from paragraph 96a (Article 134—Wrongful interference with an adverse administrative proceeding) of the MCM (2016 edition) with the following amendments. The offense is relocated to Article 131g pursuant to Section 5449 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016). Proof of the Article 134 “terminal element” is no longer required.

2018 Amendment: Subparagraph d. *Lesser included offenses* from the MCM (2016 edition) has been deleted. Subparagraphs e. *Maximum punishment* and f. *Sample specification* from the MCM (2016 edition) have been redesignated as subparagraphs d. and e. respectively. For lesser included offenses, see Appendix 12A.

The Analysis for paragraph 89. Article 132 – Retaliation reads as follows:

Analysis

89. Art. 132. —Retaliation

This is a new enumerated offense pursuant to Section 5450 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016), as amended by Section 1081(c)(1)(Q) of the National Defense Authorization Act for Fiscal Year 2018, Pub. Law. No. 115-91, 131 Stat. 1283 (2017), which supplements and does not preempt Service regulations that address other types or categories of prohibited retaliatory actions. *See also* 10 U.S.C. § 1034, 18 U.S.C. § 1513. Service regulations may specify additional types of retaliatory conduct punishable at court-martial under Article 92 or Article 134.

The Analysis for paragraph 90. Article 133 – Conduct unbecoming an officer and a gentleman reads as follows:

Analysis

90. Art. 133—Conduct unbecoming an officer and a gentleman

This paragraph is taken from paragraph 59 (Article 133—Conduct unbecoming an officer and a gentleman) of the MCM (2016 edition) with the following amendments:

2018 Amendment: c. *Explanation* (1) *Gentleman*. This subparagraph is amended to emphasize that the term “gentleman” connotes failings in an officer’s personal character, regardless of gender.

Subparagraph d. *Lesser included offenses* from the MCM (2016 edition) has been deleted. Subparagraphs e. *Maximum punishment* and f. *Sample specification* from the MCM (2016 edition) have been redesignated as subparagraphs d. and e. respectively. For lesser included offenses, see Appendix 12A.

The Discussion following paragraph 91.a. of Part IV of the Manual for Courts-Martial, reads as follows:

Discussion

The terminal element is merely the expression of one of the clauses under Article 134. See subparagraph c. for an explanation of the clauses and rules for drafting specifications. More than one clause may be alleged and proven; however, proof of only one clause will satisfy the terminal element. For clause 3 offenses, the military judge may judicially notice whether an offense is capital. *See* Mil. R. Evid. 202.

The Discussion following paragraph 91.c.(4)(a)(1)(i) of Part IV of the Manual for Courts-Martial, reads as follows:

Discussion

Counterfeiting is an example of a crime punishable regardless where the wrongful act or omission occurred. *See* 18 U.S.C. § 471.

The Discussion following paragraph 91.c.(4)(a)(2) of Part IV of the Manual for Courts-Martial, reads as follows:

Discussion

If the direct prosecution of state and federal crimes under Article 134, clause 3 is unavailable because the offense is committed outside of otherwise applicable areas of jurisdiction, the substance of these crimes may still be prosecuted, in an appropriate case, under clause 1 or clause 2 of Article 134. In such a case, the Government would be required to prove the terminal element under clause 1 or clause 2 that the underlying misconduct was either prejudicial to good order and discipline; of a nature to bring discredit upon the armed forces; or both.

18 U.S.C. § 5 provides, “The term ‘United States’, as used in this title in a territorial sense, includes all places and waters, continental or insular, subject to the jurisdiction of the United States, except the Canal Zone.”

18 U.S.C. § 7 provides,

“The term “special maritime and territorial jurisdiction of the United States,” as used in this title, includes:

(1) The high seas, any other waters within the admiralty and maritime jurisdiction of the United States and out of the jurisdiction of any particular State, and any vessel belonging in whole or in part to the United States or any citizen thereof, or to any corporation created by or under the laws of the United States, or of any State, Territory, District, or possession thereof, when such vessel is within the admiralty and maritime jurisdiction of the United States and out of the jurisdiction of any particular State.

(2) Any vessel registered, licensed, or enrolled under the laws of the United States, and being on a voyage upon the waters of any of the Great Lakes, or any of the waters connecting them, or upon the Saint Lawrence River where the same constitutes the International Boundary Line.

(3) Any lands reserved or acquired for the use of the United States, and under the exclusive or concurrent jurisdiction thereof, or any place purchased or otherwise acquired by the United States by consent of the legislature of the State in which the same shall be, for the erection of a fort, magazine, arsenal, dockyard, or other needful building.

(4) Any island, rock, or key containing deposits of guano, which may, at the discretion of the President, be considered as appertaining to the United States.

(5) Any aircraft belonging in whole or in part to the United States, or any citizen thereof, or to any corporation created by or under the laws of the United States, or any State, Territory, district, or possession thereof, while such aircraft is in flight over the high seas, or over any other waters within the admiralty and maritime jurisdiction of the United States and out of the jurisdiction of any particular State.

(6) Any vehicle used or designed for flight or navigation in space and on the registry of the United States pursuant to the Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies and the Convention on Registration of Objects Launched into Outer

Space, while that vehicle is in flight, which is from the moment when all external doors are closed on Earth following embarkation until the moment when one such door is opened on Earth for disembarkation or in the case of a forced landing, until the competent authorities take over the responsibility for the vehicle and for persons and property aboard.

(7) Any place outside the jurisdiction of any nation with respect to an offense by or against a national of the United States.

(8) To the extent permitted by international law, any foreign vessel during a voyage having a scheduled departure from or arrival in the United States with respect to an offense committed by or against a national of the United States.

(9) With respect to offenses committed by or against a national of the United States as that term is used in section 101 of the Immigration and Nationality Act—

(A) the premises of United States diplomatic, consular, military or other United States Government missions or entities in foreign States, including the buildings, parts of buildings, and land appurtenant or ancillary thereto or used for purposes of those missions or entities, irrespective of ownership; and

(B) residences in foreign States and the land appurtenant or ancillary thereto, irrespective of ownership, used for purposes of those missions or entities or used by United States personnel assigned to those missions or entities.

Nothing in this paragraph shall be deemed to supersede any treaty or international agreement with which this paragraph conflicts. This paragraph does not apply with respect to an offense committed by a person described in section 3261(a) of this title.”

The Discussion following paragraph 91.c.(5)(a). of Part IV of the Manual for Courts-Martial, reads as follows:

Discussion

Although the preemption doctrine generally does not preclude charging Article 134, clause 3 offenses (crimes or offense, not capital), the preemption doctrine does preclude charging a federal “crime or offense, not capital” under Article 134 clause 3 where either direct legislative language or direct legislative history demonstrate that Congress intended a factually similar UCMJ punitive article to cover a class of offenses in a complete way.

The Discussion following paragraph 91.c.(6)(a). of Part IV of the Manual for Courts-Martial, reads as follows:

Discussion

Clauses 1 and 2 are theories of liability that must be expressly alleged in a specification so that the accused will have notice as to which clause or clauses to defend against. The words “to the prejudice of good order and discipline in the armed forces” encompass both subparagraph c.(2)(a), prejudice to good order and discipline, and subparagraph c.(2)(b), breach of custom of the Service.

If clauses 1 and 2 are alleged together in the terminal element, the word “and” should be used to separate them. Any clause not proven beyond a reasonable doubt should be excepted from the specification at findings. *See* R.C.M. 918(a)(1). *See also* Appendix 23 of this Manual, Art. 79.

Although using the conjunctive “and” to connect the two theories of liability is recommended, a specification connecting the two theories with the disjunctive “or” is sufficient to provide the accused reasonable notice of the charge against him. *See* Appendix 23 of this Manual, Art. 134. However, use of the term “or” as a charging mechanism for alleging the terminal element in an Article 134 specification (i.e. “such conduct was

prejudicial to good order and discipline or of a nature to bring discredit upon the armed forces”) is not recommended due to the risk of creating a vague and duplicitous specification, which may lead to uncertainty as to which theory of liability the members convicted the accused. To avoid ambiguity, an Article 134 clause 1 or 2 violation should be alleged as follows: (1) the conduct was prejudicial to good order and discipline; (2) the conduct was of a nature to bring discredit upon the armed forces; or (3) the conduct was prejudicial to good order and discipline and of a nature to bring discredit upon the armed forces.

See Appendix 12A for a chart of lesser included offenses.

The Analysis for paragraph 91. Article 134 – General article reads as follows:

Analysis

91. Art. 134—General article

This paragraph is taken from paragraph 60 (Article 134—General Article) of the MCM (2016 edition), and reflects two significant changes to designated Article 134 offenses within the MCM (2016 edition), namely, (1) the “relocation” of 36 of the 53 Article 134 offenses listed in MCM (2016 edition) to the enumerated punitive articles (Articles 80-132); and (2) the statutory amendment to Article 134 to provide extraterritorial jurisdiction for noncapital federal crimes committed outside of the United States which otherwise require commission of the offense “within the special maritime and territorial jurisdiction of the United States.”

2018 Amendment: a. *Statutory text.* Article 134 is amended and specifically provides that under clause 3, extraterritorial jurisdiction exists over non-capital federal crimes committed outside the United States which include as an element that the crime occur “within the special maritime or territorial jurisdiction of the United States.” Clause 3 aligns the prosecutorial scope of noncapital federal offenses under Article 134 with the prosecutorial scope of 18 U.S.C. § 3261 (applicable to civilian misconduct). This extraterritorial jurisdiction does not extend to 18 U.S.C. § 13—Federal Assimilative Crimes Act—which requires the commission of the offense concerned upon an enclave of federal exclusive or concurrent jurisdiction.

b. *Elements.* The terminal element for each Article 134 offense is revised as follows: “That, under the circumstances, the conduct of the accused was either: (i) to the prejudice of good order and discipline in the armed forces; (ii) of a nature to bring discredit upon the armed forces; or (iii) to the prejudice of good order and discipline in the armed forces and of a nature to bring discredit upon the armed forces.” See RCM 307(c)(3) regarding the form for alleging this terminal element.

c. *Explanation* Subparagraph c.(4) is amended and clarifies the categories of federal crimes and offenses which may be prosecuted under clause (3), Article 134.

(6) *Drafting specifications for Article 134 offenses.* The third paragraph in the Discussion following subparagraph c.(6)(a) is consistent with *United States v. Miles*, 71 M.J. 671 (N.M. Ct. Crim. App. 2012), and R. Peter Masterton, “A View From the Bench: Prohibition on Disjunctive Charging Using ‘Or’”, *A View From the Bench: Prohibition on Disjunctive Charging Using ‘Or,’* ARMY LAW., May 2012.

The Analysis for paragraph 92. Article 134 – (Animal abuse) reads as follows:

Analysis

92. Art. 134—(Animal abuse)

This paragraph is taken from paragraph 61 (Article 134—Animal Abuse) of the MCM (2016 edition) with the following amendments:

2018 Amendment: Subparagraph d. *Lesser included offenses* from the MCM (2016 edition) has been deleted. Subparagraphs e. *Maximum punishment* and f. *Sample specification* from the MCM (2016 edition) have been redesignated as subparagraphs d. and e. respectively. For lesser included offenses, see Appendix 12A.

The Analysis for paragraph 93 Article 134 – (Bigamy) reads as follows:

Analysis

93. Art. 134—(Bigamy)

This paragraph is taken from paragraph 65 (Article 134—Bigamy) of the MCM (2016 edition) with the following amendments:

2018 Amendment: Subparagraph d. *Lesser included offenses* from the MCM (2016 edition) has been deleted. Subparagraphs e. *Maximum punishment* and f. *Sample specification* from the MCM (2016 edition) have been redesignated as subparagraphs d. and e. respectively. For lesser included offenses, see Appendix 12A.

The Analysis for paragraph 94. Article 134 – (Check, worthless making and uttering- by dishonorably failing to maintain funds) reads as follows:

Analysis

94. Art. 134—(Check, worthless making and uttering—by dishonorably failing to maintain funds)

This paragraph is taken from paragraph 68 (Article 134—Check, worthless, making and uttering—by dishonorably failing to maintain funds) of the MCM (2016 edition) with the following amendments:

2018 Amendment: Subparagraph d. *Lesser included offenses* from the MCM (2016 edition) has been deleted. Subparagraphs e. *Maximum punishment* and f. *Sample specification* from the MCM (2016 edition) have been redesignated as subparagraphs d. and e. respectively. For lesser included offenses, see Appendix 12A.

The Analysis for paragraph 95. Article 134 – (Child pornography) reads as follows:

Analysis

95. Art. 134—(Child pornography)

This paragraph is taken from paragraph 68b (Article 134—Child pornography) of the MCM (2016 edition) with the following amendments:

2018 Amendment: c. *Explanation* (1) *In general.* The scope of child pornography under Article 134 is broader than the scope of child pornography criminalized under 18 U.S.C. § 2252A. *Cf. Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002). Article 134 includes visual depictions of what appear to be minors engaged in sexually explicit conduct within the definition of child pornography. *See United States v. Blouin*, 74 M.J. 247 (C.A.A.F. 2015); *United States v. Forney*, 67 M.J. 271, 275 (C.A.A.F. 2009); *United States v. Brisbane*, 63 M.J. 106, 116 (C.A.A.F. 2006); *United States v. Roderick*, 62 M.J. 425, 429 (C.A.A.F. 2006); *United States v. Reeves*, 62 M.J. 88, 96 (C.A.A.F. 2005); *United States v. Mason*, 60 M.J. 15, 19 (C.A.A.F. 2004); *United States v. O'Connor*, 58 M.J. 450 (C.A.A.F. 2003).

(2) *Federal “Child pornography” and “Obscenity” offenses* and (3) *State “child pornography” and “obscenity” offenses* are new and emphasize that Article 134—(Child pornography) is not intended to preempt applicable federal and state child pornography and obscenity statutes. (2) and (3) also discuss the circumstances under which these federal and state child pornography and obscenity statutes may be charged under Article 134, clauses 2 and 3.

(10) *Sexually explicit conduct.* The amendments do not change the usefulness of the “*Dost* factors” in determining whether a particular image qualifies as a “lascivious exhibition” for purposes of this offense. *United States v. Dost*, 636 F. Supp. 828, 832 (S.D. Ca. 1986), *aff’d sub nom United States v. Wiegand*, 812 F.2d 1239 (9th Cir. 1987). The *Dost* factors are also commonly employed by federal civilian and military courts in interpreting “lascivious exhibition” for purposes of 18 U.S.C. § 2252A. *See United States v. Roderick*, 62 M.J. 425, 430 (C.A.A.F. 2006).

Subparagraph d. *Lesser included offenses* from the MCM (2016 edition) has been deleted. Subparagraphs e. *Maximum punishment* and f. *Sample specification* from the MCM (2016 edition) have been redesignated as subparagraphs d. and e. respectively. For lesser included offenses, see Appendix 12A.

The Analysis for paragraph 96. Article 134 – (Debt, dishonorably failing to pay) reads as follows:

Analysis

96. Art. 134—(Debt, dishonorably failing to pay)

This paragraph is taken from paragraph 71 (Article 134—Debt: dishonorable failing to pay) of the MCM (2016 edition) with the following amendments:

2018 Amendment: Subparagraph d. *Lesser included offenses* from the MCM (2016 edition) has been deleted. Subparagraphs e. *Maximum punishment* and f. *Sample specification* from the MCM (2016 edition) have been redesignated as subparagraphs d. and e. respectively. For lesser included offenses, see Appendix 12A.

The Analysis for paragraph 97. Article 134 – (Disloyal statements) reads as follows:

Analysis

97. Art. 134—(Disloyal statements)

This paragraph is taken from paragraph 72 (Article 134—Disloyal statements) of the MCM (2016 edition) with the following amendments:

2018 Amendment: Subparagraph d. *Lesser included offenses* from the MCM (2016 edition) has been deleted. Subparagraphs e. *Maximum punishment* and f. *Sample specification* from the MCM (2016 edition) have been redesignated as subparagraphs d. and e. respectively. For lesser included offenses, see Appendix 12A.

The Analysis for paragraph 98. Article 134 – (Disorderly conduct, drunkenness) reads as follows:

Analysis

98. Art. 134—(Disorderly conduct, drunkenness)

This paragraph is taken from paragraph 73 (Article 134—Disorderly conduct, drunkenness) of the MCM (2016 edition) with the following amendments:

2018 Amendment: Subparagraph d. *Lesser included offenses* from the MCM (2016 edition) has been deleted. Subparagraphs e. *Maximum punishment* and f. *Sample specification* from the MCM (2016 edition) have been redesignated as subparagraphs d. and e. respectively. For lesser included offenses, see Appendix 12A.

The Analysis for paragraph 99. Article 134 – (Extramarital sexual conduct) reads as follows:

Analysis

99. Art. 134—(Extramarital sexual conduct)

This paragraph is drawn from paragraph 62 (Article 134—Adultery) of the MCM (2016 edition) with the following amendments:

2018 Amendment: This offense does not preempt any additional lawful regulations prescribed by a proper authority to proscribe additional forms of improper extramarital conduct by military personnel. Violations of such regulations, directives, or orders may be punishable under Article 92. *See* paragraph 18.

b. *Elements.* The definition of extramarital conduct is consistent with the definition of sexually explicit conduct under 18 U.S.C. § 2256(2)(A)(i) and is gender neutral.

c. *Explanation.* (1) *Nature of the offense* was deleted and replaced with *Conduct prejudicial to good order and discipline or of a nature to bring discredit upon the armed forces*. Subparagraph c.(1)(h) from the MCM (2016

edition) regarding legal separations is now an affirmative defense. Subparagraph c.(1)(h) now lists pending legal dissolution as a factor in assessing whether the conduct at issue meets a terminal element.

(4) *Legal separation*. This is a new affirmative defense. In order for the affirmative defense to apply, both parties to the conduct must either be legally separated or unmarried. That is, it is not an affirmative defense if the accused is legally separated but the co-actor is still married. By the same token, it is an affirmative defense if the accused is legally separated and the co-actor is unmarried.

Subparagraph d. *Lesser included offenses* from the MCM (2016 edition) has been deleted. Subparagraphs e. *Maximum punishment* and f. *Sample specification* from the MCM (2016 edition) have been redesignated as subparagraphs d. and e. respectively. For lesser included offenses, see Appendix 12A.

The Analysis for paragraph 100. Article 134 – (Firearm, discharging – through negligence) reads as follows:

Analysis

100. Art. 134—(Firearm, discharging—through negligence)

This paragraph is taken from paragraph 80 (Article 134—Firearm, discharging through negligence) of the MCM (2016 edition) with the following amendments:

2018 Amendment: Subparagraph d. *Lesser included offenses* from the MCM (2016 edition) has been deleted. Subparagraphs e. *Maximum punishment* and f. *Sample specification* from the MCM (2016 edition) have been redesignated as subparagraphs d. and e. respectively. For lesser included offenses, see Appendix 12A.

The Analysis for paragraph 101 Article 134 (Fraternization) reads as follows:

Analysis

101. Art. 134—(Fraternization)

This paragraph is taken from paragraph 83 (Article 134—Fraternization) of the MCM (2016 edition) with the following amendments:

2018 Amendment: Subparagraph d. *Lesser included offenses* from the MCM (2016 edition) has been deleted. Subparagraphs e. *Maximum punishment* and f. *Sample specification* from the MCM (2016 edition) have been redesignated as subparagraphs d. and e. respectively. For lesser included offenses, see Appendix 12A.

The Analysis for paragraph 102. Article 134 – (Gambling with subordinate) reads as follows:

Analysis

102. Art. 134—(Gambling with subordinate)

This paragraph is taken from paragraph 84 (Article 134—Gambling with subordinate) of the MCM (2016 edition) with the following amendments:

2018 Amendment: Subparagraph d. *Lesser included offenses* from the MCM (2016 edition) has been deleted. Subparagraphs e. *Maximum punishment* and f. *Sample specification* from the MCM (2016 edition) have been redesignated as subparagraphs d. and e. respectively. For lesser included offenses, see Appendix 12A.

The Analysis for paragraph 103. Article 134 – (Homicide, negligent) reads as follows:

Analysis

103. Art. 134—(Homicide, negligent)

This paragraph is taken from paragraph 85 (Article 134—Homicide, negligent) of the MCM (2016 edition) with the following amendments:

2018 Amendment: Subparagraph d. *Lesser included offenses* from the MCM (2016 edition) has been deleted. Subparagraphs e. *Maximum punishment* and f. *Sample specification* from the MCM (2016 edition) have been redesignated as subparagraphs d. and e. respectively. For lesser included offenses, see Appendix 12A.

The Analysis for paragraph 104. Article 134 – (Indecent conduct) reads as follows:

Analysis

104. Art. 134—(Indecent conduct)

This paragraph is taken from paragraph 90 (Article 134—Indecent conduct) of the MCM (2016 edition) with the following amendments:

2018 Amendment: Subparagraph d. *Lesser included offenses* from the MCM (2016 edition) has been deleted. Subparagraphs e. *Maximum punishment* and f. *Sample specification* from the MCM (2016 edition) have been redesignated as subparagraphs d. and e. respectively. For lesser included offenses, see Appendix 12A.

The Analysis for paragraph 105. Article 134 – (Indecent language) reads as follows:

Analysis

105. Art. 134—(Indecent language)

This paragraph is taken from paragraph 89 (Article 134—Indecent language) of the MCM (2016 edition) with the following amendments:

2018 Amendment: Subparagraph d. *Lesser included offenses* from the MCM (2016 edition) has been deleted. Subparagraphs e. *Maximum punishment* and f. *Sample specification* from the MCM (2016 edition) have been redesignated as subparagraphs d. and e. respectively. For lesser included offenses, see Appendix 12A.

The Analysis for paragraph 106. Article 134 – (Pandering and prostitution) reads as follows:

Analysis

106. Art. 134—(Pandering and prostitution)

This paragraph is based on paragraph 97 (Article 134—Pandering and prostitution) of the MCM (2016 edition) with the following amendments:

2018 Amendment: (c)(1) *Sexual act*. The definition of “sexual act” conforms to Article 120(g) as amended by Section 5430 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016).

Subparagraph d. *Lesser included offenses* from the MCM (2016 edition) has been deleted. Subparagraphs e. *Maximum punishment* and f. *Sample specification* from the MCM (2016 edition) have been redesignated as subparagraphs d. and e. respectively. For lesser included offenses, see Appendix 12A.

The Discussion following paragraph 107.c.(2) of Part IV of the Manual for Courts-Martial reads as follows:

Discussion

Bona fide suicide attempts should not be charged as criminal offenses. When making a determination whether the injury by the Servicemember was a bona fide suicide attempt, the convening authority should consider factors including, but not limited to, health conditions, personal stressors, and DoD policy related to suicide prevention.

The Analysis for paragraph 107. Article 134 – (Self-injury without intent to avoid service) reads as follows:

Analysis

107. Art. 134—(Self-injury without intent to avoid service)

This paragraph is taken from paragraph 103a (Article 134—Self-injury without intent to avoid service) of the MCM (2016 edition).

2018 Amendment: Subparagraph d. *Lesser included offenses* from the MCM (2016 edition) has been deleted. Subparagraphs e. *Maximum punishment.* and f. *Sample specification.* from the MCM (2016 edition) have been redesignated as subparagraphs d. and e. respectively. For lesser included offenses, see Appendix 12A.

The Analysis for paragraph 108. Article 134 – (Straggling) reads as follows:

Analysis

108. Art. 134—(Straggling)

This paragraph is taken from paragraph 107 (Article 134—Straggling) of the MCM (2016 edition).

2018 Amendment: Subparagraph d. *Lesser included offenses* from the MCM (2016 edition) has been deleted. Subparagraphs e. *Maximum punishment.* and f. *Sample specification.* from the MCM (2016 edition) have been redesignated as subparagraphs d. and e. respectively. For lesser included offenses, see Appendix 12A.

The Analysis for paragraph 109. Article 134 – (Visual depiction, nonconsensual distribution or broadcast) reads as follows:

Analysis

109. Art. 134—(Visual depiction, nonconsensual distribution or broadcast)

This paragraph is taken from paragraph 114 (Article 134—(Visual depiction, nonconsensual distribution or broadcast) of the MCM (2016 edition), as amended by Exec. Order No. 13825, 83 Fed. Reg. 9889 (March 1, 2018) without substantive amendment.

2018 Amendment: Subparagraph d. *Lesser included offenses* from the MCM (2016 edition) has been deleted. Subparagraphs e. *Maximum punishment.* and f. *Sample specification.* from the MCM (2016 edition) have been redesignated as subparagraphs d. and e. respectively. For lesser included offenses, see Appendix 12A.

The Analysis following paragraph 1(i) of Part V of the Manual for Courts-Martial reads as follows:

Analysis

2018 Amendment: Paragraph 1.e. is amended and addresses the definition of minor offense.

Paragraph 1.f.(4) is amended and clarifies that a member may waive the statute of limitations applicable to nonjudicial punishment. This is consistent with court-martial practice. *See United States v. Moore*, 32 M.J. 170 (CMA 1991).

The Analysis following paragraph 3 of Part V of the Manual for Courts-Martial reads as follows:

Analysis

2018 Amendment: Paragraph 3 is amended and addresses nonjudicial punishment of a person attached to or embarked in a vessel.

The Analysis following paragraph 5.b.(2)(B)(vi) of Part V of the Manual for Courts-Martial reads as follows:

Analysis

2018 Amendment: Subparagraphs 5.b.(2)(A)(i) and 5.b.(2)(B)(i) are amended and reflect the elimination of confinement on bread and water or diminished rations as an authorized nonjudicial punishment in Section 5141 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016).

The Analysis following paragraph 5.c.(5) of Part V of the Manual for Courts-Martial reads as follows:

Analysis

2018 Amendment: Subparagraph 5.c.(1) is amended and reflects the elimination of confinement on bread and water or diminished rations as an authorized nonjudicial punishment in Section 5141 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016).

The Analysis following paragraph 5.d.(5) of Part V of the Manual for Courts-Martial reads as follows:

Analysis

2018 Amendment: Subparagraph 5.d.(1) is amended and reflects the elimination of confinement on bread and water or diminished rations as an authorized nonjudicial punishment in Section 5141 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016).

The Analysis following paragraph 5.g. of Part V of the Manual for Courts-Martial reads as follows:

Analysis

2018 Amendment: Paragraphs 5.b.(2)(A)(i), 5.b.(2)(B)(i), 5.c.(5), and 5.d.(2) are amended and address the authorized punishments.

The Analysis following paragraph 6.b.(4) of Part V of the Manual for Courts-Martial reads as follows:

Analysis

2018 Amendment: Subparagraph 6.d is amended and reflects the elimination of confinement on bread and water or diminished rations as an authorized nonjudicial punishment in Section 5141 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016).

The Analysis following paragraph 6.d. of Part V of the Manual for Courts-Martial reads as follows:

Analysis

2018 Amendment: Paragraphs 6.b.(2) and b.(3) are amended and address mitigation and remission of authorized punishments.