Section 2. Part II of the Manual for Courts-Martial, United States is amended and reads as follows:

Rule 101. Scope, title
(a) *In general.* These rules govern the procedures and punishments in all courts-martial and, whenever expressly provided, preliminary, supplementary, and appellate procedures and activities.
(b) *Title.* These rules may be known and cited as the Rules for Courts-Martial (R.C.M.).

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

Rule 102. Purpose and construction
(a) *Purpose.* These rules are intended to provide for the just determination of every proceeding relating to trial by court-martial.
(b) *Construction.* These rules shall be construed to secure simplicity in procedure, fairness in administration, and the elimination of unjustifiable expense and delay.

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

Rule 103. Definitions and rules of construction
The following definitions and rules of construction apply throughout this Manual, unless otherwise expressly provided.

(1) "Article" refers to articles of the Uniform Code of Military Justice unless the context indicates otherwise.

(2) "Capital case" means a general court-martial to which a capital offense has been referred with an instruction that the case be treated as capital, and, in the case of a rehearing or new or other trial, for which offense death remains an authorized punishment under R.C.M. 810(d).

(3) "Capital offense" means an offense for which death is an authorized punishment under the UCMJ and Part IV of this Manual or under the law of war.

(4) "UCMJ" refers to the Uniform Code of Military Justice, unless the context indicates otherwise.

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

(5) "Commander" means a commissioned officer in command or an officer in charge except in Part V or unless the context indicates otherwise.

(6) "Convening authority" includes a commissioned officer in command for the time being and successors in command.

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

(7) "Copy" means an accurate reproduction, however made. Whenever necessary and feasible, a copy may be made by handwriting.

(8) “Court-martial” includes, depending on the context:

(A) The military judge and members of a general or special court-martial;

(B) The military judge when a session of a general or special court-martial is conducted without members under Article 39(a);

(C) The military judge when a request for trial by military judge alone has been approved under R.C.M. 903;

(D) The military judge when the case is referred as a special court-martial consisting of a military judge alone under Article 16(c)(2)(A); or

(E) The summary court-martial officer.

(9) “Days.” When a period of time is expressed in a number of days, the period shall be in calendar days, unless otherwise specified. Unless otherwise specified, the date on which the period begins shall not count, but the date on which the period ends shall count as one day.

(10) “Detail” means to order a person to perform a specific temporary duty, unless the context indicates otherwise.

(11) “Explosive” means gunpowders, powders used for blasting, all forms of high explosives, blasting materials, fuzes (other than electrical circuit breakers), detonators, and other detonating agents, smokeless powders, any explosive bomb, grenade, missile, or similar device, and any incendiary bomb or grenade, fire bomb, or similar device, and any other compound, mixture, or device which is an explosive within the meaning of 18 U.S.C. § 232(5) or 844(j).

(12) “Firearm” means any weapon which is designed to or may be readily converted to expel any projectile by the action of an explosive.

(13) “Joint” in connection with military organization connotes activities, operations, organizations, and the like in which elements of more than one military service of the same nation participate.

(14) “Members.” The members of a court-martial are the voting members detailed by the convening authority.

(15) “Military judge” means a judge advocate designated under Article 26(c) who is detailed under Article 26(a) or Article 30a to preside over a general or special court-martial or proceeding before referral. In the context of a summary court-martial “military judge” means the summary court-martial officer. In the context of a pre-referral proceeding or a special court-martial consisting of a military judge alone, “military judge” includes a military magistrate designated under Article 19 or Article 30a.

(16) “Party” in the context of parties to a court-martial or other proceeding under these rules, means—

(A) The accused and any defense or associate or assistant defense counsel and agents of the defense counsel when acting on behalf of the accused with respect to the court-martial or proceeding in question; and

(B) Any trial or assistant trial counsel or other counsel representing the United States, and agents of the trial counsel or such other counsel when acting on behalf of the United States with respect to the court-martial or proceeding in question.

(17) “Staff judge advocate” means a judge advocate so designated in the Army, Air Force, or Marine Corps, and means the principal legal advisor of a command in the Navy and Coast Guard who is a judge advocate.

(18) “*Sua sponte*” means that the person involved acts on that person’s initiative, without the

need for a request, motion, or application.

(19) "War, time of." For purpose of R.C.M. 1004(c)(6) and of implementing the applicable paragraphs of Parts IV and V of this Manual only, "time of war" means a period of war declared by Congress or the factual determination by the President that the existence of hostilities warrants a finding that a "time of war" exists for purposes of R.C.M. 1004(c)(6) and Parts IV and V of this Manual.

(20) The terms "writings" and "recordings" have the same meaning as in Mil. R. Evid. 1001.

(21) The definitions and rules of construction in 1 U.S.C. §§ 1 through 5 and in 10 U.S.C. §§ 101 and 801.

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:

(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.

Analysis

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

2017 Amendment:

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), 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(15) is amended and implements Article 1, as amended by Section 5101 of

the NDAA for FY17, which amended the definition of military judge.

R.C.M. 103(16) is amended and clarifies the definition of "party" to include acting on behalf of a party in to pre-referral and post-referral proceedings under these rules.

R.C.M. 103(20) is amended and aligns the definitions of "writings" and "recordings" with Mil. R. Evid. 1001.

Rule 104. Unlawful command influence

(a) *General prohibitions.*

(1) *Convening authorities and commanders.* No convening authority or commander may censure, reprimand, or admonish a court-martial or other military tribunal or any member, military judge, or counsel thereof, with respect to the findings or sentence adjudged by the court-martial or tribunal, or with respect to any other exercise of the functions of the court-martial or tribunal or such persons in the conduct of the proceedings.

(2) *All persons subject to the UCMJ.* No person subject to the UCMJ may attempt to coerce or, by any unauthorized means, influence the action of a court-martial or any other military tribunal or any member thereof, in reaching the findings or sentence in any case or the action of any convening, approving, or reviewing authority with respect to such authority's judicial acts.

(3) *Scope.*

(A) *Instructions.* Paragraphs (a)(1) and (2) of this rule do not prohibit general instructional or informational courses in military justice if such courses are designed solely for the purpose of instructing personnel of a command in the substantive and procedural aspects of courts-martial.

(B) *Court-martial statements.* Paragraphs (a)(1) and (2) of this rule do not prohibit statements and instructions given in open session by the military judge or counsel.

(C) *Professional supervision.* Paragraphs (a)(1) and (2) of this rule do not prohibit action by the Judge Advocate General concerned under R.C.M. 109.

(D) *Offense.* Paragraphs (a)(1) and (2) of this rule do not prohibit appropriate action against a person for an offense committed while detailed as a military judge, counsel, or member of a court-martial, or while serving as individual counsel.

(b) *Prohibitions concerning evaluations.*

(1) *Evaluation of member, defense counsel or special victims' counsel.* In the preparation of an effectiveness, fitness, or efficiency report or any other report or document used in whole or in part for the purpose of determining whether a member of the armed forces is qualified to be advanced in grade, or in determining the assignment or transfer of a member of the armed forces, or in determining whether a member of the armed forces should be retained on active duty, no person subject to the UCMJ may:

(A) Consider or evaluate the performance of duty of any such person as a member of a court-martial; or

(B) Give a less favorable rating or evaluation of any defense counsel or special victims' counsel because of the zeal with which such counsel represented any client. As used in this rule, "special victims' counsel" are judge advocates, and civilian counsel, who, in accordance with 10 U.S.C. 1044e, are designated as Special Victims' Counsel.

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.

(2) *Evaluation of military judge.*

(A) *General courts-martial.* Unless the general court-martial was convened by the President or the Secretary concerned, neither the convening authority nor any member of the convening authority's staff may prepare or review any report concerning the effectiveness, fitness, or efficiency of the military judge detailed to a general court-martial, which relates to the performance of duty as a military judge.

(B) *Special courts-martial.* The convening authority may not prepare or review any report concerning the effectiveness, fitness, or efficiency of a military judge detailed to a special court-martial which relates to the performance of duty as a military judge. When the military judge is normally rated or the military judge's report is reviewed by the convening authority, the manner in which such military judge will be rated or evaluated upon the performance of duty as a military judge may be as prescribed in regulations of the Secretary concerned which shall ensure the absence of any command influence in the rating or evaluation of the military judge's judicial performance.

Discussion

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

Analysis

This rule is taken from Rule 104 of the MCM (2016 edition) as amended by Executive Order XXXXX without substantive amendment.

Rule 105. Direct communications: convening authorities and staff judge advocates; among staff judge advocates

(a) *Convening authorities and staff judge advocates.* Convening authorities shall at all times communicate directly with their staff judge advocates in matters relating to the administration of military justice.

(b) *Among staff judge advocates and with the Judge Advocate General.* The staff judge advocate of any command is entitled to communicate directly with the staff judge advocate of a superior or subordinate command, or with the Judge Advocate General.

Discussion

See R.C.M. 103(17) for a definition of staff judge advocate

Analysis

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

Rule 106. Delivery of military offenders to civilian authorities

Under such regulations as the Secretary concerned may prescribe, a member of the armed forces accused of an offense against civilian authority may be delivered, upon request, to the civilian authority for trial. A member may be placed in restraint by military authorities for this purpose only upon receipt of a duly issued warrant for the apprehension of the member or upon receipt of information establishing probable cause that the member committed an offense, and upon reasonable belief that such restraint is necessary. Such restraint may continue only for such time as is reasonably necessary to effect the delivery.

Discussion

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

Analysis

This rule is taken from Rule 106 of the MCM (2016 edition) without substantive amendment.

Rule 107. Dismissed officer's right to request trial by court-martial

If a commissioned officer of any armed force is dismissed by order of the President under 10 U.S.C. § 1161(a)(3), that officer may apply for trial by general court-martial within a reasonable time.

Discussion

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

Analysis

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

Rule 108. Rules of court

The Judge Advocate General concerned and persons designated by the Judge Advocate General may make rules of court not inconsistent with these rules for the conduct of court-martial proceedings. Such rules shall be disseminated in accordance with procedures prescribed by the Judge Advocate General concerned or a person to whom this authority has been delegated. Noncompliance with such procedures shall not affect the validity of any rule of court with respect to a party who has received actual and timely notice of the rule or who has not been prejudiced under Article 59 by the absence of such notice. Copies of all rules of court issued under this rule shall be forwarded to the Judge Advocate General concerned.

Analysis

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

Rule 109. Professional supervision of appellate military judges, military judges, military magistrates, judge advocates, and counsel

(a) *In general.* Each Judge Advocate General is responsible for the professional supervision and discipline of appellate military judges, military judges, military magistrates, judge advocates, and other lawyers who practice in proceedings governed by the UCMJ and this Manual. To discharge this responsibility each Judge Advocate General may prescribe rules of professional conduct not inconsistent with this rule or this Manual. Rules of professional conduct promulgated pursuant to this rule may include sanctions for violations of such rules. Sanctions may include but are not limited to indefinite suspension from practice in courts-martial and in the Courts of Criminal Appeals. Such suspensions may only be imposed by the Judge Advocate General of the armed service of such courts. Prior to imposing any discipline under this rule, the subject of the proposed action must be provided notice and an opportunity to be heard. The Judge Advocate General concerned may upon good cause shown modify or revoke suspension. Procedures to investigate complaints against appellate military judges, military judges, and military magistrates are contained in subsection (c) of this rule.

(b) *Action after suspension or disbarment.* When a Judge Advocate General suspends a person

from practice or the Court of Appeals for the Armed Forces disbars a person, any Judge Advocate General may suspend that person from practice upon written notice and opportunity to be heard in writing.

(c) *Investigation of appellate military judges, military judges, and military magistrates.*

(1) *In general.* These rules and procedures promulgated pursuant to Article 6a are established to investigate and dispose of charges, allegations, or information pertaining to the fitness of an appellate military judge, military judge, or military magistrate to perform the duties of the judge's or magistrate's office.

(2) *Policy.* Allegations of judicial misconduct or unfitness shall be investigated pursuant to the procedures of this rule and appropriate action shall be taken. Judicial misconduct includes any act or omission that may serve to demonstrate unfitness for further duty as a judge or magistrate, including, but not limited to violations of applicable ethical standards.

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.

(3) *Complaints.* Complaints concerning an appellate military judge, military judge, or military magistrate will be forwarded to the Judge Advocate General of the Service concerned or to a person designated by the Judge Advocate General concerned to receive such complaints.

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).

(4) *Initial action upon receipt of a complaint.* Upon receipt, a complaint will be screened by the Judge Advocate General concerned or by the individual designated in paragraph (c)(3) of this rule to receive complaints. An initial inquiry is necessary if the complaint, taken as true, would constitute judicial misconduct or unfitness for further service as an appellate military judge, a military judge, or military magistrate. Prior to the commencement of an initial inquiry, the Judge Advocate General concerned shall be notified that a complaint has been filed and that an initial inquiry will be conducted. The Judge Advocate General concerned may temporarily suspend the subject of a complaint from performing judicial duties pending the outcome of any inquiry or investigation conducted pursuant to this rule. Such inquiries or investigations shall be conducted with reasonable promptness.

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.

(5) *Initial Inquiry*.

(A) *In general.* An initial inquiry is necessary to determine if the complaint is substantiated. A complaint is substantiated upon finding that it is more likely than not that the subject appellate military judge, military judge, or military magistrate has engaged in judicial misconduct or is otherwise unfit for further service as a judge or magistrate.

(B) *Responsibility to conduct initial inquiry*. The Judge Advocate General concerned, or the person designated to receive complaints under paragraph (c)(3) of this rule will conduct or order an initial inquiry. The individual designated to conduct the inquiry should, if practicable, be senior to the subject of the complaint. If the subject of the complaint is a military judge or military magistrate, the individual designated to conduct the initial inquiry should, if practicable, be a military judge or an individual with experience as a military judge. If the subject of the complaint is an appellate military judge, the individual designated to conduct the inquiry should, if practicable, have experience as an appellate judge.

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.

(C) *Due process.* During the initial inquiry, the subject of the complaint will, at a minimum, be given notice and an opportunity to be heard.

(D) *Action following the initial inquiry.* If the complaint is not substantiated pursuant to subparagraph (c)(5)(A) of this rule, the complaint shall be dismissed as unfounded. If the complaint is substantiated, minor professional disciplinary action may be taken or the complaint may be forwarded, with findings and recommendations, to the Judge Advocate General concerned. Minor professional disciplinary action is defined as counseling or the issuance of an oral or written admonition or reprimand. The Judge Advocate General concerned will be notified prior to taking minor professional disciplinary action or dismissing a complaint as unfounded.

(6) *Action by the Judge Advocate General.*

(A) *In general.* The Judge Advocates General are responsible for the professional supervision and discipline of appellate military judges, military judges, and military magistrates under their jurisdiction. Upon receipt of findings and recommendations required by paragraph (c)(5) of this rule the Judge Advocate General concerned will take appropriate action.

(B) *Appropriate actions.* The Judge Advocate General concerned may dismiss the complaint, order an additional inquiry, appoint an ethics commission to consider the complaint, refer the matter to another appropriate investigative agency or take appropriate professional disciplinary action pursuant to the rules of professional conduct prescribed by the Judge Advocate General under subsection (a) of this rule. Any decision of the Judge Advocate General, under this rule, is final and is not subject to appeal.

Discussion

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

(C) *Standard of proof.* Prior to taking professional disciplinary action, other than minor disciplinary action as defined in paragraph (c)(5) of this rule, the Judge Advocate General concerned shall find, in writing, that the subject of the complaint engaged in judicial misconduct

or is otherwise unfit for continued service as an appellate military judge, military judge, or military magistrate, and that such misconduct or unfitness is established by clear and convincing evidence.

(D) *Due process.* Prior to taking final action on the complaint, the Judge Advocate General concerned will ensure that the subject of the complaint is, at a minimum, given notice and an opportunity to be heard.

(7) *The Ethics Commission.*

(A) *Membership.* If appointed pursuant to subparagraph (c)(6)(B) of this rule, an ethics commission shall consist of at least three members. If the subject of the complaint is a military judge or military magistrate, the commission should include one or more military judges or individuals with experience as a military judge. If the subject of the complaint is an appellate military judge, the commission should include one or more individuals with experience as an appellate military judge. Members of the commission should, if practicable, be senior to the subject of the complaint.

(B) *Duties.* The commission will perform those duties assigned by the Judge Advocate General concerned. Normally, the commission will provide an opinion as to whether the subject's acts or omissions constitute judicial misconduct or unfitness. If the commission determines that the affected appellate military judge, military judge, or military magistrate engaged in judicial misconduct or is unfit for continued judicial service, the commission may be required to recommend an appropriate disposition to The Judge Advocate General concerned.

Discussion

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

(8) *Rules of procedure.* The Secretary of Defense or the Secretary of the Service concerned may establish additional procedures consistent with this rule and Article 6a.

Analysis

This rule is taken from Rule 109 of the MCM (2016 edition) with the following amendment: *2017 Amendment:* R.C.M. 109 is amended and reflects Article 26a, as enacted by Section 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 authorizes the Judge Advocate General to certify the qualifications of military magistrates.

Rule 201. Jurisdiction in general

(a) *Nature of court-martial jurisdiction.*

(1) The jurisdiction of courts-martial is entirely penal or disciplinary.

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.

(2) The UCMJ applies in all places.

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.

(3) The jurisdiction of a court-martial with respect to offenses under the UCMJ is not affected by the place where the court-martial sits. The jurisdiction of a court-martial with respect to military government or the law of war is not affected by the place where the court-martial sits except as otherwise expressly required by this Manual or applicable rule of international law.

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.

(b) *Requisites of court-martial jurisdiction*. A court-martial always has jurisdiction to determine whether it has jurisdiction. Otherwise for a court-martial to have jurisdiction:

(1) The court-martial must be convened by an official empowered to convene it;

Discussion

See R.C.M. 504; 1302.

(2) The court-martial must be composed in accordance with these rules with respect to number and qualifications of its personnel. As used here "personnel" includes only the military judge, the members, and the summary court-martial;

Discussion

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

(3) Each charge before the court-martial must be referred to it by competent authority;

Discussion

See R.C.M. 601.

(4) The accused must be a person subject to court-martial jurisdiction; and

Discussion

See R.C.M. 202.

(5) The offense must be subject to court-martial jurisdiction.

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).

(c) [Deleted]

Discussion

See R.C.M. 809 for procedures and standards for contempt proceedings and the exercise of contempt authority by judicial officers under Article 48.

(d) *Exclusive and nonexclusive jurisdiction.*

(1) Courts-martial have exclusive jurisdiction of purely military offenses.

(2) An act or omission which violates both the UCMJ and local criminal law, foreign or domestic, may be tried by a court-martial, or by a proper civilian tribunal, foreign or domestic, or, subject to R.C.M. 907(b)(2)(C) and regulations of the Secretary concerned, by both.

(3) Where an act or omission is subject to trial by court-martial and by one or more civil tribunals, foreign or domestic, the determination which nation, state, or agency will exercise jurisdiction is a matter for the nations, states, and agencies concerned, and is not a right of the suspect or accused.

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 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, for example, 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.

(e) *Reciprocal jurisdiction.*

(1) Each armed force has court-martial jurisdiction over all persons subject to the UCMJ.

(2)(A) A commander of a unified or specified combatant command may convene courts-martial over members of any of the armed forces.

(B) So much of the authority vested in the President under Article 22(a)(9) to empower any commanding officer of a joint command or joint task force to convene courts-martial is delegated to the Secretary of Defense, and such a commanding officer may convene general courts-martial for the trial of members of any of the armed forces assigned or attached to a combatant command or joint command.

(C) A commander who is empowered to convene a court-martial under subparagraphs (e)(2)(A) or (e)(2)(B) of this rule may expressly authorize a commanding officer of a subordinate joint command or subordinate joint task force who is authorized to convene special and summary courts-martial to convene such courts-martial for the trial of members of other armed forces assigned or attached to a joint command or joint task force, under regulations which the superior command may prescribe.

(3) A member of one armed force may be tried by a court-martial convened by a member of another armed force, using the implementing regulations and procedures prescribed by the Secretary concerned of the military service of the accused, when:

(A) The court-martial is convened by a commander authorized to convene courts-martial under paragraph (e)(2) of this rule; or

(B) The accused cannot be delivered to the armed force of which the accused is a member without manifest injury to the armed forces.

An accused should not ordinarily be tried by a court-martial convened by a member of a different armed force except when the circumstances described in (A) or (B) exist. However, failure to comply with this policy does not affect an otherwise valid referral.

(4) Nothing in this rule prohibits detailing to a court-martial a military judge, member, or counsel who is a member of an armed force different from that of the accused or the convening authority, or both.

(5) In all cases, departmental review after that by the officer with authority to convene a general court-martial for the command which held the trial, where that review is required by the UCMJ, shall be carried out by the department that includes the armed force of which the accused is a member.

(6) When there is a disagreement between the Secretaries of two military departments or between the Secretary of a military department and the commander of a unified or specified combatant command or other joint command or joint task force as to which organization should exercise jurisdiction over a particular case or class of cases, the Secretary of Defense or an official acting under the authority of the Secretary of Defense shall designate which organization will exercise jurisdiction.

(7) Except as provided in subsections (5) and (6) or as otherwise directed by the President or Secretary of Defense, whenever action under this Manual is required or authorized to be taken by a person superior to—

(A) a commander of a unified or specified combatant command or;

(B) a commander of any other joint command or joint task force that is not part of a unified or specified combatant command, the matter shall be referred to the Secretary of the armed force of which the accused is a member. The Secretary may convene a court-martial, take other appropriate action, or, subject to R.C.M. 504(c), refer the matter to any person authorized to convene a court-martial of the accused.

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.

(f) *Types of courts-martial.*

[Note: R.C.M. 201(f)(1)(D) and (f)(2)(D) apply to offenses committed on or after 24 June 2014.]

(1) *General courts-martial.*

(A) *Cases under the UCMJ.*

(i) Except as otherwise expressly provided, general courts-martial may try any person subject to the UCMJ for any offense made punishable under the UCMJ. General courts-martial

also may try any person for a violation of Article 103, 103b, or 104a.

(ii) Upon a finding of guilty of an offense made punishable by the UCMJ, general courts-martial may, within limits prescribed by this Manual, adjudge any punishment authorized under R.C.M. 1003.

(iii) Notwithstanding any other rule, the death penalty may not be adjudged if:

(a) Not specifically authorized for the offense by the UCMJ and Part IV of this Manual; or

(b) The case has not been referred with a special instruction that the case is to be tried as capital.

(B) *Cases under the law of war.*

(i) General courts-martial may try any person who by the law of war is subject to trial by military tribunal for any crime or offense against:

(a) The law of war; or

(b) 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. The law of the occupied territory includes the local criminal law as adopted or modified by competent authority, and the proclamations, ordinances, regulations, or orders promulgated by competent authority of the occupying power.

Discussion

Subclause (f)(1)(B)(i)(b) is an exercise of the power of military government.

(ii) When a general court-martial exercises jurisdiction under the law of war, it may adjudge any punishment permitted by the law of war.

Discussion

Certain limitations on the discretion of military tribunals to adjudge punishment under the law of war are prescribed in international conventions. See, for example, 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.

(C) *Limitations in judge alone cases.* A general court-martial composed only of a military judge does not have jurisdiction to try any person for any offense for which the death penalty may be adjudged unless the case has been referred to trial as noncapital.

(D) *Jurisdiction for Certain Sexual Offenses.* Only a general court-martial has jurisdiction to try offenses under Article 120(a), 120(b), 120b(a), and 120b(b), and attempts thereof under Article 80.

(2) *Special courts-martial.*

(A) *In general.* Except as otherwise expressly provided, special courts-martial may try any person subject to the UCMJ for any noncapital offense made punishable by the UCMJ and, as provided in this rule, for capital offenses.

(B) *Punishments.*

(i) Upon a finding of guilty, special courts-martial may adjudge, under limitations prescribed by this Manual, any punishment authorized under R.C.M. 1003 except death, dishonorable discharge, dismissal, confinement for more than 1 year, hard labor without confinement for more than 3 months, forfeiture of pay exceeding two-thirds pay per month, or any forfeiture of pay for more than 1 year.

(ii) A bad-conduct discharge, confinement for more than six months, or forfeiture of pay for more than six months, may not be adjudged by a special court-martial when the case is

referred as a special court-martial consisting of a military judge alone under Article 16(c)(2)(A).

(C) *Capital offenses*

(i) A capital offense for which there is prescribed a mandatory punishment beyond the punitive power of a special court-martial shall not be referred to such a court-martial.

(ii) An officer exercising general court-martial jurisdiction over the command which includes the accused may permit any capital offense other than one described in subparagraph (C)(i) to be referred to a special court-martial for trial.

(iii) The Secretary concerned may authorize, by regulation, officers exercising special court-martial jurisdiction to refer capital offenses, other than those described in subparagraph (C)(i), to trial by special court-martial without first obtaining the consent of the officer exercising general court-martial jurisdiction over the command.

Discussion

See R.C.M. 103(3) for a definition of capital offenses.

(D) *Certain Offenses under Articles 120 and 120b.* Notwithstanding subparagraph (f)(2)(A), special courts-martial do not have jurisdiction over offenses under Articles 120(a), 120(b), 120b(a), and 120b(b), and attempts thereof under Article 80. Such offenses shall not be referred to a special court-martial.

Discussion

Pursuant to the National Defense Authorization Act for Fiscal Year 2014, 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.

[Two alternative provisions dealing with special courts-martial consisting of a military judge alone under Article 16c(2)(A) are set out below. The Department of Defense invites comments concerning these, or any other, alternatives.]

Proposal #1:

(E) *Limitations in cases referred for trial by special court-martial consisting of a military judge alone.* Except as provided in subparagraph (iii) of this paragraph, no specification alleging an offense for which, following a conviction, the accused may be required to register as a sex offender may be referred for trial by a special court-martial consisting of a military judge alone under Article 16(c)(2)(A). A specification may be referred for trial by a special court-martial consisting of a military judge alone under Article 16(c)(2)(A) only if:

(i) the maximum authorized confinement for the offense it alleges would be two years or less if the offense were tried by a general court-martial;

(ii) the offense it alleges is wrongful use or possession of a controlled substance specified in Article 112a(b) or an attempt thereof under Article 80; or

(iii) the offense it alleges is otherwise eligible for referral to a special court-martial under these rules and the accused does not object.

Discussion

In determining whether a conviction for the offense may require sex offender registration, Department of Defense regulations may be consulted.

Proposal #2:

(E) *Limitations on trial by special court-martial consisting of a military judge alone.*

(1) No specification may be tried by a special court-martial consisting of a military judge alone under Article 16(c)(2)(A) if, before arraignment, the accused objects on the basis that:

(i) the maximum authorized confinement for the offense it alleges would be greater than two years if the offense were tried by a general court-martial, with the exception of a specification alleging wrongful use or possession of a controlled substance in violation of Article 112a(b) or an attempt thereof under Article 80; or

(ii) the specification alleges an offense for which sex offender notification would be required under regulations issued by the Secretary of Defense.

Discussion

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

(2) If the accused objects to trial by a special court-martial consisting of a military judge alone under Article 16(c)(2)(A), trial may be ordered by a special court-martial under Article 16(c)(1) or a general court-martial as may be appropriate.

[end of alternative proposals]

(3) *Summary courts-martial. See* R.C.M. 1301(c) and (d)(1).

(g) *Concurrent jurisdiction of other military tribunals.* The provisions of the UCMJ and this Manual conferring jurisdiction upon courts-martial do not deprive military commissions, provost courts, or other military tribunals of concurrent jurisdiction with respect to offenders or offenses that by statute or by the law of war may be tried by military commissions, provost courts, or other military tribunals.

Discussion

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

Analysis

This rule is taken from Rule 201 of the MCM (2016 edition) with the following amendments: *2017 Amendment*: R.C.M. 201(f)(1)(D) and (f)(2)(D) were amended and eliminates redundancies and to implement 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).

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), which eliminated special courts-martial without a military judge and 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. 201(f)(2)(E) is new and implements Article 16, as amended by Section 5161 of the NDAA for FY17, 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.

Rule 202. Persons subject to the jurisdiction of courts-martial

(a) *In general.* Courts-martial may try any person when authorized to do so under the UCMJ.

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 paragraph (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 amendable 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 83, 104, or 106. 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), which provides:

> Notwithstanding any other provision of law, a person serving with an armed force who—
>
> (1) submitted voluntary to military authority;
>
> (2) met the mental competency and minimum age qualifications of sections 504 and 505 of this title at the time of voluntary submission to military authority [that is, not insane, intoxicated, or under the age of 17]
>
> (3) received military pay or allowances; and
>
> (4) performed military duties;
>
> is subject to [the UCMJ] until such person's active service has been terminated in accordance with law or regulations promulgated by the Secretary concerned.

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.

(b) *Offenses under the law of war*. Nothing in this rule limits the power of general courts-martial to try persons under the law of war. *See* R.C.M. 201(f)(1)(B).

(c) *Attachment of jurisdiction over the person.*

(1) *In general.* Court-martial jurisdiction attaches over a person when action with a view to trial of that person is taken. Once court-martial jurisdiction over a person attaches, such jurisdiction shall continue for all purposes of trial, sentence, and punishment, notwithstanding the expiration of that person's term of service or other period in which that person was subject to the UCMJ or trial by court-martial. When jurisdiction attaches over a Servicemember on active duty, the Servicemember may be held on active duty over objection pending disposition of any offense for which held and shall remain subject to the UCMJ during the entire period.

Discussion

Court-martial jurisdiction exists to try a person as long as that person occupies a status as a person subject to the UCMJ. *See also* Article 104 and 106. 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.

(2) *Procedure.* Actions by which court-martial jurisdiction attaches include: apprehension; imposition of restraint, such as restriction, arrest, or confinement; and preferral of charges.

Analysis

This rule is taken from Rule 202 of the MCM (2016 edition) with the following amendment:
2017 Amendment: The Discussion to R.C.M. 202 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.

Rule 203. Jurisdiction over the offense

To the extent permitted by the Constitution, courts-martial may try any offense under the UCMJ and, in the case of general courts-martial, the law of war.

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).

Analysis

This rule is taken from Rule 203 of the MCM (2016 edition) with the following amendment: *2017 Amendment*: The Discussion to 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.

Rule 204. Jurisdiction over certain reserve component personnel.

(a) *Service regulations*. The Secretary concerned shall prescribe regulations setting forth rules and procedures for the exercise of court-martial jurisdiction and nonjudicial punishment authority over reserve component personnel under Article 2(a)(3) and 2(d), subject to the limitations of this Manual and the UCMJ.

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.

(b) *Courts-martial*.

(1) *General and special court-martial proceedings.* A member of a reserve component must be on active duty prior to arraignment at a general or special court-martial. A member ordered to active duty pursuant to Article 2(d) may be retained on active duty to serve any adjudged confinement or other restriction on liberty if the order to active duty was approved in accordance with Article 2(d)(5), but such member may not be retained on active duty pursuant to Article 2(d) after service of the confinement or other restriction on liberty. All punishments remaining unserved at the time the member is released from active duty may be carried over to subsequent periods of inactive-duty training or active duty.

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).

(2) *Summary courts-martial.* A member of a reserve component may be tried by summary court-martial either while on active duty or inactive-duty training. A summary court-martial conducted during inactive-duty training may be in session only during normal periods of such training. The accused may not be held beyond such periods of training for trial or service or any punishment. All punishments remaining unserved at the end of a period of active duty or the end of any normal period of inactive duty training may be carried over to subsequent periods of inactive-duty training or active duty

Discussion

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

(c) *Applicability*. This subsection is not applicable when a member is held on active duty pursuant to R.C.M. 202(c).

(d) *Changes in type of service.* A member of a reserve component at the time disciplinary action is initiated, who is alleged to have committed an offense while subject to the UCMJ, is subject to court-martial jurisdiction without regard to any change between active and reserve service or within different categories of reserve service subsequent to commission of the offense. This subsection does not apply to a person whose military status was completely terminated after commission of an offense.

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, clause (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.

Analysis

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

2017 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.

Rule 301. Report of offense

(a) *Who may report.* Any person may report an offense subject to trial by court-martial.

(b) *To whom reports conveyed for disposition.* Ordinarily, any military authority who receives a report of an offense shall forward as soon as practicable the report and any accompanying

information to the immediate commander of the suspect. Competent authority superior to that commander may direct otherwise.

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); R.C.M. 304, 305 (Pretrial restraint, confinement).

Analysis

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

Rule 302. Apprehension

(a) *Definition and scope.*

(1) *Definition.* Apprehension is the taking of a person into custody.

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(c)(1). Evidence obtained as the result of an unlawful civilian arrest may be challenged under Mil. R. Evid. 311(c)(1), (2).

(2) *Scope.* This rule applies only to apprehensions made by persons authorized to do so under subsection (b) of this rule with respect to offenses subject to trial by court-martial. Nothing in this rule limits the authority of federal law enforcement officials to apprehend persons, whether or not subject to trial by court-martial, to the extent permitted by applicable enabling statutes and other law.

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 agents of the Secret Service may apprehend persons for any offenses committed in their presence and for felonies. 18 U.S.C. §§ 3052, 3053, 3056. Other agencies have 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.

(b) *Who may apprehend.* The following officials may apprehend any person subject to trial by court-martial:

(1) *Military law enforcement officials.* Security police, military police, master at arms personnel, members of the shore patrol, and persons designated by proper authorities to perform military criminal investigative, guard, or police duties, whether subject to the UCMJ or not, when in each of the foregoing instances, the official making the apprehension is in the execution of law enforcement duties;

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.

(2) *Commissioned, warrant, petty, and noncommissioned officers.* All commissioned, warrant, petty, and noncommissioned officers on active duty or inactive duty training;

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.

(3) *Civilians authorized to apprehend deserters.* Under Article 8, any civilian officer having authority to apprehend offenders under laws of the United States or of a State, Territory, Commonwealth, or possession, or the District of Columbia, when the apprehension is of a deserter from the armed forces.

Discussion

The UCMJ specifically provides that any civil officer, whether of a State, Territory, district, or of the United States may apprehend any deserter. However, this authority does not permit state and local law enforcement officers to apprehend persons for other violations of the UCMJ. *See* Article 8.

(c) *Grounds for apprehension.* A person subject to the UCMJ or trial thereunder may be apprehended for an offense triable by court-martial upon probable cause to apprehend. Probable cause to apprehend exists when there are reasonable grounds to believe that an offense has been or is being committed and the person to be apprehended committed or is committing it. Persons authorized to apprehend under paragraph (b)(2) of this rule may also apprehend persons subject to the UCMJ who take part in quarrels, frays, or disorders, wherever they occur.

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.

(d) *How an apprehension may be made.*

(1) *In general.* An apprehension is made by clearly notifying the person to be apprehended that person is in custody. This notice should be given orally or in writing, but it may be implied by the circumstances.

(2) *Warrants.* Neither warrants nor any other authorizations shall be required for an apprehension under these rules except as required in paragraph (e)(2) of this rule.

(3) *Use of force.* Any person authorized under these rules to make an apprehension may use such force and means as reasonably necessary under the circumstances to effect the apprehension.

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.

(e) *Where an apprehension may be made.*

(1) *In general.* An apprehension may be made at any place, except as provided in paragraph (e)(2) of this rule.

(2) *Private dwellings.* A private dwelling includes dwellings, on or off a military installation, such as single family houses, duplexes, and apartments. The quarters may be owned, leased, or rented by the residents, or assigned, and may be occupied on a temporary or permanent basis. "Private dwelling" does not include the following, whether or not subdivided into individual units: living areas in military barracks, vessels, aircraft, vehicles, tents, bunkers, field encampments, and similar places. No person may enter a private dwelling for the purpose of making an apprehension under these rules unless:

(A) Pursuant to consent under Mil. R. Evid. 314(e) or 316(d)(2);

(B) Under exigent circumstances described in Mil. R. Evid. 315(g) or 316(d)(4)(B);

(C) In the case of a private dwelling which is military property or under military control, or nonmilitary property in a foreign country

(i) if the person to be apprehended is a resident of the private dwelling, there exists, at the time of the entry, reason to believe that the person to be apprehended is present in the dwelling, and the apprehension has been authorized by an official listed in Mil. R. Evid. 315(d) upon a determination that probable cause to apprehend the person exists; or

(ii) if the person to be apprehended is not a resident of the private dwelling, the entry has been authorized by an official listed in Mil. R. Evid. 315(d) upon a determination that probable cause exists to apprehend the person and to believe that the person to be apprehended is or will be present at the time of the entry;

(D) In the case of a private dwelling not included in subparagraph (e)(2)(C) of this rule,

(i) if the person to be apprehended is a resident of the private dwelling, there exists at the time of the entry, reason to believe that the person to be apprehended is present and the apprehension is authorized by an arrest warrant issued by competent civilian authority; or

(ii) if the person to be apprehended is not a resident of the private dwelling, the apprehension is authorized by an arrest warrant and the entry is authorized by a search warrant, each issued by competent civilian authority. A person who is not a resident of the private dwelling entered may not challenge the legality of an apprehension of that person on the basis of failure to secure a warrant or authorization to enter that dwelling, or on the basis of the

sufficiency of such a warrant or authorization. Nothing in paragraph (e)(2) affects the legality of an apprehension which is incident to otherwise lawful presence in a private dwelling.

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.

Analysis

This rule is taken from Rule 302 of the MCM (2016 edition) without substantive amendment.

Rule 303. Preliminary inquiry into reported offenses

Upon receipt of information that a member of the command is accused or suspected of committing an offense or offenses triable by court-martial, the immediate commander shall make or cause to be made a preliminary inquiry into the charges or suspected offenses.

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. Section 1742 of the National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66 (2013) requires that 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 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. 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.

Analysis

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

2017 Amendment: The Discussion to R.C.M. 303 is amended and implements Section 1742 of the National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66 (2013) which created the responsibility for commanders to refer reports of sex-related offenses involving members of the armed forces in their chain of command to the appropriate military criminal investigative organization.

Rule 304. Pretrial restraint

(a) *Types of pretrial restraint.* Pretrial restraint is moral or physical restraint on a person's liberty which is imposed before and during disposition of offenses. Pretrial restraint may consist of conditions on liberty, restriction in lieu of arrest, arrest, or confinement.

(1) *Conditions on liberty.* Conditions on liberty are imposed by orders directing a person to do or refrain from doing specified acts. Such conditions may be imposed in conjunction with other forms of restraint or separately.

(2) *Restriction in lieu of arrest.* Restriction in lieu of arrest is the restraint of a person by oral or written orders directing the person to remain within specified limits; a restricted person shall, unless otherwise directed, perform full military duties while restricted.

(3) *Arrest.* Arrest is the restraint of a person by oral or written order not imposed as punishment, directing the person to remain within specified limits; a person in the status of arrest may not be required to perform full military duties such as commanding or supervising personnel, serving as guard, or bearing arms. The status of arrest automatically ends when the person is placed, by the authority who ordered the arrest or a superior authority, on duty inconsistent with the status of arrest, but this shall not prevent requiring the person arrested to do ordinary cleaning or policing, or to take part in routine training and duties.

(4) *Confinement.* Pretrial confinement is physical restraint, imposed by order of competent authority, depriving a person of freedom pending disposition of offenses. *See* R.C.M. 305.

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 by 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).

(b) *Who may order pretrial restraint.*

(1) *Of civilians and officers.* Only a commanding officer to whose authority the civilian or officer is subject may order pretrial restraint of that civilian or officer.

Discussion

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

(2) *Of enlisted persons.* Any commissioned officer may order pretrial restraint of any enlisted person.

(3) *Delegation of authority.* The authority to order pretrial restraint of civilians and commissioned and warrant officers may not be delegated. A commanding officer may delegate to warrant, petty, and noncommissioned officers authority to order pretrial restraint of enlisted

persons of the commanding officer's command or subject to the authority of that commanding officer.

(4) *Authority to withhold.* A superior competent authority may withhold from a subordinate the authority to order pretrial restraint.

(c) *When a person may be restrained.* No person may be ordered into restraint before trial except for probable cause. Probable cause to order pretrial restraint exists when there is a reasonable belief that:

(1) An offense triable by court-martial has been committed;

(2) The person to be restrained committed it; and

(3) The restraint ordered is required by the circumstances.

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.

(d) *Procedures for ordering pretrial restraint.* Pretrial restraint other than confinement is imposed by notifying the person orally or in writing of the restraint, including its terms or limits. The order to an enlisted person shall be delivered personally by the authority who issues it or through other persons subject to the UCMJ. The order to an officer or a civilian shall be delivered personally by the authority who issues it or by another commissioned officer. Pretrial confinement is imposed pursuant to orders by a competent authority by the delivery of a person to a place of confinement.

(e) *Notice of basis for restraint.* When a person is placed under restraint, the person shall be informed of the nature of the offense which is the basis for such restraint.

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 restrain is not the commander of the person restrained, that officer should be notified.

(f) *Punishment prohibited.* Pretrial restraint is not punishment and shall not be used as such. No person who is restrained pending trial may be subjected to punishment or penalty for the offense which is the basis for that restraint. Prisoners being held for trial shall not be required to undergo punitive duty hours or training, perform punitive labor, or wear special uniforms prescribed only for post-trial prisoners. This rule does not prohibit minor punishment during pretrial confinement for infractions of the rules of the place of confinement. Prisoners shall be afforded facilities and treatment under regulations of the Secretary concerned.

Discussion

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

(g) *Release.* Except as otherwise provided in R.C.M. 305, a person may be released from pretrial restraint by a person authorized to impose it. Pretrial restraint shall terminate a sentence is adjudged, the accused is acquitted of all charges, or all charges are dismissed.

Discussion

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

(h) *Administrative restraint.* Nothing in this rule prohibits limitations on a Servicemember imposed for operational or other military purposes independent of military justice, including administrative hold or medical reasons.

Discussion

See R.C.M. 306.

Analysis

This rule is taken from Rule 304 of the MCM (2016 edition) without substantive amendment.

Rule 305. Pretrial confinement

(a) *In general.* Pretrial confinement is physical restraint, imposed by order of competent authority, depriving a person of freedom pending disposition of charges.

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.

(b) *Who may be confined.* Any person who is subject to trial by court-martial may be confined if the requirements of this rule are met.

Discussion

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

(c) *Who may order confinement. See* R.C.M. 304(b).

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. Article 11(a).

(d) W*hen a person may be confined.* No person may be ordered into pretrial confinement except for probable cause. Probable cause to order pretrial confinement exists when there is a reasonable belief that:

(1) An offense triable by court-martial has been committed;

(2) The person confined committed it; and

(3) Confinement is required by the circumstances.

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.

"[W]hen charged only with an offense normally tried by summary court-martial, [an accused] shall not ordinarily be placed in confinement." Article 10.

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.

(e) *Advice to the accused upon confinement.* Each person confined shall be promptly informed of:

(1) The nature of the offenses for which held;

(2) The right to remain silent and that any statement made by the person may be used against the person;

(3) The right to retain civilian counsel at no expense to the United States, and the right to request assignment of military counsel; and

(4) The procedures by which pretrial confinement will be reviewed.

(f) *Military counsel.* If requested by the confinee and such request is made known to military authorities, military counsel shall be provided to the confinee before the initial review under subsection (i) of this rule or within 72 hours of such a request being first communicated to military authorities, whichever occurs first. Counsel may be assigned for the limited purpose of representing the accused only during the pretrial confinement proceedings before charges are referred. If assignment is made for this limited purpose, the confinee shall be so informed. Unless otherwise provided by regulations of the Secretary concerned, a confinee does not have a right under this rule to have military counsel of the confinee's own selection.

(g) *Who may direct release from confinement.* Any commander of a confinee, an officer appointed under regulations of the Secretary concerned to conduct the review under subsection (i) or (j) of this rule, or, once charges have been referred, a military judge detailed to the court-martial to which the charges against the accused have been referred, may direct release from pretrial confinement. For purposes of this subsection, "any commander" includes the immediate or higher commander of the confinee and the commander of the installation on which the confinement facility is located.

(h) *Notification and action by commander.*

(1) *Report.* Unless the commander of the confinee ordered the pretrial confinement, the commissioned, warrant, noncommissioned, or petty officer into whose charge the confinee was committed shall, within 24 hours after that commitment, cause a report to be made to the commander that shall contain the name of the confinee, the offenses charged against the confinee, and the name of the person who ordered or authorized confinement.

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 paragraph (h)(2) of this rule.

(2) *Action by commander.*

(A) *Decision.* Not later than 72 hours after the commander's ordering of a confinee into pretrial confinement or, after receipt of a report that a member of the commander's unit or organization has been confined, whichever situation is applicable, the commander shall decide whether pretrial confinement will continue. A commander's compliance with this paragraph may also satisfy the 48-hour probable cause determination of paragraph (i)(1) of this rule, provided

the commander is a neutral and detached officer and acts within 48 hours of the imposition of confinement under military control. Nothing in subsection (d), paragraph (i)(1), or this subparagraph prevents a neutral and detached commander from completing the 48-hour probable cause determination and the 72-hour commander's decision immediately after an accused is ordered into pretrial confinement.

(B) *Requirements for confinement.* The commander shall direct the confinee's release from pretrial confinement unless the commander believes upon probable cause, that is, upon reasonable grounds, that:

(i) An offense triable by a court-martial has been committed;

(ii) The confinee committed it; and

(iii) Confinement is necessary because it is foreseeable that:

(a) The confinee will not appear at trial, pretrial hearing, or preliminary hearing, or

(b) The confinee will engage in serious criminal misconduct; and

(iv) Less severe forms of restraint are inadequate.

Serious criminal misconduct includes intimidation of witnesses or other obstruction of justice, serious injury of others, or other offenses which pose a serious threat to the safety of the community or to the effectiveness, morale, discipline, readiness, or safety of the command, or to the national security of the United States. As used in this rule, "national security" means the national defense and foreign relations of the United States and specifically includes: a military or defense advantage over any foreign nation or group of nations; a favorable foreign relations position; or a defense posture capable of successfully resisting hostile or destructive action from within or without, overt or covert.

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 records, 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, at liberty or under restriction, arrest, or conditions on liberty. *See* R.C.M. 304.

(C) *72-hour memorandum.* If continued pretrial confinement is approved, the commander shall prepare a written memorandum that states the reasons for the conclusion that the requirements for confinement in subparagraph (h)(2)(B) of this rule have been met. This memorandum may include hearsay and may incorporate by reference other documents, such as

witness statements, investigative reports, or official records. This memorandum shall be forwarded to the 7-day reviewing officer under paragraph (i)(2) of this rule. If such a memorandum was prepared by the commander before ordering confinement, a second memorandum need not be prepared; however, additional information may be added to the memorandum at any time.

(i) *Procedures for review of pretrial confinement.*

(1) *48-hour probable cause determination.* Review of the adequacy of probable cause to continue pretrial confinement shall be made by a neutral and detached officer within 48 hours of imposition of confinement under military control. If the confinee is apprehended by civilian authorities and remains in civilian custody at the request of military authorities, reasonable efforts will be made to bring the confinee under military control in a timely fashion.

(2) *7-day review of pretrial confinement.* Within 7 days of the imposition of confinement, a neutral and detached officer appointed in accordance with regulations prescribed by the Secretary concerned shall review the probable cause determination and necessity for continued pretrial confinement. In calculating the number of days of confinement for purposes of this rule, the initial date of confinement under military control shall count as one day and the date of the review shall also count as one day.

(A) *Nature of the 7-day review.*

(i) *Matters considered.* The review under this subsection shall include a review of the memorandum submitted by the confinee's commander under subparagraph (h)(2)(C) of this rule. Additional written matters may be considered, including any submitted by the confinee. The confinee and the confinee's counsel, if any, shall be allowed to appear before the 7-day reviewing officer and make a statement, if practicable. A representative of the command may also appear before the reviewing officer to make a statement.

(ii) *Rules of evidence.* Except for Mil. R. Evid., Section V (Privileges) and Mil. R. Evid. 302 and 305, the Military Rules of Evidence shall not apply to the matters considered.

(iii) *Standard of proof.* The requirements for confinement under subparagraph (h)(2)(B) of this rule must be proved by a preponderance of the evidence.

(iv) *Victim's right to be reasonably heard.* A victim of an alleged offense committed by the confinee has the right to reasonable, accurate, and timely notice of the 7-day review; the right to confer with the representative of the command and counsel for the government, if any; and the right to be reasonably heard during the review. However, the hearing may not be unduly delayed for this purpose. The right to be heard under this rule includes the right to be heard through counsel and the right to be reasonably protected from the confinee during the 7-day review. The victim of an alleged offense shall be notified of these rights in accordance with regulations of the Secretary concerned.

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.

(B) *Extension of time limit.* The 7-day reviewing officer may, for good cause, extend the time limit for completion of the review to 10 days after the imposition of pretrial confinement.

(C) *Action by 7-day reviewing officer.* Upon completion of review, the reviewing officer shall approve continued confinement or order immediate release. If the reviewing officer orders immediate release, a victim of an alleged offense committed by the confinee has the right to

reasonable, accurate, and timely notice of the release, unless such notice may endanger the safety of any person.

(D) *Memorandum.* The 7-day reviewing officer's conclusions, including the factual findings on which they are based, shall be set forth in a written memorandum. The memorandum shall also state whether the victim was notified of the review, was given the opportunity to confer with the representative of the command or counsel for the government, and was given a reasonable opportunity to be heard. A copy of the memorandum and all documents considered by the 7-day reviewing officer shall be maintained in accordance with regulations prescribed by the Secretary concerned and provided to the accused or the Government on request.

(E) *Reconsideration of approval of continued confinement.* The 7-day reviewing officer shall upon request, and after notice to the parties, reconsider the decision to confine the confinee based upon any significant information not previously considered.

(j) *Review by military judge.* Once the charges for which the accused has been confined are referred to trial, the military judge shall review the propriety of pretrial confinement upon motion for appropriate relief.

(1) *Release.* The military judge shall order release from pretrial confinement only if:

(A) The 7-day reviewing officer's decision was an abuse of discretion, and there is not sufficient information presented to the military judge justifying continuation of pretrial confinement under subparagraph (h)(2)(B) of this rule;

(B) Information not presented to the 7-day reviewing officer establishes that the confinee should be released under subparagraph (h)(2)(B) of this rule; or

(C) The provisions of paragraph (i)(1) or (2) of this rule have not been complied with and information presented to the military judge does not establish sufficient grounds for continued confinement under subparagraph (h)(2)(B) of this rule.

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).

(2) *Credit.* The military judge shall order administrative credit under subsection (k) of this rule for any pretrial confinement served as a result of an abuse of discretion or failure to comply with the provisions of subsections (f), (h), or (i) of this rule.

(k) *Remedy.* The remedy for noncompliance with subsections (f), (h), (i), or (j) of this rule shall be an administrative credit against the sentence adjudged for any confinement served as the result of such noncompliance. Such credit shall be computed at the rate of 1 day credit for each day of confinement served as a result of such noncompliance. The military judge may order additional credit for each day of pretrial confinement that involves an abuse of discretion or unusually harsh circumstances. This credit is to be applied in addition to any other credit the accused may be entitled as a result of pretrial confinement served. This credit shall be applied first against any confinement adjudged. If no confinement is adjudged, or if the confinement adjudged is insufficient to offset all the credit to which the accused is entitled, the credit shall be applied against hard labor without confinement, restriction, fine, and forfeiture of pay, in that order, using the conversion formula under R.C.M. 1003(b)(6) and (7). For purposes of this subsection, 1 day of confinement shall be equal to 1 day of total forfeiture or a like amount of fine. The credit shall not be applied against any other form of punishment.

(l) *Confinement after release.* No person whose release from pretrial confinement has been directed by a person authorized in subsection (g) of this rule may be confined again before completion of trial except upon discovery, after the order of release, of evidence or of misconduct which, either alone or in conjunction with all other available evidence, justifies confinement.

Discussion

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

(m) *Exceptions.*

(1) *Operational necessity.* The Secretary of Defense may suspend application of paragraphs (e)(3), (e)(4), subsection (f), subparagraph (h)(2)(A) and (C), and subsection (i) of this rule to specific units or in specified areas when operational requirements of such units or in such areas would make application of such provisions impracticable.

(2) *At sea.* Paragraph (e)(3) and (e)(4), clause (f), subparagraph (h)(2)(C), and subsection (i) of this rule shall not apply in the case of a person on board a vessel at sea. In such situations, confinement on board the vessel at sea may continue only until the person can be transferred to a confinement facility ashore. Such transfer shall be accomplished at the earliest opportunity permitted by the operational requirements and mission of the vessel. Upon such transfer the memorandum required by subparagraph (h)(2)(C) of this rule shall be transmitted to the reviewing officer under subsection (i) of this rule and shall include an explanation of any delay in the transfer.

Discussion

Under this subsection 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 subparagraph (h)(2)(B) of this rule. The suspension of subparagraph (h)(2)(A) of this rule 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 subsection (2) since the commander of a vessel is always available.)

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

(n) *Notice to victim of escaped confinee.* A victim of an alleged offense committed by the confinee for which the confinee has been placed in pretrial confinement has the right to reasonable, accurate, and timely notice of the escape of the prisoner, unless such notice may endanger the safety of any person.

Discussion

For purposes of this rule, the term "victim of an alleged offense" means a person who has suffered direct, physical, emotional, or pecuniary harm as a result of the commission of the offense under the UCMJ. *See* Article 6b.

Analysis

This rule is taken from Rule 305 of the MCM (2016 edition) with the following amendments:
2017 Amendment: The term "prisoner" is replaced with the term "confinee" throughout the rule.

Technical corrections are made to the references in R.C.M. 305(m)(1) and (2).

Rule 306. Initial Disposition.

(a) *Who may dispose of offenses.* Each commander has discretion to dispose of offenses by

members of that command. Ordinarily the immediate commander of a person accused or suspected of committing an offense triable by court-martial initially determines how to dispose of that offense. A superior commander may withhold the authority to dispose of offenses in individual cases, types of cases, or generally. A superior commander may not limit the discretion of a subordinate commander to act on cases over which authority has not been withheld.

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 may be 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.

(b) *Policy.* Allegations of offenses should be disposed of in a timely manner at the lowest appropriate level of disposition listed in subsection (c) of this rule

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).

(c) *How offenses may be disposed of.* Within the limits of the commander's authority, a commander may take the actions set forth in this subsection to initially dispose of a charge or suspected offense.

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).

(1) *No action.* A commander may decide to take no action on an offense. If charges have been preferred, they may be dismissed.

Discussion

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

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.

(2) *Administrative action.* A commander may take or initiate administrative action, in addition to or instead of other action taken under this rule, subject to regulations of the Secretary concerned. Administrative actions include corrective measures such as counseling, admonition, reprimand, exhortation, disapproval, criticism, censure, reproach, rebuke, extra military instruction, or the administrative withholding of privileges, or any combination of the above.

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.

(3) *Nonjudicial punishment.* A commander may consider the matter pursuant to Article 15, nonjudicial punishment. *See* Part V.

(4) *Disposition of charges.* Charges may be disposed of in accordance with R.C.M. 401.

Discussion

If charges have not been preferred, they may be preferred. See R.C.M. 307 concerning preferral of charges. However, 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, an investigation under R.C.M. 405 may be directed. Additional guidance on these matters is found in R.C.M. 401-407.

(5) *Forwarding for disposition.* A commander may forward a matter concerning an offense, or charges, to a superior or subordinate authority for disposition.

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.

(d) *National security matters.* If a commander not authorized to convene general courts-martial finds that an offense warrants trial by court-martial, but believes that trial would be detrimental to the prosecution of a war or harmful to national security, the matter shall be forwarded to the general court-martial convening authority for action under R.C.M. 407(b).

(e) *Sex-related offenses.*

(1) For purposes of this subsection, a "sex-related offense" means any allegation of a violation of Article 120, 120b, 120c, or 130, or any attempt thereof under Article 80, UCMJ.

(2) Under such regulations as the Secretary concerned may prescribe, for alleged sex-related offenses committed in the United States, the victim of the sex-related offense shall be provided an opportunity to express views as to whether the offense should be prosecuted by court-martial

or in a civilian court with jurisdiction over the offense. The commander, and if charges are preferred, the convening authority, shall consider such views as to the victim's preference for jurisdiction, if available, prior to making an initial disposition decision. For purposes of this rule, "victim" is defined as an individual who has suffered direct physical, emotional, or pecuniary harm as a result of the commission of an alleged sex-related offense as defined in subparagraph (1) of this rule.

(3) Under such regulations as the Secretary concerned may prescribe, if the victim of an alleged sex-related offense expresses a preference for prosecution of the offense in a civilian court, the commander, and if charges are preferred, the convening authority, shall ensure that the civilian authority with jurisdiction over the offense is notified of the victim's preference for civilian prosecution. If the commander, and if charges are preferred, the convening authority learns of any decision by the civilian authority to prosecute or not prosecute the offense in civilian court, the convening authority shall ensure the victim is notified.

Analysis

This rule is taken from Rule 306 of the MCM (2016 edition) with the following amendments: *2017 Amendment*: The Discussion to 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). R.C.M. 306(e)(1) is amended and reflects the Military Justice Act of 2016's reorganization of the punitive articles. See Sections 5401-5452 of the NDAA for FY17.

Rule 307. Preferral of charges

(a) *Who may prefer charges*. Any person subject to the UCMJ may prefer charges.

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 subsection (b) of this rule. 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; however, *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

(b) *How charges are preferred; oath.* In preferring charges and specifications—

(1) The person preferring the charges and specifications must sign them under oath before a commissioned officer of the armed forces authorized to administer oaths; and

(2) The writing under paragraph (1) must state that—

(A) the signer has personal knowledge of, or has investigated, the matters set forth in the charges and specifications; and

(B) the matters set forth in the charges and specifications are true to the best of the

knowledge and belief of the signer.

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.

(c) *How to allege offenses*.

(1) *In general*. The format of charge and specification is used to allege violations of the UCMJ.

Discussion

See Appendix 4 for a sample of a Charge Sheet (DD Form 458).

(2) *Charge*. A charge states the article of the UCMJ, law of war, or local penal law of an occupied territory which the accused is alleged to have violated.

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 subsection (d) of this rule.

(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 subsection (d) of this rule. 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.

(3) *Specification*. A specification is a plain, concise, and definite statement of the essential facts constituting the offense charged. A specification is sufficient if it alleges every element of the charged offense expressly or by necessary implication; however, specifications under Article 134 must expressly allege the terminal element. Except for aggravating factors under R.C.M. 1003(d) and R.C.M. 1004, facts that increase the maximum authorized punishment must be alleged in order to permit the possible increased punishment. No particular format is required.

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) *Duplicitousness.* 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 (vii) of this rule.

(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. Aggravating factors in capital cases should not be alleged in the specification. Notice of such factors is normally provided in accordance with R.C.M. 1004(b)(1).

(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.

(4) Multiple offenses. Charges and specifications alleging all known offenses by an accused may be preferred at the same time. Each specification shall state only one offense. What is substantially one transaction should not be made the basis for an unreasonable multiplication of charges against one person.

Discussion

Practitioners are advised that the use of the phrase "multiplicity in sentencing" has been deemed confusing. *United States v. Campbell*, 71 M.J. 19 (C.A.A.F. 2012). Unreasonable multiplication of charges should not be confused with multiplicity. *See* R.C.M. 1003(c)(1)(C). 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.

(5) *Multiple offenders.* A specification may name more than one person as an accused if each person so named is believed by the accuser to be a principal in the offense which is the subject of the specification.

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 paragraph (c)(3) Discussion (H) (viii)(a) of this rule. 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.

(d) *Harmless error in citation.* Error in or omission of the designation of the article of the UCMJ or other statute, law of war, or regulation violated shall not be ground for dismissal of a charge or reversal of a conviction if the error or omission did not prejudicially mislead the accused.

Analysis
This rule is taken from Rule 307 of the MCM (2016 edition) with the following amendment: *2017 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).

Rule 308. Notification to accused of charges
(a) *Immediate commander.* The immediate commander of the accused shall cause the accused to be informed of the charges preferred against the accused, and the name of the person who preferred the charges and of any person who ordered the charges to be preferred, if known, as soon as practicable.

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.

(b) *Commanders at higher echelons.* When the accused has not been informed of the charges, commanders at higher echelons to whom the preferred charges are forwarded shall cause the accused to be informed of the matters required under subsection (a) of this rule as soon as practicable.
(c) *Remedy.* The sole remedy for violation of this rule is a continuance or recess of sufficient length to permit the accused to adequately prepare a defense, and no relief shall be granted upon a failure to comply with this rule unless the accused demonstrates that the accused has been hindered in the preparation of a defense.

Analysis
This rule is taken from Rule 308 of the MCM (2016 edition) as amended by Executive Order XXXXX without amendment.

Rule 309. Pre-referral judicial proceedings
(a) *In general.*

(1) A military judge detailed under regulations of the Secretary concerned may conduct proceedings under Article 30a before referral of charges and specifications to court-martial for trial, and may issue such rulings and orders as necessary to further the purpose of the proceedings.

(2) The matters that may be considered and ruled upon by a military judge in proceeding under this rule are limited to those matters specified in subsection (b).

(3) If any matter in a proceeding under this rule becomes a subject at issue with respect to charges that have been referred to a general or special court-martial, the matter, to include any motions, related papers, and the record of the hearing, if any, shall be provided to the military judge detailed to the court-martial.

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.

(b) *Pre-referral matters.* The following matters may be considered in a pre-referral proceeding under Article 30a:

(1) *Pre-referral investigative subpoenas.* A military judge may, upon application by the Government, consider whether to issue a pre-referral investigative subpoena under R.C.M. 703(g)(3)(C). The proceeding may be conducted *ex parte*, and may be conducted *in camera*.

(2) *Pre-referral warrants or orders for wire or electronic communications.* A military judge may, upon written application by a federal law enforcement officer or authorized counsel for the Government in connection with an ongoing investigation of an offense or offenses under the UCMJ, consider whether to issue a warrant or court order for wire or electronic communications and related information as provided under R.C.M. 703A. The proceeding may be conducted *ex parte*, and may be conducted *in camera*.

Discussion

The defense may request that the trial counsel or other counsel for the Government make an application under paragraph (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.

(3) *Requests for relief from subpoena or other process.* A person in receipt of a pre-referral investigative subpoena under R.C.M. 703(g)(3)(C) or a service provider in receipt of a court order to disclose information about wire or electronic communications under R.C.M. 703A(c) may request relief on grounds that compliance with the subpoena or order is unreasonable, oppressive or prohibited by law. The military judge shall review the request and shall either order the person or service provider to comply with the subpoena or order, or modify or quash the subpoena or order as appropriate. In a proceeding under this paragraph, the United States shall be represented by an authorized counsel for the Government.

Discussion

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

(4) *Pre-referral matters referred by an appellate court.* When a Court of Criminal Appeals or the Court of Appeals for the Armed Forces, in the course of exercising the jurisdiction of such court, remands the case for a pre-referral judicial proceeding, a military judge may conduct such a proceeding under this rule.

(c) *Procedure for submissions.* The Secretary concerned shall prescribe the procedures for receiving requests for proceedings under this rule and for detailing military judges to such proceedings.

(d) *Hearings.* Any hearing conducted under this rule shall be conducted in accordance with the procedures generally applicable to sessions conducted under Article 39(a) and R.C.M. 803.

(e) *Record.* A separate record of any proceeding under this rule shall be prepared and forwarded to the convening authority or commander with authority to dispose of the charges or offenses in the case. If charges are referred to trial in the case, such record shall be included in the record of trial.

(f) *Military magistrate.* If authorized under regulations of the Secretary concerned, a military

judge detailed to a proceeding under this rule, other than a proceeding under paragraph (b)(2), may designate a military magistrate to preside and exercise the authority of the military judge over the proceeding.

Analysis
R.C.M. 309 is new and implements Article 30a, as enacted 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 establishes the matters that may be addressed by a military judge or military magistrate in a pre-referral proceeding.

Rule 401. Forwarding and disposition of charges in general
(a) *Who may dispose of charges.* Only persons authorized to convene courts-martial or to administer nonjudicial punishment under Article 15 may dispose of charges. A superior competent authority may withhold the authority of a subordinate to dispose of charges in individual cases, types of cases, or generally.

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 preferral. 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). However, see R.C.M. 1302(b) (accuser may refer charges to a summary court-martial).

(b) *Prompt determination.* When a commander with authority to dispose of charges receives charges, that commander shall promptly determine what disposition will be made in the interest of justice and discipline.

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) concerning policy and factors relating to disposition of charges and specifications in the interest of justice and discipline. 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 131(f).

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.

(c) *How charges may be disposed of.* Unless the authority to do so has been limited or withheld by superior competent authority, a commander may dispose of charges by dismissing any or all of them, forwarding any or all of them to another commander for disposition, or referring any or all of them to a court-martial which the commander is empowered to convene. Charges should be disposed of in accordance with the policy in R.C.M. 306(b).

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.

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) for policy and factors relating to disposition of charges and specifications in the interest of justice and discipline.

(1) *Dismissal.* When a commander dismisses charges further disposition under R.C.M. 306(c) of the offenses is not barred.

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.

(2) *Forwarding charges.*

(A) *Forwarding to a superior commander.* When charges are forwarded to a superior commander for disposition, the forwarding commander shall make a personal recommendation as to disposition. If the forwarding commander is disqualified from acting as convening authority in the case, the basis for the disqualification shall be noted.

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) for policy and factors relating to disposition of charges and specifications in the interest of justice and discipline.

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.

(B) *Other cases.* When charges are forwarded to a commander who is not a superior of the forwarding commander, no recommendation as to disposition may be made.

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 1d(2) of Part V. When appropriate, charges may be sent or returned to a subordinate commander for compliance with procedural requirements. See, for example, R.C.M. 303 (preliminary inquiry); R.C.M. 308 (notification to accused of charges).

(3) *Referral of charges. See* R.C.M. 403, 404, 407, 601.

(d) *National security matters.* If a commander who is not a general court-martial convening authority finds that the charges warrant trial by court-martial but believes that trial would probably be detrimental to the prosecution of a war or harmful to national security, the charges shall be forwarded to the officer exercising general court-martial convening authority.

Discussion

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

Analysis

This rule is taken from Rule 401 of the MCM (2016 edition) with the following amendment:
2017 Amendment: The Discussion following R.C.M. 401(c)(2) 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).

Rule 402. Action by commander not authorized to convene courts-martial

When in receipt of charges, a commander authorized to administer nonjudicial punishment but not authorized to convene courts-martial may:

(1) Dismiss any charges; or

Discussion

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

(2) Forward them to a superior commander for disposition.

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.

Analysis

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

Rule 403. Action by commander exercising summary court-martial jurisdiction

(a) *Recording receipt.* Immediately upon receipt of sworn charges, an officer exercising summary court-martial jurisdiction over the command shall cause the hour and date of receipt to be entered on the charge sheet.

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.

(b) *Disposition*. When in receipt of charges a commander exercising summary court-martial jurisdiction may:

(1). Dismiss any charges;

Discussion

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

(2) Forward charges (or, after dismissing charges, the matter) to a subordinate commander for disposition;

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.

(3) Forward any charges to a superior commander for disposition;

Discussion

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

(4) Subject to R.C.M. 601(d) and 1301(c), refer charges to a summary court-martial for trial; or

Discussion

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

(5) Unless otherwise prescribed by the Secretary concerned, direct a preliminary hearing under R.C.M. 405, and, if appropriate, forward the report of preliminary hearing with the charges to a superior commander for disposition.

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.

Analysis

This rule is taken from Rule 403 of the MCM (2016 edition) without substantive amendment.

Rule 404. Action by commander exercising special court-martial jurisdiction

When in receipt of charges, a commander exercising special court-martial jurisdiction may:

(1) Dismiss any charges;

Discussion

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

(2) Forward charges (or, after dismissing charges, the matter) to a subordinate commander for disposition;

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.

(3) Forward any charges to a superior commander for disposition;

Discussion

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

(4) Subject to R.C.M. 201(f)(1)(D) and (E), 601(d), and 1301(c), refer charges to a summary court-martial or to a special court-martial for trial.

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)(1)(D) and (E) and 1301(c) for limitations on the referral of certain offenses to special and summary courts-martial.

(5) Unless otherwise prescribed by the Secretary concerned, direct a preliminary hearing under R.C.M. 405, and, if appropriate, forward the report of preliminary hearing with the charges to a superior commander for disposition.

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).

Analysis

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

2017 Amendment: R.C.M. 404(4) is amended and implements Article 18, as 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).

Rule 404A. Initial Disclosures

(a) *Generally.* Except as otherwise provided in subsections (b)–(d), counsel for the Government shall provide the following information, matters, and disclosures to the defense**:**

(1) *After preferral of charges.* As soon as practicable after notification to the accused of preferred charges under R.C.M. 308, counsel for the Government shall provide the defense with copies of, or if impracticable, permit the defense to inspect the charges and any matters that accompanied the charges when they were preferred.

(2) *After direction of a preliminary hearing.* As soon as practicable after direction of an Article 32 preliminary hearing, counsel for the Government shall provide the defense with copies of, or if impracticable, permit the defense to inspect:

(A) the Article 32 appointment order;

(B) statements, within the control of military authorities, of witnesses that counsel for the Government intends to call at the preliminary hearing;

(C) evidence counsel for the Government intends to present at the preliminary hearing; and

(D) any matters provided to the convening authority when deciding to direct the preliminary hearing.

Discussion

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

(b) *Contraband.* If items covered by subsection (a) of this rule are contraband, the disclosure required under this rule is a reasonable opportunity to inspect said contraband prior to the preliminary hearing.

(c) *Privilege.* If items covered by subsection (a) of this rule are privileged, classified or otherwise protected under Section V of Part III, no disclosure of those items is required under this rule. However, counsel for the Government may disclose privileged, classified, or otherwise protected information covered by subsection (a) of this rule if authorized by the holder of the privilege, or in the case of Mil. R. Evid. 505 or 506, if authorized by a competent authority.

(d) *Protective order if privileged information is disclosed.* If the Government agrees to disclose to the accused information to which the protections afforded by Section V of Part III may apply, the convening authority, or other person designated by regulation of the Secretary concerned, may enter an appropriate protective order, in writing, to guard against the compromise of information disclosed to the accused. The terms of any such protective order may include prohibiting the disclosure of the information except as authorized by the authority issuing the protective order, as well as those terms specified by Mil. R. Evid. 505(g)(2)–(6) or 506(g)(2)–(5).

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 the National Defense Authorization Act for Fiscal Year 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).

Analysis

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

2017 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.

Rule 405. Preliminary Hearing

(a) *In general.* Except as provided in subsection (m), no charge or specification may be referred to a general court-martial for trial until completion of a preliminary hearing in

substantial compliance with this rule. The issues for determination at a preliminary hearing are limited to the following: whether each specification alleges an offense; whether there is probable cause to believe that the accused committed the offense or offenses charged; whether the convening authority has court-martial jurisdiction over the accused and over the offense; and to recommend the disposition that should be made of the case. Failure to comply with this rule shall have no effect on the disposition of any charge if the charge is not referred to a general court-martial.

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 subsection (m) of this rule. 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.

(b) *Earlier preliminary hearing.* If a preliminary hearing on the subject matter of an offense has been conducted before the accused is charged with an offense, and the accused was present at the preliminary hearing and afforded the rights to counsel, cross-examination, and presentation of evidence required by this rule, no further preliminary hearing is required.

(c) *Who may direct a preliminary hearing.* Unless prohibited by regulations of the Secretary concerned, a preliminary hearing may be directed under this rule by any court-martial convening authority. That authority may also give procedural instructions not inconsistent with these rules.

(d) *Personnel.*

(1) *Preliminary hearing officer.*

(A) The convening authority directing the preliminary hearing shall detail an impartial judge advocate, not the accuser, who is certified under Article 27(b)(2) to conduct the hearing. When it is impracticable to appoint a judge advocate certified under Article 27(b)(2) due to exceptional circumstances:

(i) The convening authority may detail an impartial commissioned officer as the preliminary hearing officer, and

(ii) An impartial judge advocate certified under Article 27(b)(2) shall be available to provide legal advice to the detailed preliminary hearing officer.

(B) Whenever practicable, the preliminary hearing officer shall be equal or senior in grade to the military counsel detailed to represent the accused and the Government at the preliminary hearing.

(C) The Secretary concerned may prescribe additional limitations on the detailing of preliminary hearing officers.

(D) The preliminary hearing officer shall not depart from an impartial role and become an advocate for either side. The preliminary hearing officer is disqualified to act later in the same case in any other capacity.

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* paragraph (j)(1). The responsibility for requesting and producing such information, however, rests with the parties.

(2) *Counsel for the Government.* A judge advocate, not the accuser, shall serve as counsel to represent the Government.

(3) *Defense counsel.*

(A) *Detailed counsel.* Military counsel certified in accordance with Article 27(b) shall be detailed to represent the accused.

(B) *Individual military counsel.* The accused may request to be represented by individual military counsel. Such requests shall be acted on in accordance with R.C.M. 506(b).

(C) *Civilian counsel.* The accused may be represented by civilian counsel at no expense to the Government. Upon request, the accused is entitled to a reasonable time to obtain civilian counsel and to have such counsel present for the preliminary hearing. However, the preliminary hearing shall not be unduly delayed for this purpose. Representation by civilian counsel shall not limit the rights to military counsel under subparagraphs (A) and (B).

(4) *Others.* The convening authority who directed the preliminary hearing may also detail or request an appropriate authority to detail a reporter, an interpreter, or both.

(e) *Scope of preliminary hearing.*

(1) The preliminary hearing officer shall limit the inquiry to the examination of evidence, including witnesses, relevant to the issues for determination under subsection (a).

(2) If evidence adduced during the preliminary hearing indicates that the accused committed any uncharged offense, the preliminary hearing officer may examine evidence and hear witnesses presented by the parties relating to the subject matter of such offense and make the determinations specified in subsection (a) regarding such offense without the accused first having been charged with the offense. The rights of the accused under subsection (f), and, where it would not cause undue delay to the proceedings, the procedure applicable for production of witnesses and other evidence under subsection (h), are the same with regard to both charged and uncharged offenses. When considering uncharged offenses identified during the preliminary hearing, the preliminary hearing officer shall inform the accused of the general nature of each uncharged offense considered, and otherwise afford the accused the same opportunity for representation, cross examination, and presentation afforded during the preliminary hearing of any charged offense.

Discussion

Except as set forth in subsection (i) of this rule, the Mil. R. Evid. 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.

(f) *Rights of the accused.* At any preliminary hearing under this rule the accused shall have the right to:

(1) Be advised of the charges under consideration;

(2) Be represented by counsel;

(3) Be informed of the purpose of the preliminary hearing;

(4) Be informed of the right against self-incrimination under Article 31;

(5) Except in the circumstances described in R.C.M. 804(c)(2), be present throughout the taking of evidence;

(6) Cross-examine witnesses on matters relevant to the issues for determination under subsection (a);

(7) Present matters relevant to the issues for determination under subsection (a); and

(8) Make a sworn or unsworn statement relevant to the issues for determination under subsection (a).

(g) *Notice to and presence of victim.*

(1) For the purposes of this rule, a "victim" is an individual who is alleged to have suffered a direct physical, emotional, or pecuniary harm as a result of the commission of an offense under the UCMJ.

(2) A victim of an offense under the UCMJ has the right to reasonable, accurate, and timely notice of a preliminary hearing relating to the alleged offense and the reasonable right to confer with counsel for the Government.

(3) A victim has the right not to be excluded from any public proceeding of the preliminary hearing, except to the extent a similarly situated victim would be excluded at trial.

(h) *Notice, Production of Witnesses, and Production of Other Evidence.*

(1) *Notice.* Prior to any preliminary hearing under this rule the parties shall, in accordance with timelines set by the preliminary hearing officer, provide to the preliminary hearing officer and the opposing party the following notices:

(A) Notice of the name and contact information for each witness the party intends to call at the preliminary hearing; and

(B) Notice of any other evidence that the party intends to offer at the preliminary hearing; and

(C) Notice of any additional information the party intends to submit under subsection (l).

(2) *Production of Witnesses.*

(A) *Military Witnesses.*

(i) Prior to the preliminary hearing, defense counsel shall provide to counsel for the Government the names of proposed military witnesses whom the accused requests that the Government produce to testify at the preliminary hearing, and the requested form of the testimony, in accordance with the timeline established by the preliminary hearing officer. Counsel for the Government shall respond that either (1) the Government agrees that the witness' testimony is relevant, not cumulative, and necessary to a determination of the issues under subsection (a) and will seek to secure the witness' testimony for the hearing; or (2) the Government objects to the proposed defense witness on the grounds that the testimony would be irrelevant, cumulative, or unnecessary to a determination of the issues under subsection (a).

(ii) If the Government objects to the proposed defense witness, defense counsel may request that the preliminary hearing officer determine whether the witness is relevant, not cumulative, and necessary to a determination of the issues under subsection (a).

(iii) If the Government does not object to the proposed defense military witness or the preliminary hearing officer determines that the military witness is relevant, not cumulative, and necessary, counsel for the Government shall request that the commanding officer of the proposed military witness make that person available to provide testimony. The commanding officer shall determine whether the individual is available, and if so, whether the witness will testify in person, by video teleconference, by telephone, or by similar means of remote testimony, based on operational necessity or mission requirements. If the commanding officer

determines that the military witness is available, counsel for the Government shall make arrangements for that individual's testimony. The commanding officer's determination of unavailability due to operational necessity or mission requirements is final. A victim who is alleged to have suffered a direct physical, emotional, or pecuniary harm as a result of the matters set forth in a charge or specification under consideration and is named in one of the specifications under consideration shall not be required to testify at a preliminary hearing.

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.

(B) *Civilian Witnesses.*

(i) Defense counsel shall provide to counsel for the Government the names of proposed civilian witnesses whom the accused requests that the Government produce to testify at the preliminary hearing, and the requested form of the testimony, in accordance with the timeline established by the preliminary hearing officer. Counsel for the Government shall respond that either (1) the Government agrees that the witness' testimony is relevant, not cumulative, and necessary to a determination of the issues under subsection (a) and will seek to secure the witness' testimony for the hearing; or (2) the Government objects to the proposed defense witness on the grounds that the testimony would be irrelevant, cumulative, or unnecessary to a determination of the issues under subsection (a).

(ii) If the Government objects to the proposed defense witness, defense counsel may request that the preliminary hearing officer determine whether the witness is relevant, not cumulative, and necessary to a determination of the issues under subsection (a).

(iii) If the Government does not object to the proposed civilian witness or the preliminary hearing officer determines that the civilian witness' testimony is relevant, not cumulative, and necessary, counsel for the Government shall invite the civilian witness to provide testimony and, if the individual agrees, shall make arrangements for that witness' testimony. If expense to the Government is to be incurred, the convening authority who directed the preliminary hearing, or the convening authority's delegate, shall determine whether the witness testifies in person, by video teleconference, by telephone, or by similar means of remote testimony.

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* Department of Defense Joint Travel Regulations.

(3) *Production of other evidence.*

(A) *Evidence under the control of the Government.*

(i) Prior to the preliminary hearing, defense counsel shall provide to counsel for the Government a list of evidence under the control of the Government the accused requests the Government produce to the defense for introduction at the preliminary hearing. The preliminary hearing officer may set a deadline by which defense requests must be received. Counsel for the Government shall respond that either (1) the Government agrees that the evidence is relevant, not cumulative, and necessary to a determination of the issues under subsection (a) and shall make reasonable efforts to obtain the evidence; or (2) the Government objects to production of the evidence on the grounds that the evidence would be irrelevant, cumulative, or unnecessary to a determination of the issues under subsection (a).

(ii) If the Government objects to production of the evidence, defense counsel may request that the preliminary hearing officer determine whether the evidence should be produced. The preliminary hearing officer shall determine whether the evidence is relevant, not cumulative, and necessary to a determination of the issues under subsection (a). If the preliminary hearing officer determines that the evidence shall be produced, counsel for the Government shall make reasonable efforts to obtain the evidence.

(iii) The preliminary hearing officer may not order the production of any privileged matters, however, when a party offers evidence that an opposing party claims is privileged, the preliminary hearing officer may rule on whether a privilege applies.

(B) *Evidence not under the control of the Government*.

(i) Evidence not under the control of the Government may be obtained through noncompulsory means or by a pre-referral investigative subpoena issued by a military judge under R.C.M. 309 or counsel for the Government in accordance with the process established by R.C.M. 703(g)(3)(C).

(ii) Prior to the preliminary hearing, defense counsel shall provide to counsel for the Government a list of evidence not under the control of the Government that the accused requests the Government obtain. The preliminary hearing officer may set a deadline by which defense requests must be received. Counsel for the Government shall respond that either (1) the Government agrees that the evidence is relevant, not cumulative, and necessary to a determination of the issues under subsection (a) and shall issue a pre-referral investigative subpoena for the evidence; or (2) the Government objects to production of the evidence on the grounds that the evidence would be irrelevant, cumulative, or unnecessary to a determination of the issues under subsection (a).

(iii) If the Government objects to production of the evidence, defense counsel may request that the preliminary hearing officer determine whether the evidence should be produced. If the preliminary hearing officer determines that the evidence is relevant, not cumulative, and necessary based on the limited scope and purpose of the preliminary hearing and that the issuance of a pre-referral investigative subpoena would not cause undue delay to the preliminary hearing, the preliminary hearing officer shall direct counsel for the Government to issue a pre-referral investigative subpoena for the defense-requested evidence. If counsel for the Government declines this request, the counsel shall set forth the reasons for such declination in a written statement that shall be included in the preliminary hearing report under subsection (l).

(iv) The preliminary hearing officer may not order the production of any privileged matters; however, when a party offers evidence that an opposing party claims is privileged, the preliminary hearing officer may rule on whether a privilege applies.

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.

(i) *Military Rules of Evidence.*

(1) *In general.*

(A) Only the following Military Rules of Evidence apply to preliminary hearings:

(i) Mil. R. Evid. 301–303 and 305.

(ii) Mil. R. Evid. 412(a), except as provided in paragraph (2).

(iii) Mil. R. Evid., Section V, Privileges, except that Mil. R. Evid. 505(f)-(h) and (j); 506(f)-(h), (j), (k), and (m); and 514(d)(6) shall not apply.

(B) In applying the rules to a preliminary hearing in accordance with subparagraph (A), the term "military judge," as used in such rules, means the preliminary hearing officer, who shall assume the military judge's authority to exclude evidence from the preliminary hearing, and who shall, in discharging this duty, follow the procedures set forth in such rules. Evidence offered in violation of the procedural requirements of the rules in subparagraph (A) shall be excluded from the preliminary hearing, unless good cause is shown.

Discussion

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

(2) *Sex-offense cases.*

(A) *Inadmissibility of certain evidence.* In a case of an alleged sexual offense under Mil. R. Evid. 412(d), evidence offered to prove that any alleged victim engaged in other sexual behavior or evidence offered to prove any alleged victims' sexual predisposition is not admissible at a preliminary hearing unless—

(i) the evidence would be admissible at trial under Mil. R. Evid. 412(b)(1)(A) or (B); and

(ii) the evidence is relevant, not cumulative, and necessary to a determination of the issues under subsection (a) of this rule.

(B) *Initial procedure to determine admissibility.* A party intending to offer evidence under subparagraph (A) shall, no later than five days before the preliminary hearing begins, submit a written motion specifically describing the evidence and stating why the evidence is admissible. The preliminary hearing officer may permit a different filing time, but any motion shall be filed prior to the beginning of the preliminary hearing. The moving party shall serve the motion on the opposing party, who shall have the opportunity to respond in writing. Counsel for the Government shall cause the motion and any written responses to be served on the victim, or victim's counsel, if any, or, when appropriate, the victim's guardian or representative. After reviewing the motion and any written responses, the preliminary hearing officer shall either—

(i) deny the motion on the grounds that the evidence does not meet the criteria specified in R.C.M. 405(i)(2)(A)(i) or (ii); or

(ii) conduct a hearing to determine the admissibility of the evidence.

(C) *Admissibility hearing.* If the preliminary hearing officer conducts a hearing to determine the admissibility of the evidence, the admissibility hearing shall be closed and should ordinarily be conducted at the end of the preliminary hearing, after all other evidence offered by the parties has been admitted. At the admissibility hearing, the parties may call witnesses and

offer relevant evidence. The victim shall be afforded a reasonable opportunity to attend and be heard, to include through counsel. If the preliminary hearing officer determines that the evidence should be admitted, the victim may directly petition the Court of Criminal Appeals for a writ of mandamus pursuant to Article 6b.

Discussion

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

(D) *Sealing.* The motions, related papers, and the record of an admissibility hearing shall be sealed and remain under seal in accordance with R.C.M. 1113.

(j) *Preliminary hearing procedure.*

(1) *Generally.* The preliminary hearing shall begin with the preliminary hearing officer informing the accused of the accused's rights under subsection (f). Counsel for the Government will then present evidence. Upon the conclusion of counsel for the Government's presentation of evidence, defense counsel may present matters. Both counsel for the Government and defense shall be afforded an opportunity to cross-examine adverse witnesses. The preliminary hearing officer may also question witnesses called by the parties. If the preliminary hearing officer determines that additional evidence is necessary for a determination of the issues under subsection (a), the preliminary hearing officer may provide the parties an opportunity to present additional testimony or evidence. Except as provided in subparagraph (l)(2)(J), the preliminary hearing officer shall not consider evidence not presented at the preliminary hearing in making the determinations under subsection (a). The preliminary hearing officer shall not call witnesses *sua sponte.*

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.

(2) *Presentation of evidence.*

(A) *Testimony.* Witness testimony may be provided in person, by video teleconference, by telephone, or by similar means of remote testimony. All testimony shall be taken under oath, except that the accused may make an unsworn statement. The preliminary hearing officer shall only consider testimony that is relevant to the issues for determination under subsection (a).

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.

(B) *Other evidence.* If relevant to the issues for determination under subsection (a) and not cumulative, a preliminary hearing officer may consider other evidence offered by either

counsel for the Government or defense counsel, in addition to or in lieu of witness testimony, including statements, tangible evidence, or reproductions thereof, that the preliminary hearing officer determines is reliable. This other evidence need not be sworn.

(3) *Access by spectators.* Preliminary hearings are public proceedings and should remain open to the public whenever possible. If there is an overriding interest that outweighs the value of an open preliminary hearing, the convening authority or the preliminary hearing officer may restrict or foreclose access by spectators to all or part of the proceedings. Any restriction or closure must be narrowly tailored to protect the overriding interest involved. Before ordering any restriction or closure, a convening authority or preliminary hearing officer must determine whether any reasonable alternatives to such restriction or closure exist, or if some lesser means can be used to protect the overriding interest in the case. The convening authority or preliminary hearing officer shall make specific findings of fact in writing that support the restriction or closure. The written findings of fact shall be included in the preliminary hearing report.

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.

(4) *Presence of accused.* The accused shall be considered to have waived the right to be present at the preliminary hearing, if the accused:

(A) After being notified of the time and place of the proceeding is voluntarily absent; or

(B) After being warned by the preliminary hearing officer that disruptive conduct will cause removal from the proceeding, persists in conduct which is such as to justify exclusion from the proceeding.

(5) *Recording of the preliminary hearing.* Counsel for the Government shall ensure that the preliminary hearing is recorded by a suitable recording device. A victim named in one of the specifications under consideration may request access to, or a copy of, the recording of the proceedings. Upon request, counsel for the Government shall provide the requested access to, or a copy of, the recording or, at the Government's discretion, a transcript, to the victim not later than a reasonable time following dismissal of the charges, unless charges are dismissed for the purpose of rereferral, or court-martial adjournment. This rule does not entitle the victim to classified information or access to or a copy of a recording of closed sessions which that victim did not have the right to attend.

(6) *Recording and broadcasting prohibited.* Video and audio recording, broadcasting, and the taking of photographs—except as required in paragraph (j)(5) of this rule—are prohibited. The convening authority may, as a matter of discretion permit contemporaneous closed-circuit video or audio transmission to permit viewing or hearing by an accused removed under paragraph (j)(4) of this rule or by spectators when the facilities are inadequate to accommodate a reasonable number of spectators

(7) *Objections.* Any objection alleging a failure to comply with this rule, other than an objection under subsection (l), shall be made to the preliminary hearing officer promptly upon discovery of the alleged error. The preliminary hearing officer is not required to rule on any objection. An objection shall be noted in the preliminary hearing report if the person objecting

so requests. The preliminary hearing officer may require a party to file any objection in writing.

(8) *Sealed exhibits and proceedings.* The preliminary hearing officer has the authority to order exhibits, recordings of proceedings, or other matters sealed as described in R.C.M. 1113.

(k) *Supplementary information for the convening authority.*

(1) No later than 24 hours from the closure of the preliminary hearing, counsel for the Government, defense counsel, and any victim named in one of the specifications under consideration (or, if applicable, counsel for such a victim) may submit to the preliminary hearing officer, Government, and defense counsel additional information that the submitter deems relevant to the convening authority's disposition of the charges and specifications.

(2) Defense counsel may submit additional matters that rebut the submissions of counsel for the Government or any victim provided under subparagraph (k)(1). Such matters must be provided to the preliminary hearing officer and to the counsel for the Government within 5 days of the closure of the preliminary hearing.

(3) The preliminary hearing officer shall examine all supplementary information submitted under subsection (k) and shall seal, in accordance with R.C.M. 1113, any matters the preliminary hearing officer deems privileged or otherwise not subject to disclosure.

Discussion

Preliminary hearing officers shall seal any supplementary information that may be privileged under the Military Rules of Evidence. Preliminary hearing officers shall also seal other supplementary information that is required to be sealed by regulation. 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.

(A) The preliminary hearing officer shall provide a written summary and an analysis of the supplementary information submitted under subsection (k) that is not sealed and is relevant to disposition for inclusion in the report to the convening authority under subsection (l).

(B) If the preliminary hearing officer seals any supplementary information submitted under subsection (k), the preliminary hearing officer shall provide an analysis of those materials. The analysis of the sealed materials shall be sealed. Additionally, the preliminary hearing officer shall generally describe those matters and detail the basis for sealing them in a separate cover sheet. This cover sheet shall accompany the sealed matters and shall not contain privileged information or be sealed.

(4) The supplementary information and any summary and analysis provided by the preliminary hearing officer, and any sealed matters and cover sheets, as applicable, shall be forwarded to the convening authority for consideration in making a disposition determination.

(5) Submissions under subsection (k) shall be maintained as an attachment to the preliminary hearing report provided under subsection (l).

(l) *Preliminary hearing report.*

(1) *In general.* The preliminary hearing officer shall make a timely written report of the preliminary hearing to the convening authority. This report is advisory and does not bind the staff judge advocate or convening authority.

Discussion

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

(2) *Contents.* The preliminary hearing report shall include:

(A) A statement of names and organizations or addresses of counsel for the Government and defense counsel and, if applicable, a statement of why either counsel was not present at any time during the proceedings;

(B) The recording of the preliminary hearing under paragraph (j)(5);

(C) For each specification, the preliminary hearing officer's reasoning and conclusions with respect to the issues for determination under subsection (a), including a summary of relevant witness testimony and documentary evidence presented at the hearing and any observations concerning the testimony of witnesses and the availability and admissibility of evidence at trial;

(D) If applicable, a statement that an essential witness may not be available for trial;

(E) An explanation of any delays in the preliminary hearing;

(F) A notation if counsel for the Government declined to issue a pre-referral investigative subpoena that was requested by the preliminary hearing officer and the counsel's statement of the reasons for such declination;

(G) Recommendations for any necessary modifications to the form of the charges and specifications;

(H) A statement of whether the preliminary hearing officer examined evidence or heard witnesses relating to any uncharged offenses in accordance with paragraph (e)(2), and, for each such offense, the preliminary hearing officer's reasoning and conclusions as to whether there is probable cause to believe that the accused committed the offense and whether the convening authority would have court-martial jurisdiction over the offense if it were charged;

(I) A notation of any objections if required under paragraph (j)(7);

(J) The recommendation of the preliminary hearing officer as to the disposition that should be made of the charges and specifications in the interest of justice and discipline. In making this disposition recommendation, the preliminary hearing officer may consider any evidence admitted during the preliminary hearing and matters submitted under subsection (k); and

(K) The written summary and analysis required by subparagraph (k)(3)(A).

Discussion

The preliminary hearing officer may include any additional matters useful to the convening authority in determining disposition. For a discussion of factors relating to disposition of offenses in the interest of justice and discipline, 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.

(3) *Sealed exhibits and proceedings.* If the preliminary hearing report contains exhibits, proceedings, or other matters ordered sealed by the preliminary hearing officer in accordance with R.C.M. 1113, counsel for the Government shall cause such materials to be sealed so as to prevent unauthorized viewing or disclosure.

(4) *Distribution of preliminary hearing report.* The preliminary hearing officer shall promptly cause the preliminary hearing report to be delivered to the convening authority. That convening authority shall promptly cause a copy of the report to be delivered to each accused and, in accordance with R.C.M. 401(b), shall promptly determine what disposition will be made in the interest of justice and discipline. If applicable, the convening authority shall promptly forward the report, together with the charges, to a superior commander for disposition.

(5) *Objections.* Any objection to the preliminary hearing report shall be made to the convening authority who directed the preliminary hearing, via the preliminary hearing officer. Upon receipt of the report, the accused has 5 days to submit objections to the preliminary hearing officer. The preliminary hearing officer will forward the objections to the convening authority as soon as practicable. This paragraph does not prohibit a convening authority from referring any charge or taking other action within the 5-day period.

(m) *Waiver.* The accused may waive a preliminary hearing. However, the convening authority authorized to direct the preliminary hearing may direct that a preliminary hearing be conducted notwithstanding the waiver. Failure to make a timely objection under this rule, including an objection to the report, shall constitute waiver of the objection. Relief from the waiver may be granted by the convening authority who directed the preliminary hearing, a superior convening authority, or the military judge, as appropriate, for good cause shown.

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.

Analysis

This rule is taken from Rule 405 of the MCM (2016 edition) with the following amendments: *2017 Amendments*: R.C.M. 405 is substantially amended throughout the rule and implements Articles 6b, 30a, 32, 46, 47, as amended by Sections 5105, 5202, 5203, 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).

Rule 406. Pretrial advice

(a) *In general.* Before any charge may be referred for trial by a general court-martial, it shall be referred to the staff judge advocate of the convening authority for consideration and advice.

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.

(b) *Contents*. The advice of the staff judge advocate shall include a written and signed statement which sets forth that person's:

(1) Conclusion with respect to whether each specification alleges an offense under the UCMJ;

(2) Conclusion with respect to whether there is probable cause to believe that the accused committed the offense charged in the specification;

(3) Conclusion with respect to whether a court-martial would have jurisdiction over the accused and the offense; and

(4) 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.

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, a preliminary hearing officer's report and recommendations are not binding on the staff judge advocate or convening authority. Another person may prepare the advice, but 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 that 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.

Analysis

This rule is taken from Rule 406 of the MCM (2016 edition) with the following amendment: *2017 Amendments*: The Discussion sections following R.C.M. 406(a) and R.C.M. 406(b) 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.

Rule 406A. Pretrial advice before referral to special court-martial.

(a) *In general.* Before any charge may be referred for trial by special court-martial, the convening authority shall consult a judge advocate on relevant legal issues. Such issues may include:

(1) Whether each specification alleges an offense under the UCMJ;

(2) Whether there is probable cause to believe the accused committed the offense(s) charged;

(3) Whether a court-martial would have jurisdiction over the accused and the offense;

(4) The form of the charges and specifications and any necessary modifications; and

(5) Any other factors relating to disposition of the charges and specifications in the interest of justice and discipline.

Discussion

For a discussion of factors relating to disposition of charges and specifications in the interest of justice and discipline, see Appendix 2.1 (Non-binding disposition guidance).

(b) *Prior staff judge advocate advice*. In cases in which the convening authority previously

received staff judge advocate advice under R.C.M. 406 with respect to a charge or specification, additional judge advocate consultation is not required before referral to special court-martial for trial.

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.

Rule 407. Action by commander exercising general court-martial jurisdiction
(a) *Disposition*. When in receipt of charges, a commander exercising general court-martial jurisdiction may:

(1) Dismiss any charges;

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

(2) Forward charges (or, after dismissing charges, the matter) to a subordinate commander for disposition;

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*, for example, R.C.M. 303 (preliminary inquiry); R.C.M. 308 (notification to accused of charges).

(3) Forward any charges to a superior commander for disposition;

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

(4) Subject to R.C.M. 201(f)(1)(D) and (E), 601(d), and 1301(c), refer charges to a summary court-martial or to a special court-martial for trial;

Discussion
See R.C.M. 201(f)(1)(D) and (E) and 1301(c) for limitations on the referral of certain offenses to special and summary courts-martial.

(5) Unless otherwise prescribed by the Secretary concerned, direct a preliminary hearing under R.C.M. 405, after which additional action under this rule may be taken;

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).

(6) Subject to R.C.M. 601(d), refer charges to a general court-martial.

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 of the National Defense Authorization Act for Fiscal Year 2014, Section 541 of the National Defense Authorization Act for Fiscal Year 2015, 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.

(b) *National security matters.* When in receipt of charges the trial of which the commander exercising general court-martial jurisdiction finds would probably be inimical to the prosecution of a war or harmful to national security, that commander, unless otherwise prescribed by regulations of the Secretary concerned, shall determine whether trial is warranted and, if so, whether the security considerations involved are paramount to trial. As the commander finds appropriate, the commander may dismiss the charges, authorize trial of them, or forward them to a superior authority.

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.

Analysis

This rule is taken from Rule 407 of the MCM (2016 edition) with the following amendments: *2017 Amendment*: R.C.M. 407(a)(4) is amended and implements Article 18, as 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).

R.C.M. 407(a)(6) Discussion is modified and references Sec. 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 Sec. 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).

Rule 501. Composition and personnel of courts-martial

(a) *Composition of courts-martial.*

(1) *General courts-martial.*

(A) *Non-capital cases.* In non-capital cases, a general court-martial shall consist of:

(i) A military judge and eight members;

(ii) A military judge, eight members, and any alternate members authorized by the convening authority;

(iii) A military judge alone if trial by a military judge is requested and approved under R.C.M. 903; or

(iv) A military judge and six or seven members, but only if, after impanelment, the panel is reduced below eight members as a result of challenges or excusals.

(B) *Capital cases.* In capital cases, a general court-martial shall consist of:

(i) A military judge and twelve members; or

(ii) A military judge, twelve members, and any alternate members authorized by the convening authority.

(2) *Special courts-martial.* Special courts-martial shall consist of:

(A) A military judge and four members;

(B) A military judge, four members, and any alternate members authorized by the

convening authority;

(C) A military judge alone if trial by a military judge is requested and approved under R.C.M. 903; or

(D) A military judge alone if the case is referred for trial by a special court-martial consisting of a military judge alone under Article 16(c)(2)(A).

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

(b) *Counsel in general and special courts-martial.* Military trial and defense counsel shall be detailed to general and special courts-martial. Assistant trial and associate or assistant defense counsel may be detailed

(c) *Other personnel.* Other personnel, such as interpreters, bailiffs, clerks, escorts, and orderlies, may be detailed or employed as appropriate but need not be detailed by the convening authority personally.

Analysis

This rule is taken from Rule 501 of the MCM (2016 edition) with the following amendments:
2017 Amendment: R.C.M. 501(a) is amended and implements 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).

Rule 502. Qualifications and duties of personnel of courts-martial

(a) *Members.*

(1) *Qualifications.* The members detailed to a court-martial shall be those persons who in the opinion of the convening authority are best qualified for the duty by reason of their age, education, training, experience, length of service, and judicial temperament. Each member shall be on active duty with the armed forces and shall be:

(A) A commissioned officer;

(B) A warrant officer, except when the accused is a commissioned officer; or

(C) An enlisted person, except when the accused is either a commissioned or warrant officer.

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.

(2) *Duties.*

(A) *Members.* The members of a court-martial shall determine whether the accused is proved guilty and, in a capital case in which the accused is found guilty of a capital offense, or in a non-capital case when the accused elects sentencing by members in accordance with R.C.M. 1002, the members shall determine an appropriate sentence, based on the evidence and

in accordance with the instructions of the military judge. Each member has an equal voice and vote with other members in deliberating upon and deciding all matters submitted to them. No member may use rank or position to influence another member. No member of a court-martial may have access to or use in any open or closed session this Manual, reports of decided cases, or any other reference material.

(B) *Alternate members.* Members impaneled as alternate members shall have the same duties as members under subparagraph (A). However, an alternate member shall not vote or participate in deliberations on findings or sentencing unless the alternate member has become a member by replacing a member who was excused after impanelment under R.C.M. 912B.

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.

(b) *President.*

(1) *Qualifications.* The president of a court-martial shall be the detailed member senior in rank then serving.

(2) *Duties.* The president shall have the same duties as the other members and shall also:

(A) Preside over closed sessions of the members of the court-martial during their deliberations; and

(B) Speak for the members of the court-martial when announcing the decision of the members or requesting instructions from the military judge.

(c) *Qualifications of military judge and military magistrate.*

(1) *Military judge.* A military judge shall be a commissioned officer of the armed forces who is a member of the bar of a federal court or a member of the bar of the highest court of a State and who is certified to be qualified, by reason of education, training, experience, and judicial temperament, for duty as a military judge by the Judge Advocate General of the armed force of which such military judge is a member. In addition, the military judge of a general court-martial shall be designated for such duties by the Judge Advocate General or the Judge Advocate General's designee, certified to be qualified for duty as a military judge of a general court-martial, and assigned and directly responsible to the Judge Advocate General or the Judge Advocate General's designee. The Secretary concerned may prescribe additional qualifications for military judges in special courts-martial.

(2) *Military magistrate.* The Secretary concerned may establish a military magistrate program. A military magistrate shall be a commissioned officer of the armed forces who is a member of the bar of a federal court or a member of the bar of highest court of a State and who is certified to be qualified, by reason of education, training, experience, and judicial temperament, for duty as a military magistrate by the Judge Advocate General of the armed force of which such military magistrate is a member.

Discussion

See R.C.M. 801 for 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 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.

(3) *Minimum tour lengths.* A person assigned for duty as a military judge shall serve as a military judge for a term of not less than three years, subject to such provisions for reassignment as may be prescribed in regulations issued by the Secretary concerned.

(d) *Counsel.*

(1) *Qualifications of trial counsel.*

(A) *General courts-martial.* Only persons certified under Article 27(b) as competent to perform duties as counsel in courts-martial by the Judge Advocate General of the armed force of which the counsel is a member may be detailed as trial counsel in general courts-martial.

(B) *Trial counsel in special courts-martial and assistant trial counsel in general or special courts-martial.* Any commissioned officer may be detailed as trial counsel in special courts-martial, or as assistant trial counsel in general or special courts-martial if that officer—

(i) meets the requirements of paragraph (1)(A); or

(ii) takes an oath in accordance with Article 42(a), certifies to the court that the officer has read and is familiar with the applicable rules of procedure, evidence, and professional responsibility, and meets any additional qualifications the Secretary concerned may establish.

(2) *Qualifications of defense counsel.*

(A) *Detailed military counsel.* Only persons certified under Article 27(b) as competent to perform duties as counsel in courts-martial by the Judge Advocate General of the armed force of which the counsel is a member may be detailed as defense counsel, assistant defense counsel, or associate defense counsel in general or special courts-martial.

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).

(B) *Individual military counsel and civilian defense counsel.* Individual military or civilian defense counsel who represents an accused in accordance with Article 38(b) in a court-martial shall be:

(i) a member of the bar of a federal court or of the bar of the highest court of a State; or

(ii) if not a member of such a bar, a lawyer who is authorized by a recognized licensing authority to practice law and is found by the military judge to be qualified to represent the accused upon a showing to the satisfaction of the military judge that the counsel has appropriate training and familiarity with the general principles of criminal law which apply in a court-martial.

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.

(C) *Counsel in capital cases.*

(i) *In general.* In any capital case, to the greatest extent practicable, at least one defense counsel shall, as determined by the Judge Advocate General, be learned in the law applicable to such cases. If necessary, this counsel may be a civilian and, if so, may be compensated in accordance with regulations prescribed by the Secretary of Defense.

(ii) *Qualifications*. A counsel learned in the law applicable to capital cases is an attorney whose background, knowledge or experience would enable him or her to competently represent an accused in a capital case, with due consideration of the seriousness of the possible penalty and the unique and complex nature of the litigation.

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, are dispositive of the issue.

(3) *Disqualifications*. No person shall act as trial counsel or assistant trial counsel or, except when expressly requested by the accused, as defense counsel or associate or assistant defense counsel in any case in which that person is or has been:

(A) The accuser;

(B) An investigating or preliminary hearing officer;

(C) A military judge or appellate military judge; or

(D) A member.

No person who has acted as counsel for a party may serve as counsel for an opposing party in the same case.

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.

(4) *Duties of trial and assistant trial counsel.* The trial counsel shall prosecute cases on behalf of the United States. Under the supervision of trial counsel an assistant trial counsel may perform any act or duty which trial counsel may perform under law, regulation, or custom of the Service.

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; 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. However, *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 results of trial 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).

(5) *Duties of defense and associate or assistant defense counsel.* Defense counsel shall represent the accused in matters under the UCMJ and these rules arising from the offenses of which the accused is then suspected or charged. Under the supervision of the defense counsel an associate or assistant defense counsel may perform any act or duty which a defense counsel may perform under law, regulation, or custom of the Service.

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.

(e) *Interpreters, reporters, escorts, bailiffs, clerks, guards, and orderlies.*

(1) *Qualifications.* The qualifications of interpreters and reporters may be prescribed by the Secretary concerned. Any person who is not disqualified under paragraph (e)(2) of this rule may serve as escort, bailiff, clerk, guard, or orderly, subject to removal by the military judge.

(2) *Disqualifications.* In addition to any disqualifications which may be prescribed by the Secretary concerned, no person shall act as interpreter, reporter, escort, bailiff, clerk, guard, or orderly in any case in which that person is or has been in the same case:

(A) The accuser;

(B) A witness;

(C) An investigating or preliminary hearing officer;

(D) Counsel for any party; or

(E) A member of the court-martial or of any earlier court-martial of which the trial is a rehearing or new or other trial.

(3) *Duties.* In addition to such other duties as the Secretary concerned may prescribe, the following persons may perform the following duties.

(A) *Interpreters.* Interpreters shall interpret for the court-martial or for an accused who does not speak or understand English.

Discussion

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

(B) *Reporters.* Reporters shall record the proceedings and testimony and shall transcribe them so as to comply with the requirements for the record of trial as prescribed in these rules.

(C) *Others.* Other personnel detailed for the assistance of the court-martial shall have such duties as may be imposed by the military judge.

(4) *Payment of reporters, interpreters.* The Secretary concerned may prescribe regulations for the payment of allowances, expenses, per diem, and compensation of reporters and interpreters.

Discussion

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

(f) *Action upon discovery of disqualification or lack of qualifications.* Any person who discovers that a person detailed to a court-martial is disqualified or lacks the qualifications specified by this rule shall cause a report of the matter to be made before the court-martial is first in session to the convening authority or, if discovered later, to the military judge.

Analysis

This rule is taken from Rule 502 of the MCM (2016 edition) with the following amendments. *2017 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(c)(2) and (c)(3) are new and implement Article 26a, as enacted by Section 5185 of the NDAA for FY17, which permits the Secretary concerned to establish a military magistrate program.

R.C.M. 502(d)(2) is amended and implements Article 27(b) and (c) as amended by Section 5186 of NDAA for FY17.

R.C.M. 502(d)(2)(C) is new and implements Article 27(d).

Rule 503. Detailing members, military judge, and counsel, and designating military magistrates

(a) Members.

(1) *In general.* The convening authority shall—

(A) detail qualified persons as members for courts-martial;

(B) detail not fewer than the number of members required under R.C.M. 501(a), as applicable; and

(C) state whether the military judge is authorized to impanel alternate members and if so, whether a military judge is authorized to impanel—

(i) a specified number of alternate members; or

(ii) alternate members only if, after the exercise of all challenges, excess members remain.

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.

(2) *Member election by enlisted accused.* An enlisted accused may, before assembly, request orally on the record or in writing that the membership of the court-martial to which that accused's case has been referred be comprised entirely of officers or of at least one-third enlisted members. If such a request is made, the court-martial membership must be consistent with the accused's request unless eligible members cannot be obtained because of physical conditions or military exigencies. If the appropriate number of members cannot be obtained, the court-martial may be assembled and the members impaneled, and the trial may proceed without them, but the convening authority shall make a detailed written explanation why such members could not be obtained which must be appended to the record of trial.

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.

(3) *Members from another command or armed force.* A convening authority may detail as members of general and special courts-martial persons under that convening authority's command or made available by their commander, even if those persons are members of an armed force different from that of the convening authority or accused.

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.

(4) This subsection does not apply to charges referred to a special court-martial consisting of a military judge alone under Article 16(c)(2)(A).

(b) *Military judge.*

(1) *By whom detailed.* The military judge shall be detailed, in accordance with regulations of the Secretary concerned, by a person assigned as a military judge and directly responsible to the Judge Advocate General or the Judge Advocate General's designee. The authority to detail military judges may be delegated to persons assigned as military judges. If authority to detail military judges has been delegated to a military judge, that military judge may detail himself or herself as military judge for a court-martial.

(2) *Record of detail.* The order detailing a military judge shall be reduced to writing and included in the record of trial or announced orally on the record at the court-martial. The writing or announcement shall indicate by whom the military judge was detailed. The Secretary concerned may require that the order be reduced to writing.

(3) *Military judge from a different armed force.* A military judge from one armed force may be detailed to a court-martial convened in a different armed force, a combatant command or joint command when permitted by the Judge Advocate General of the armed force of which the military judge is a member. The Judge Advocate General may delegate authority to make military judges available for this purpose.

(4) *Military magistrate.* If authorized under regulations of the Secretary concerned, a detailed military judge may designate a military magistrate to perform pre-referral duties under R.C.M. 309, and, with the consent of the parties, to preside over a special court-martial consisting of a military judge alone under Article 16(c)(2)(A).

(c) *Counsel.*

(1) *By whom detailed.* Trial and defense counsel, assistant trial and defense counsel, and associate defense counsel shall be detailed in accordance with regulations of the Secretary concerned. If authority to detail counsel has been delegated to a person that person may detail himself or herself as counsel for a court-martial. In a capital case, counsel learned in the law applicable to such cases under R.C.M. 502(d)(2)(C) shall be assigned in accordance with

regulations of the Secretary concerned.

(2) *Record of detail.* The order detailing a counsel shall be reduced to writing and included in the record of trial or announced orally on the record at the court-martial. The writing or announcement shall indicate by whom the counsel was detailed. The Secretary concerned may require that the order be reduced to writing.

(3) *Counsel from a different armed force.* A person from one armed force may be detailed to serve as counsel in a court-martial in a different armed force, a combatant command or joint command when permitted by the Judge Advocate General of the armed force of which the counsel is a member. The Judge Advocate General may delegate authority to make persons available for this purpose

Analysis

This rule is taken from Rule 503 of the MCM (2016 edition) with the following amendments:
2017 Amendment: R.C.M. 503(a) is amended and implements Articles 25 and 29, 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), 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 NDAA for FY17, which permits a convening 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 NDAA for FY17, which authorizes military judges to detail military magistrates, if available, 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 NDAA for FY17.

Rule 504. Convening courts-martial

(a) In general. A court-martial is created by a convening order of the convening authority.

(b) Who may convene courts-martial.

(1) General courts-martial. Unless otherwise limited by superior competent authority, general courts-martial may be convened by persons occupying positions designated in Article 22(a) and by any commander designated by the Secretary concerned or empowered by the President.

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 rule by which command devolves are found in regulations of the Secretary concerned.

(2) Special courts-martial. Unless otherwise limited by superior competent authority, special courts-martial may be convened by persons occupying positions designated in Article 23(a) and by commanders designated by the Secretary concerned.

Discussion

See the discussion of paragraph (b)(1) of this rule. Persons authorized to convene general courts-martial may also convene special courts-martial.

(A) Definition. For purposes of Articles 23 and 24, a command or unit is "separate or detached" when isolated or removed from the immediate disciplinary control of a superior in such manner as to make its commander the person held by superior commanders primarily responsible for discipline. "Separate or detached" is used in a disciplinary sense and not necessarily in a tactical or physical sense. A subordinate joint command or joint task force is ordinarily considered to be "separate or detached."

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.

(B) Determination. If a commander is in doubt whether the command is separate or detached, the matter shall be determined:

(i) In the Army or the Air Force, by the officer exercising general court-martial jurisdiction over the command; or

(ii) In the Naval Service or Coast Guard, by the flag or general officer in command or the senior officer present who designated the detachment; or

(iii) In a combatant command or joint command, by the officer exercising general court-martial jurisdiction over the command.

(3) Summary courts-martial. See R.C.M. 1302(a).

Discussion

See the discussion under paragraph (b)(1) of this rule.

(4) Delegation prohibited. The power to convene courts-martial may not be delegated.

(c) Disqualification.

(1) Accuser. An accuser may not convene a general or special court-martial for the trial of the person accused

Discussion

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

(2) Other. A convening authority junior in rank to an accuser may not convene a general or special court-martial for the trial of the accused unless that convening authority is superior in command to the accuser. A convening authority junior in command to an accuser may not convene a general or special court-martial for the trial of the accused.

(3) Action when disqualified. When a commander who would otherwise convene a general or special court-martial is disqualified in a case, the charges shall be forwarded to a superior competent authority for disposition. That authority may personally dispose of the charges or forward the charges to another convening authority who is superior in rank to the accuser, or, if in the same chain of command, who is superior in command to the accuser.

Discussion

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

(d) Convening orders.

(1) General and special courts-martial.

(A) A convening order for a general or special court-martial shall—

(i) designate the type of court-martial; and

(ii) detail the members, if any, in accordance with R.C.M. 503(a);

(B) A convening order may designate where the court-martial will meet.

(C) If the convening authority has been designated by the Secretary concerned, the convening order shall so state.

Discussion

See Appendix 6 for a suggested format for a convening order.

(2) Summary courts-martial. A convening order for a summary court-martial shall designate that it is a summary court-martial and detail the summary court-martial, and may designate where the court-martial will meet. If the convening authority has been designated by the Secretary concerned, the convening order shall so state.

Discussion

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

(3) Additional matters. Additional matters to be included in convening orders may be prescribed by the Secretary concerned.

(e) Place. The convening authority shall ensure that an appropriate location and facilities for courts-martial are provided.

Analysis

This rule is taken from Rule 504 of the MCM (2016 edition) with the following amendment: *2017 Amendment*: R.C.M. 504(d) is amended and aligns with the 2017 amendments to R.C.M. 503(a).

Rule 505. Changes of members, military judge, military magistrate, and counsel

(a) *In general.* Subject to this rule, the members, military judge, military magistrate, and counsel may be changed by an authority competent to detail or designate such persons. Members also may be excused as provided in clause (c)(1)(B)(ii) and subparagraph (c)(2)(A).

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.

(b) *Procedure.* When new persons are added as members or counsel or when substitutions are made as to any members or counsel or the military judge or military magistrate, such persons shall be detailed or designated in accordance with R.C.M. 503. An order changing the members of the court-martial, except one which excuses members without replacement, shall be reduced to writing before certification of the record of trial.

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.

(c) *Changes of members.*

(1) *Before assembly.*

(A) *By convening authority.* Before the court-martial is assembled, the convening authority may change the members of the court-martial without showing cause.

(B) *By convening authority's delegate.*

(i) *Delegation.* The convening authority may delegate, under regulations of the Secretary concerned, authority to excuse individual members to the staff judge advocate or legal officer or other principal assistant to the convening authority.

(ii) *Limitations.* Before the court-martial is assembled, the convening authority's delegate may excuse members without cause shown; however, no more than one-third of the total number of members detailed by the convening authority may be excused by the convening authority's delegate in any one court-martial. After assembly the convening authority's delegate may not excuse members

(2) *After assembly*.

(A) *Excusal*. After assembly no member may be excused, except:

(i) By the convening authority for good cause shown on the record;

(ii) By the military judge for good cause shown on the record;

(iii) As a result of challenge under R.C.M. 912; or

(iv) By the military judge when the number of members is in excess of the number of members required for impanelment.

Discussion

R.C.M. 912A sets forth the procedures for excusing excess members.

(B) *New members*. New members may be detailed after assembly only when, as a result of excusals under subparagraph (c)(2)(A), the number of members of the court-martial is reduced below the number of members required under R.C.M. 501(a), or the number of enlisted members, when the accused has made a timely written request for enlisted members, is reduced below one-third of the total membership.

(d) *Changes of detailed counsel*.

(1) *Trial counsel.* An authority competent to detail trial counsel may change the trial counsel and any assistant trial counsel at any time without showing cause.

(2) *Defense counsel.*

(A) *Before formation of attorney-client relationship.* Before an attorney-client relationship has been formed between the accused and detailed defense counsel or associate or assistant defense counsel, an authority competent to detail defense counsel may excuse or change such counsel without showing cause.

(B) *After formation of attorney-client relationship.* After an attorney-client relationship has been formed between the accused and detailed defense counsel or associate or assistant defense counsel, an authority competent to detail such counsel may excuse or change such counsel only:

(i) Under R.C.M. 506(b)(3);

(ii) Upon request of the accused or application for withdrawal by such counsel under R.C.M. 506(c); or

(iii) For other good cause shown on the record

(e) *Change of military judge or military magistrate.*

(1) *Before assembly*. Before the court-martial is assembled, the military judge or military magistrate may be changed by an authority competent to detail the military judge or to

designate the military magistrate, without cause shown on the record.

(2) *After assembly*. After the court-martial is assembled, the military judge or military magistrate may be changed by an authority competent to detail the military judge or to designate the military magistrate only when, as a result of disqualification under R.C.M. 902 or for good cause shown, the previously detailed military judge or previously designated military magistrate is unable to proceed.

Discussion

A change in the military magistrate after assembly does not require the consent of the parties. *See* R.C.M. 503.

(f) *Good cause.* For purposes of this rule, "good cause" includes physical disability, military exigency, and other extraordinary circumstances which render the member, counsel, or military judge or military magistrate unable to proceed with the court-martial within a reasonable time. "Good cause" does not include temporary inconveniences which are incident to normal conditions of military life.

Analysis

This rule is taken from Rule 505 of the MCM (2016 edition) with the following amendments:

2017 Amendment: R.C.M. 505(a) is amended and aligns with the 2017 amendments to R.C.M. 503(b)(4) regarding military magistrates.

R.C.M. 505(b) is amended and aligns with the 2017 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 2017 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.

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.

R.C.M. 505(f) is amended and describes the circumstances in which good cause would exist to change the military magistrate.

Rule 506. Accused's rights to counsel

(a) *In general.*

(1) *Non-capital courts-martial.* The accused has the right to be represented before a non-capital general court-martial or a special court-martial by civilian counsel if retained by the accused at no expense to the Government, and either by the military counsel detailed under Article 27 or military counsel of the accused's own selection, if reasonably available. The accused is not entitled to be represented by more than one military counsel.

(2) *Capital courts-martial.* In a case referred with a special instruction that the case is to be tried as capital, the accused may be represented by more than one counsel. To the greatest extent practicable, in any capital case, at least one defense counsel shall, as determined by the Judge Advocate General, be learned in the law applicable to such cases under R.C.M. 502(d)(2)(C). If necessary, this counsel may be a civilian, and if so, may be compensated in accordance with regulations prescribed by the Secretary of Defense.

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.

(b) *Individual military counsel*.

(1) *Reasonably available*. Subject to this subsection, the Secretary concerned shall define "reasonably available." While so assigned, the following persons are not reasonably available to serve as individual military counsel because of the nature of their duties or positions:

(A) A general or flag officer;

(B) A trial or appellate military judge;

(C) A trial counsel;

(D) An appellate defense or government counsel;

(E) A principal legal advisor to a command, organization, or agency and, when such command, organization, or agency has general court-martial jurisdiction, the principal assistant of such an advisor;

(F) An instructor or student at a Service school or academy:

(G) A student at a college or university;

(H) A member of the staff of the Judge Advocate General of the Army, Navy, Air Force, Coast Guard, or the Staff Judge Advocate to the Commandant of the Marine Corps.

The Secretary concerned may determine other persons to be not reasonably available because of the nature or responsibilities of their assignments, geographic considerations, exigent circumstances, or military necessity. A person who is a member of an armed force different from that of which the accused is a member shall be reasonably available to serve as individual military counsel for such accused to the same extent as that person is available to serve as individual military counsel for an accused in the same armed force as the person requested. The Secretary concerned may prescribe circumstances under which exceptions may be made to the prohibitions in this subsection when merited by the existence of an attorney-client relationship regarding matters relating to a charge in question. However, if the attorney-client relationship arose solely because the counsel represented the accused on review under Article 70, this exception shall not apply.

(2) *Procedure*. Subject to this subsection, the Secretary concerned shall prescribe procedures for determining whether a requested person is "reasonably available" to act as individual military counsel. Requests for an individual military counsel shall be made by the accused or the detailed defense counsel through the trial counsel to the convening authority. If the requested person is among those not reasonably available under paragraph (b)(1) of this rule or under regulations of the Secretary concerned, the convening authority shall deny the request and notify the accused, unless the accused asserts that there is an existing attorney-client relationship regarding a charge in question or that the person requested will not, at the time of the trial or preliminary hearing for which requested, be among those so listed as not reasonably available. If the accused's request makes such a claim, or if the person is not among those so listed as not reasonably available, the convening authority shall forward the request to the commander or head of the organization, activity, or agency to which the requested person is assigned. That authority shall make an administrative determination whether the requested person is reasonably available in accordance with the procedure prescribed by the Secretary concerned. This determination is a matter within the sole discretion of that authority. An adverse determination may be reviewed upon request of

the accused through that authority to the next higher commander or level of supervision, but no administrative review may be made which requires action at the departmental or higher level.

(3) *Excusal of detailed counsel*. If the accused is represented by individual military counsel, detailed defense counsel shall normally be excused. The authority who detailed the defense counsel, as a matter of discretion, may approve a request from the accused that detailed defense counsel shall act as associate counsel. The action of the authority who detailed the counsel is subject to review only for abuse of discretion.

Discussion

A request under paragraph (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.

(c) *Excusal or withdrawal*. Except as otherwise provided in R.C.M. 505(d)(2) and subparagraph (b)(3) of this rule, defense counsel may be excused only with the express consent of the accused, or by the military judge upon application for withdrawal by the defense counsel for good cause shown.

(d) *Waiver*. The accused may expressly waive the right to be represented by counsel and may thereafter conduct the defense personally. Such waiver shall be accepted by the military judge only if the military judge finds that the accused is competent to understand the disadvantages of self-representation and that the waiver is voluntary and understanding. The military judge may require that a defense counsel remain present even if the accused waives counsel and conducts the defense personally. The right of the accused to conduct the defense personally may be revoked if the accused is disruptive or fails to follow basic rules of decorum and procedure.

(e) *Nonlawyer present*. Subject to the discretion of the military judge, the accused may have present and seated at the counsel table for purpose of consultation persons not qualified to serve as counsel under R.C.M. 502.

Discussion

See also Mil. R. Evid. 615 if the person is a potential witness in the case.

Analysis

This rule is taken from Rule 506 of the MCM (2016 edition) with the following amendment:
2017 Amendment: R.C.M. 506(a) is amended and aligns with the 2017 amendments to R.C.M. 502(d)(2)(C) regarding the detailing of defense counsel in capital cases.

Rule 601. Referral.

(a) *In general.* Referral is the order of a convening authority that charges and specifications against an accused will be tried by a specified court-martial.

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).

(b) *Who may refer*. Any convening authority may refer charges to a court-martial convened by that convening authority or a predecessor, unless the power to do so has been withheld by superior competent authority.

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.

(c) *Disqualification*. An accuser may not refer charges to a general or special court-martial.

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.

(d) *When charges may be referred.*

(1) *Basis for referral.* If the convening authority finds or is advised by a judge advocate that there is probable cause to believe that an offense triable by a court-martial has been committed and that the accused committed it, and that the specification alleges an offense, the convening authority may refer it. The finding may be based on hearsay in whole or in part. The convening authority or judge advocate may consider information from any source and shall not be limited to the information reviewed by any previous authority, but a case may not be referred to a general or special court-martial except in compliance with paragraph (d)(2) or (d)(3) of this rule. The convening authority or judge advocate shall not be required before charges are referred to resolve legal issues, including objections to evidence, which may arise at trial.

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.

(2) *General courts-martial.* The convening authority may not refer a specification under a charge to a general court-martial unless—

(A) There has been substantial compliance with the preliminary hearing requirements of R.C.M. 405; and

(B) The convening authority has received the advice of the staff judge advocate required under Article 34.

Discussion

Compliance with R.C.M. 405 includes the opportunity for the accused to waive the preliminary hearing. *See* R.C.M. 405.

See R.C.M. 905(b)(1) for the rule regarding forfeiture for failure to object to a defect under this rule.

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.

(3) *Special courts-martial.* The convening authority may not refer charges and specifications to a special court-martial unless the convening authority has consulted with a judge advocate as required under R.C.M. 406A.

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(3) for the definition of a capital offense.

See R.C.M. 201(f)(2)(D) 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) for the rule regarding forfeiture for failure to object.

(e) *How charges shall be referred.*

(1) *Order, instructions.* Referral shall be by the personal order of the convening authority.

(A) *Capital cases.* If a case is to be tried as a capital case, the convening authority shall so indicate by including a special instruction on the charge sheet in accordance with R.C.M. 1004(b)(1).

(B) *Special court-martial consisting of a military judge alone.* If a case is to be tried as a special court-martial consisting of a military judge alone under Article 16(c)(2)(A), the convening authority shall so indicate by including a special instruction on the charge sheet prior to arraignment.

(C) *Other instructions.* The convening authority may include any other additional instructions in the order as may be required.

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 paragraph (2) of this rule.

The convening authority may instruct that charges against one accused be referred for joint or common trial with

another accused. See paragraph (3) of this rule.

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

(2) *Joinder of offenses*. In the discretion of the convening authority, two or more offenses charged against an accused may be referred to the same court-martial for trial, whether serious or minor offenses or both, regardless whether related. Additional charges may be joined with other charges for a single trial at any time before arraignment if all necessary procedural requirements concerning the additional charges have been complied with. After arraignment of the accused upon charges, no additional charges may be referred to the same trial without consent of the accused.

Discussion

Ordinarily all known charges should be referred to a single court-martial.

(3) *Joinder of accused*. Allegations against two or more accused may be referred for joint trial if the accused are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. Such accused may be charged in one or more specifications together or separately, and every accused need not be charged in each specification. Related allegations against two or more accused which may be proved by substantially the same evidence may be referred to a common trial.

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* R.C.M. 307(c)(5) Discussion. Convening authorities should consider that joint and common trials may be complicated by procedural and evidentiary rules

(f) *Superior convening authorities*. Except as otherwise provided in these rules, a superior competent authority may cause charges, whether or not referred, to be transmitted to the authority for further consideration, including, if appropriate, referral

(g) *Parallel convening authorities*. If it is impracticable for the original convening authority to continue exercising authority over the charges, the convening authority may cause the charges, even if referred, to be transmitted to a parallel convening authority. This transmittal must be in writing and in accordance with such regulations as the Secretary concerned may prescribe. Subsequent actions taken by the parallel convening authority are within the sole discretion of that convening authority.

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

Analysis

This rule is taken from Rule 601 of the MCM (2016 edition) as amended by Executive Order XXXXX with the following amendments.

2017 Amendment: R.C.M. 601(d) is amended and implements 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.

R.C.M. 601(e)(1) is amended and implements Article 16(c)(2)(A), as amended by Section 5161 of the NDAA for FY17, concerning referring charges and specifications in a capital case or a special court-martial consisting of a military.

Rule 602. Service of charges; commencement of trial

(a) *Service of charges.* The trial counsel detailed to the court-martial to which charges have been referred for trial shall cause to be served upon each accused a copy of the charge sheet.

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 also* 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.

(b) *Commencement of trial.*

(1) Except in time of war, no person may, over objection, be brought to trial by general or special court-martial—including an Article 39(a) session—within the following time periods:

(A) In a general court-martial, from the time of service of charges under subsection (a) through the fifth day after the date of service.

(B) In a special court-martial, from the time of service of charges under subsection (a) through the third day after the date of service.

(2) If the first session of the court-martial occurs before the end of the applicable period under paragraph (1), the military judge shall, at the beginning of that session, inquire as to whether the defense objects to proceeding during the applicable period. If the defense objects, the trial may not proceed. If the defense does not object, the issue is forfeited regardless of whether the military judge made an inquiry.

Analysis

This rule is taken from Rule 602 of the MCM (2016 edition) with the following amendment:

2017 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.

Rule 603. Changes to charges and specifications

(a) *In general.* Any person forwarding, acting upon, or prosecuting charges on behalf of the United States except a preliminary hearing officer appointed under R.C.M. 405 may make major and minor changes to charges or specifications in accordance with this rule.

(b) *Major and minor changes defined.*

(1) *Major changes.* A major change is one that adds a party, an offense, or a substantial matter not fairly included in the preferred charge or specification, or that is likely to mislead the accused as to the offense charged.

(2) *Minor changes.* A minor change in a charge or specification is any change other than a major change.

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 charges 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.

(c) *Major and minor changes before referral.* Before referral, subject to paragraph (d)(2), a major or minor change may be made to any charge or specification.

(d) *Major changes after referral or preliminary hearing.*

(1) After referral, a major change may not be made over the objection of the accused unless the charge or specification is withdrawn, amended, and referred anew.

(2) In the case of a general court-martial, a major change made to a charge or specification after the preliminary hearing may require reopening the preliminary hearing in accordance with R.C.M. 405.

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.

(e) *Minor changes after referral.* Minor changes may be made to the charges and specifications after referral and before arraignment. After arraignment, the military judge may, upon motion, permit minor changes in the charges and specifications at any time before findings are announced if no substantial right of the accused is prejudiced.

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.

Analysis

This rule is taken from Rule 603 of the MCM (2016 edition) with the following amendments.

2017 Amendment: R.C.M. 603 is substantially revised and clarifies 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.

Rule 604. Withdrawal of charges

(a) *Withdrawal.* The convening authority or a superior competent authority may for any reason cause any charges or specifications to be withdrawn from a court-martial at any time before findings are announced.

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 subsection (b) of this rule.

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.

(b) *Referral of withdrawn charges.* Charges that have been withdrawn from a court-martial may be referred to another court-martial unless the withdrawal was for an improper reason. Charges withdrawn after the introduction of evidence on the general issue of guilt may be referred to another court-martial only if the withdrawal was necessitated by urgent and unforeseen military necessity.

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 guilty is introduced may be re-referred only under the narrow circumstances described in the rule

Analysis

This rule is taken from Rule 604 of the MCM (2016 edition) without substantive amendment.

Rule 701. Discovery

(a) *Disclosure by trial counsel.* Except as otherwise provided in subsection (f) and paragraph (g)(2) of this rule, and unless previously disclosed to the defense in accordance with R.C.M. 404A, the trial counsel shall provide the following to the defense:

(1) *Papers accompanying charges; convening orders; statements.* As soon as practicable after service of charges under R.C.M. 602, trial counsel shall provide the defense with copies of, or, if extraordinary circumstances make it impracticable to provide copies, permit the defense to inspect:

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.

(A) All papers that accompanied the charges when they were referred to the court-martial, including papers sent with charges upon a rehearing or new trial;

(B) The convening order and any amending orders; and

(C) Any sworn or signed statement relating to an offense charged in the case that is in the possession of the trial counsel.

(2) *Documents, tangible objects, reports*.

(A) After service of charges, upon request of the defense, the Government shall permit the defense to inspect any books, papers, documents, data, photographs, tangible objects, buildings, or places, or copies of portions of these items, if the item is within the possession, custody, or control of military authorities and—

(i) the item is relevant to preparing the defense;

(ii) the government intends to use the item in the case-in-chief at trial;

(iii) the government anticipates using the item in rebuttal; or

(iv) the item was obtained from or belongs to the accused.

(B) After service of charges, upon request of the defense, the Government shall permit the defense to inspect the results or reports of physical or mental examinations, and of any scientific tests or experiments, or copies thereof, which are within the possession, custody, or control of military authorities, the existence of which is known or by the exercise of due diligence may become known to the trial counsel if

(i) the item is relevant to preparing the defense;

(ii) the government intends to use the item in the case-in-chief at trial; or

(iii) the government anticipates using the item in rebuttal.

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.

(3) *Witnesses.* Before the beginning of trial on the merits, the trial counsel shall notify the defense of the names and contact information of the witnesses the trial counsel intends to call:

(A) In the prosecution case-in-chief; and

(B) To rebut a defense of alibi, innocent ingestion, or lack of mental responsibility, when trial counsel has received timely notice under paragraph (b)(1) or (2) of this rule.

Discussion

Such notice should be in writing except when impracticable.

(4) *Prior convictions of accused offered on the merits.* Before arraignment the trial counsel shall notify the defense of any records of prior civilian or court-martial convictions of the accused of which the trial counsel is aware and which the trial counsel may offer on the merits for any purpose, including impeachment, and shall permit the defense to inspect such records when they are in the trial counsel's possession.

(5) *Information to be offered at sentencing.* Upon request of the defense the trial counsel shall:

(A) Permit the defense to inspect such written material as will be presented by the prosecution at the presentencing proceedings; and

(B) Notify the defense of the names and contact information of the witnesses the trial counsel intends to call at the presentencing proceedings under R.C.M. 1001(b).

(6) *Evidence favorable to the defense.* The trial counsel shall, as soon as practicable, disclose to the defense the existence of evidence known to the trial counsel which reasonably tends to—

(A) Negate the guilt of the accused of an offense charged;

(B) Reduce the degree of guilt of the accused of an offense charged;

(C) Reduce the punishment; or

(D) Adversely affect the credibility of any prosecution witness or evidence.

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 R.C.M. and Mil. R. Evid. 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(c)(2) (notice of immunity or leniency to witnesses), 302 (mental examination of accused), 304(d)(1) (statements by accused), 311(d)(1) (evidence seized from accused), 321(c)(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. 201A(b) (judicial notice of foreign law), 301(c)(2) (immunized witnesses), 304(d)(2) (notice of intent to use undisclosed confessions), 304(f) (testimony of accused for limited purpose on confession), 311(d)(2)(B) (notice of intent to use undisclosed evidence seized), 311(f) (testimony of accused for limited purpose on seizures), 321(c)(2)(B) (notice of intent to use undisclosed line-up evidence), 321(e) (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(h) (intent to disclose classified information), 506(h) (intent to disclose privilege government information), and 609(b) (intent to impeach with conviction over 10 years old).

In accordance with subsection (d) of this rule, 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.

(b) *Disclosure by the defense*. Except as otherwise provided in subsection (f) and paragraph (g)(2) of this rule, the defense shall provide the following information to the trial counsel:

(1) *Names of witnesses and statements*.

(A) Before the beginning of the trial on the merits, the defense shall notify the trial counsel in writing of the names, addresses, and contact information of all witnesses, other than the accused, whom the defense intends to call during the defense case in chief, and provide all sworn or signed statements known by the defense to have been made by such witnesses in connection with the case.

(B) Upon request of the trial counsel, the defense shall also—

(i) Provide the trial counsel with the names, addresses, and contact information of any witnesses whom the defense intends to all at the presentencing proceedings under R.C.M. 1001(d); and

(ii) Permit the trial counsel to inspect any written material that will be presented by the defense at the presentencing proceeding.

Discussion

See R.C.M. 701(f) for statements that would not be subject to disclosure

(2) *Notice of certain defenses.* The defense shall notify the trial counsel in writing before the beginning of trial on the merits of its intent to offer the defense of alibi, innocent ingestion, or lack of mental responsibility, or its intent to introduce expert testimony as to the accused's mental condition. Such notice by the defense shall disclose, in the case of an alibi defense, the place or places at which the defense claims the accused to have been at the time of the alleged offense, and, in the case of an innocent ingestion defense, the place or places where, and the circumstances under which the defense claims the accused innocently ingested the substance in question, and the names and addresses of the witnesses upon whom the accused intends to rely to establish any such defenses.

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).

(3) *Documents and tangible items*. If the defense requests disclosure under subsection (a)(2)(A) of this rule, upon compliance with such request by the Government, the defense, on request of the trial counsel, shall permit the trial counsel to inspect and to copy or photograph books, papers, documents, data, photographs, tangible objects, buildings or places, or copies or portions of any of these items if—

(A) the item is within the possession, custody, or control of the defense; and

(B) the defense intends to use the item in the defense case-in-chief at trial.

(4) *Reports of examination and tests.* If the defense requests disclosure under subsection (a)(2)(B) of this rule, upon compliance with such request by the Government, the defense, on request of trial counsel, shall (except as provided in R.C.M. 706, Mil. R. Evid. 302, and Mil. R. Evid. 513) permit the trial counsel to inspect the results or reports of any physical or mental examinations and of any scientific tests or experiments made in connection with the particular case, or copies thereof, if the item is within the possession, custody, or control of the defense; and —

(A) the defense intends to use the item in the defense case-in-chief at trial; or

(B) the item was prepared by a witness who the defense intends to call at trial and the results or reports relate to that witness' testimony.

(5) *Inadmissibility of withdrawn defense.* If an intention to rely upon a defense under subsection (b)(2) of this rule is withdrawn, evidence of such intention and disclosures by the accused or defense counsel made in connection with such intention is not, in any court-martial, admissible against the accused who gave notice of the intention.

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. 201A(b) (judicial notice of foreign law), 304(f) (testimony by the accused for a limited purpose in relation to a confession), 311(b) (same, search), 321(e) (same, lineup), 412(c)(1) and (2) (intent to offer evidence of sexual misconduct by a victim), 505(h) (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(2) (writing used to refresh recollection), and 613(a) (prior inconsistent statements).

(c) *Failure to call witness.* The fact that a witness' name is on a list of expected or intended witnesses provided to an opposing party, whether required by this rule or not, shall not be ground for comment upon a failure to call the witness.

(d) *Continuing duty to disclose.* If, before or during the court-martial, a party discovers additional evidence or material previously requested or required to be produced, which is subject to discovery or inspection under this rule, that party shall promptly notify the other party or the military judge of the existence of the additional evidence or material.

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.

(e) *Access to witnesses and evidence.* Each party shall have adequate opportunity to prepare its case and equal opportunity to interview witnesses and inspect evidence, subject to the limitations in subsection (e)(1) of this rule. No party may unreasonably impede the access of another party to a witness or evidence.

(1) *Counsel for the Accused Interview of Victim of Alleged Offense*.

(A) Upon notice by counsel for the Government to counsel for the accused of the name of an alleged victim of an offense whom counsel for the Government intends to call as a witness at a proceeding, counsel for the accused, or that lawyer's representative, as defined in Mil. R. Evid. 502(b) (3), shall make any request to interview that victim through the special victims' counsel or other counsel for the victim, if applicable.

(B) If requested by an alleged victim who is subject to a request for interview under subsection (e)(1)(A) of this rule, any interview of the victim by counsel for the accused, or that lawyer's representative, as defined in Mil. R. Evid. 502(b)(3), shall take place only in the presence of counsel for the Government, counsel for the victim, or if applicable,

(2) [Reserved]

(f) *Information not subject to disclosure.* Nothing in this rule shall be construed to require the disclosure of information protected from disclosure by the Military Rules of Evidence. Nothing in this rule shall require the disclosure or production of notes, memoranda, or similar working papers prepared by counsel and counsel's assistants and representatives.

(g) *Regulation of discovery.*

(1) *Time, place, and manner.* The military judge may, consistent with this rule, specify the time, place, and manner of making discovery and may prescribe such terms and conditions as are just.

(2) *Protective and modifying orders.* Upon a sufficient showing the military judge may at any time order that the discovery or inspection be denied, restricted, or deferred, or make such other order as is appropriate. If any rule requires, or upon motion by a party, the military judge may review any materials *in camera*, and permit the party to make such showing, in whole or in part, in writing to be inspected only by the military judge *in camera*. If the military judge reviews any materials *in camera*, the entirety of any materials not ordered disclosed by the military judge shall be sealed and attached to the record of trial as an appellate exhibit. Such material may only be examined by reviewing or appellate authorities in accordance with R.C.M. 1113.

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 is disclosed in sufficient time to permit counsel to make beneficial use of the disclosure.

(3) *Failure to comply.* If at any time during the court-martial it is brought to the attention of the military judge that a party has failed to comply with this rule, the military judge may take one or more of the following actions:

(A) Order the party to permit discovery;

(B) Grant a continuance;

(C) Prohibit the party from introducing evidence, calling a witness, or raising a defense not disclosed; and

(D) Enter such other order as is just under the circumstances. This rule shall not limit the right of the accused to testify in the accused's behalf.

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.

(h) *Inspect.* As used in this rule "inspect" includes the right to photograph and copy.

Analysis

This rule is taken from Rule 701 of the MCM (2016 edition) as amended by Executive Order XXXXX with the following amendments.

2017 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)(2)(A)(i) and (a)(2)(B)(i) are amended by substituting the word "relevant" for "Material."

R.C.M. 701(a)(6)(D) is added and requires trial counsel to disclose to defense counsel information adverse regarding prosecution witnesses.

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).

Rule 702. Depositions

(a) *In general.*

(1) A deposition may be ordered at the request of any party if the requesting party demonstrates that, due to exceptional circumstances, it is in the interest of justice that the testimony of a prospective witness be taken and preserved for use at trial.

(2) "Exceptional circumstances" under this rule includes circumstances under which the deponent is likely to be unavailable to testify at the time of trial.

(3) A victim's declination to testify at a preliminary hearing or a victim's declination to submit to pretrial interviews shall not, by themselves, be considered "exceptional circumstances" under this rule.

(4) A request for a written deposition may not be approved without the consent of the opposing party except when the deposition is ordered solely in lieu of producing a witness for sentencing under R.C.M. 1001 and the authority ordering the deposition determines that the interests of the parties and the court-martial can be adequately served by a written deposition.

(5) A request for an oral deposition may be approved without the consent of the opposing party.

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 subsection (j) of this rule 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* subsection (i)(1)(B) of this rule. 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.

(b) *Who may order.* A convening authority who has the charges for disposition or, after referral, the convening authority or the military judge may order that a deposition be taken on request of a party.

(c) *Request to take deposition.* A party requesting a deposition shall do so in writing, and shall include in such written request—

(1) The name and contact information of the person whose deposition is requested, or, if the name of the person is unknown, a description of the office or position of the person;

(2) A statement of the matters on which the person is to be examined;

(3) A statement of the reasons for needing to preserve the testimony of the prospective witness; and

(4) Whether an oral or written deposition is requested.

Discussion

A copy of the request and any accompanying papers ordinarily should be served on the other party when the request is submitted.

(d) *Action on request.*

(1) *Prompt notification.* The authority under subsection (b) who acts on a request for deposition shall promptly inform the requesting party of the action on the request and, if the request is denied, the reasons for denial.

(2) *Action when request is denied.* If a request for deposition is denied by the convening authority, the requesting party may seek review of the decision by the military judge after referral.

(3) *Action when request is approved.*

(A) *Detail of deposition officer.* When a request for a deposition is approved, the convening authority shall detail a judge advocate certified under Article 27(b) to serve as deposition officer. In exceptional circumstances, when the appointment of a judge advocate as deposition officer is not practicable, the convening authority may detail an impartial commissioned officer or appropriate civil officer authorized to administer oaths, other than the accuser, to serve as deposition officer. If the deposition officer is not a judge advocate certified under Article 27(b), an impartial judge advocate so certified shall be made available to provide

legal advice to the deposition officer.

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.

(B) *Assignment of counsel.* If charges have not yet been referred to a court-martial when a request to take a deposition is approved, the convening authority shall ensure that counsel qualified as required under R.C.M. 502(d) are assigned to represent each party.

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.

(C) *Instructions.* The convening authority may give instructions not inconsistent with this rule to the deposition officer.

Discussion

Such instruction may include the time and place for taking the deposition.

(D) *Notice to other party.* The requesting party shall give to every other party reasonable written notice of the time and place for the deposition and the name and address of each person to be examined. On motion of a party upon whom the notice is served, the deposition officer may for cause shown extend or shorten the time or change the place for taking the deposition, consistent with any instructions from the convening authority.

(e) *Duties of the deposition officer.* In accordance with this rule, and subject to any instructions under subsection (d)(3)(C), the deposition officer shall—

(1) Arrange a time and place for taking the deposition and, in the case of an oral deposition, notify the party who requested the deposition accordingly;

(2) Arrange for the presence of any witness whose deposition is to be taken in accordance with the procedures for production of witnesses and evidence under R.C.M. 703;

(3) Maintain order during the deposition and protect the parties and witnesses from annoyance, embarrassment, or oppression;

(4) Administer the oath to each witness, the reporter, and interpreter, if any;

(5) In the case of a written deposition, ask the questions submitted by counsel to the witness;

(6) Cause the proceedings to be recorded so that a verbatim transcript may be prepared;

(7) Record, but not rule upon, objections or motions and the testimony to which they relate;

(8) Certify the record of the deposition and forward it to the authority who ordered the deposition; and

(9) Report to the convening authority any substantial irregularity in the proceeding.

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

(f) *Rights of accused.*

(1) *Oral depositions.*

(A) At an oral deposition, the accused shall have the following rights:

(i) Except as provided in subparagraph (B), the right to be present.

(ii) The right to be represented by counsel as provided in R.C.M. 506.

(B) At an oral deposition, the accused shall not have the right to be present when—

(i) the accused, absent good cause shown, fails to appear after notice of time and place of the deposition;

(ii) the accused is disruptive within the meaning of R.C.M. 804(c)(2); or

(iii) the deposition is ordered in lieu of production of a witness on sentencing under R.C.M. 1001 and the authority ordering the deposition determines that the interests of the parties and the court-martial can be served adequately by an oral deposition without the presence of the accused.

(2) *Written depositions.* The accused shall have the right to be represented by counsel as provided in R.C.M. 506 for the purpose of taking a written deposition, except when the deposition is taken for use at a summary court-martial unless otherwise provided by the Secretary concerned.

(g) *Procedure.*

(1) *Oral depositions.*

(A) *Examination of witnesses*. Each witness giving an oral deposition shall be examined under oath. The scope and manner of examination and cross-examination shall be such as would be allowed in the trial itself. The Government shall make available to each accused for examination and use at the taking of the deposition any statement of the witness which is in the possession of the United States and to which the accused would be entitled at the trial.

Discussion

As to objections, *see* subsections (e)(7) and (h) of this rule. 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)?"

(B) *How recorded.* In the discretion of the authority who ordered the deposition, a deposition may be recorded by a reporter or by other means including video and audio recording.

(2) *Written depositions*.

(A) *Presence of parties*. No party has a right to be present at a written deposition.

(B) *Submission of interrogatories to opponent*. The party requesting a written deposition shall submit to opposing counsel a list of written questions to be asked of the witness. Opposing counsel may examine the questions and shall be allowed a reasonable time to prepare cross-interrogatories and objections, if any.

Discussion

The interrogatories and cross-interrogatories should be sent to the deposition officer by the party who requested the deposition. *See* subsection (h)(3) of this rule concerning objections.

(C) *Examination of witnesses*. The deposition officer shall swear the witness, read each question presented by the parties to the witness, and record each response. The testimony of the

witness shall be recorded on videotape, audiotape, or similar material or shall be transcribed. When the testimony is transcribed, the deposition shall, except when impracticable, be submitted to the witness for examination. The deposition officer may enter additional matters then stated by the witness under oath. The deposition shall be signed by the witness if the witness is available. If the deposition is not signed by the witness, the deposition officer shall record the reason. The certificate of authentication shall then be executed.

(h) *Objections.*

(1) *In general.* A failure to object prior to the deposition to the taking of the deposition on grounds which may be corrected if the objection is made prior to the deposition forfeits such objection.

(2) *Oral depositions*. Objections to questions, testimony, or evidence at an oral deposition and the grounds for such objection shall be stated at the time of taking such deposition. If an objection relates to a matter which could have been corrected if the objection had been made during the deposition, the objection is forfeited if not made at the deposition.

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.

(3) *Written depositions*. Objections to any question in written interrogatories shall be served on the party who proposed the question before the interrogatories are sent to the deposition officer or the objection is forfeited. Objections to answers in a written deposition may be made at trial.

(i) *Admissibility and use as evidence.*

(1) *In general.*

(A) The ordering of a deposition under paragraph (a)(1) does not control the admissibility of the deposition at court-martial. Except as provided in paragraph (2), a party may use all or part of a deposition as provided by the rules of evidence.

(B) In the discretion of the military judge, audio or video recorded depositions may be played for the court-martial or may be transcribed and read to the court-martial.

(2) *Capital cases.* Testimony by deposition may be presented in capital cases only by the defense.

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.

(j) *Deposition by agreement not precluded.*

(1) *Taking deposition*. Nothing in this rule shall preclude the taking of a deposition without cost to the United States, orally or upon written questions, by agreement of the parties.

(2) *Use of deposition*. Subject to Article 49, nothing in this rule shall preclude the use of a deposition at the court-martial by agreement of the parties unless the military judge forbids its use for good cause.

Analysis

2017 Amendment: This rule is taken from Rule 702 of the MCM (2016 edition) with substantial

amendments and clarifies the circumstances in which depositions may be ordered and their uses at trial.

Rule 703. Production of witnesses and evidence

(a) *In general.* The prosecution and defense and the court-martial shall have equal opportunity to obtain witnesses and evidence, subject to the limitations set forth in R.C.M. 701, including the benefit of compulsory process.

Discussion

See also R.C.M. 801(c) concerning the opportunity of the court-martial to obtain witnesses and evidence.

(b) *Right to witnesses.*

(1) *On the merits or on interlocutory questions.* Each party is entitled to the production of any witness whose testimony on a matter in issue on the merits or on an interlocutory question would be relevant and necessary. With the consent of both the accused and Government, the military judge may authorize any witness to testify via remote means. Over a party's objection, the military judge may authorize any witness to testify on interlocutory questions via remote means or similar technology if the practical difficulties of producing the witness outweigh the significance of the witness' personal appearance (although such testimony will not be admissible over the accused's objection as evidence on the ultimate issue of guilt). Factors to be considered include, but are not limited to: the costs of producing the witness; the timing of the request for production of the witness; the potential delay in the interlocutory proceeding that may be caused by the production of the witness; the willingness of the witness to testify in person; the likelihood of significant interference with military operational deployment, mission accomplishment, or essential training; and, for child witnesses, the traumatic effect of providing in-court testimony

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.

(2) *On sentencing.* Each party is entitled to the production of a witness whose testimony on sentencing is required under R.C.M. 1001(f).

(3) *Unavailable witness.* Notwithstanding subsections (b)(1) and (2) of this rule, a party is not entitled to the presence of a witness who is unavailable within the meaning of Mil. R. Evid. 804(a). However, if the testimony of a witness who is unavailable is of such central importance to an issue that it is essential to a fair trial, and if there is no adequate substitute for such testimony, the military judge shall grant a continuance or other relief in order to attempt to secure the witness' presence or shall abate the proceedings, unless the unavailability of the witness is the fault of or could have been prevented by the requesting party.

(c) *Determining which witnesses will be produced.* Notwithstanding subsections (b)(1) and (2) of this rule, a party is not entitled to the presence of a witness who is unavailable within the

meaning of Mil. R. Evid. 804(a). However, if the testimony of a witness who is unavailable is of such central importance to an issue that it is essential to a fair trial, and if there is no adequate substitute for such testimony, the military judge shall grant a continuance or other relief in order to attempt to secure the witness' presence or shall abate the proceedings, unless the unavailability of the witness is the fault of or could have been prevented by the requesting party

(1) *Witnesses for the prosecution.* The trial counsel shall obtain the presence of witnesses whose testimony the trial counsel considers relevant and necessary for the prosecution.

(2) *Witnesses for the defense.*

(A) *Request.* The defense shall submit to the trial counsel a written list of witnesses whose production by the Government the defense requests.

(B) *Contents of request.*

(i) *Witnesses on merits or interlocutory questions.* A list of witnesses whose testimony the defense considers relevant and necessary on the merits or on an interlocutory question shall include the name, telephone number, if known, and address or location of the witness such that the witness can be found upon the exercise of due diligence and a synopsis of the expected testimony sufficient to show its relevance and necessity.

(ii) *Witnesses on sentencing.* A list of witnesses wanted for presentencing proceedings shall include the name, telephone number, if known, and address or location of the witness such that the witness can be found upon the exercise of due diligence, a synopsis of the testimony that it is expected the witness will give, and the reasons why the witness' personal appearance will be necessary under the standards set forth in R.C.M. 1001(f).

(C) Time of request. A list of witnesses under this subsection shall be submitted in time reasonably to allow production of each witness on the date when the witness' presence will be necessary. The military judge may set a specific date by which such lists must be submitted. Failure to submit the name of a witness in a timely manner shall permit denial of a motion for production of the witness, but relief from such denial may be granted for good cause shown.

(D) Determination. The trial counsel shall arrange for the presence of any witness listed by the defense unless the trial counsel contends that the witness' production is not required under this rule. If the trial counsel contends that the witness' production is not required by this rule, the matter may be submitted to the military judge. If the military judge grants a motion for a witness, the trial counsel shall produce the witness or the proceedings shall be abated.

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).

(d) *Employment of expert witnesses and consultants.*

(1) *In general.* When the employment at Government expense of an expert witness or consultant is considered necessary by a party, the party shall, in advance of employment of the expert, and with notice to the opposing party, submit a request to the convening authority to authorize the employment and to fix the compensation for the expert. The request shall include a complete statement of reasons why employment of the expert is necessary and the estimated cost of employment.

Discussion

See Mil. R. Evid. 702; 706.

(2) *Review by military judge.*

(A) A request for an expert witness or consultant denied by the convening authority may be renewed after referral of the charges before the military judge who shall determine—

(i) in the case of an expert witness, whether the testimony of the expert is relevant and necessary, and, if so, whether the Government has provided or will provide an adequate substitute; or

(ii) in the case of an expert consultant, whether the assistance of the expert is necessary for an adequate defense.

(B) If the military judge grants a motion for employment of an expert or finds that the Government is required to provide a substitute, the proceedings shall be abated if the Government fails to comply with the ruling. In the absence of advance authorization, an expert witness may not be paid fees other than those to which entitled under subsection (g)(3)(E)

(e) *Right to evidence.*

(1) *In general*. Each party is entitled to the production of evidence which is relevant and necessary.

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.

(2) *Unavailable evidence.* Notwithstanding subsection (e)(1), a party is not entitled to the production of evidence which is destroyed, lost, or otherwise not subject to compulsory process. However, if such evidence is of such central importance to an issue that it is essential to a fair trial, and if there is no adequate substitute for such evidence, the military judge shall grant a continuance or other relief in order to attempt to produce the evidence or shall abate the proceedings, unless the unavailability of the evidence is the fault of or could have been prevented by the requesting party.

(f) *Determining what evidence will be produced.* The procedures in subsection (c) shall apply to a determination of what evidence will be produced, except that any defense request for the production of evidence shall list the items of evidence to be produced and shall include a description of each item sufficient to show its relevance and necessity, a statement where it can be obtained, and, if known, the name, address, and telephone number of the custodian of the evidence.

(g) *Procedures for production of witnesses and evidence.*

(1) *Military witnesses.* The attendance of a military witness may be obtained by notifying the commander of the witness of the time, place, and date the presence of the witness is required and requesting the commander to issue any necessary orders to the witness.

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 subsection (g)(3) of this rule.

(2) *Evidence under the control of the Government.* Evidence under the control of the Government may be obtained by notifying the custodian of the evidence of the time, place, and date the evidence is required and requesting the custodian to send or deliver the evidence.

(3) *Civilian witnesses and evidence not under the control of the Government—subpoenas.*

(A) *In general.* The presence of witnesses not on active duty and evidence not under control of the Government may be obtained by subpoena.

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.

(B) *Contents.* A subpoena shall state the command by which the proceeding or investigation is directed, and the title, if any, of the proceeding. A subpoena shall command each person to whom it is directed to attend and give testimony at the time and place specified therein, or to produce evidence—including books, papers, documents, data, writings, or other objects or electronically stored information designated therein at the proceeding or at an earlier time for inspection by the parties. A subpoena shall not command any person to attend or give testimony at an Article 32 preliminary hearing.

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 (DD Form 453) and a Travel Order (DD Form 453-1).

(C) *Investigative subpoenas.* In the case of a subpoena issued before referral for the production of evidence for use in an investigation, the subpoena shall command each person to whom it is directed to produce the evidence requested for inspection by the Government counsel who issued the subpoena.

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.

(D) *Who may issue.* A subpoena may be issued by

(i) the summary court-martial;

(ii) the trial counsel of a general or special court-martial;

(iii) the president of a court of inquiry;

(iv) an officer detailed to take a deposition; or

(v) in the case of a pre-referral investigative subpoena, a military judge or, when issuance of the subpoena is authorized by a general court-martial convening authority, the

detailed trial counsel or counsel for the Government.

(E) *Service.* A subpoena may be served by the person authorized by this rule to issue it, a United States Marshal, or any other person who is not less than 18 years of age. Service shall be made by delivering a copy of the subpoena to the person named and, in the case of a subpoena of an individual to provide testimony, by providing to the person named travel orders and a means for reimbursement for fees and mileage as may be prescribed by the Secretary concerned, or in the case of hardship resulting in the subpoenaed witness' inability to comply with the subpoena absent initial Government payment, by providing to the person named travel orders, fees, and mileage sufficient to comply with the subpoena in rules prescribed by the Secretary concerned.

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.

For purposes of this rule, *hardship* is defined as 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.

(F) *Place of service.*

(i) *In general.* A subpoena may be served at any place within the United States, it Territories, Commonwealths, or possessions.

(ii) *Foreign territory.* In foreign territory, the attendance of civilian witnesses and evidence not under the control of the Government may be obtained in accordance with existing agreements or, in the absence of agreements, with principles of international law.

(iii) *Occupied territory.* In occupied enemy territory, the appropriate commander may compel the attendance of civilian witnesses located within the occupied territory.

(G) *Relief.* If a person subpoenaed requests relief on grounds that compliance is unreasonable or oppressive or prohibited by law the military judge or, if before referral, a military judge detailed under Article 30a shall review the request and shall—

(i) order that the subpoena be modified or withdrawn, as appropriate; or

(ii) order the person to comply with the subpoena.

(H) *Neglect or refusal to appear or produce evidence.*

(i) *Issuance of warrant of attachment.* If the person subpoenaed neglects or refuses to appear or produce evidence, the military judge or, if before referral, a military judge

detailed under Article 30a or a general court-martial convening authority, may issue a warrant of attachment to compel the attendance of a witness or the production of evidence, as appropriate.

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).

(ii) *Requirements.* A warrant of attachment may be issued only upon probable cause to believe that the witness or evidence custodian was duly served with a subpoena, that the subpoena was issued in accordance with these rules, that a means of reimbursement of fees and mileage, if applicable, was provided to the witness or advanced to the witness in cases of hardship, that the witness or evidence is material, that the witness or evidence custodian refused or willfully neglected to appear or produce the subpoenaed evidence at the time and place specified on the subpoena, and that no valid excuse is reasonably apparent for the witness' failure to appear or produce the subpoenaed evidence.

(iii) *Form.* A warrant of attachment shall be written. All documents in support of the warrant of attachment shall be attached to the warrant, together with the charge sheet and convening orders.

(iv) *Execution.* A warrant of attachment may be executed by a United States Marshal or such other person who is not less than 18 years of age as the authority issuing the warrant may direct. Only such non-deadly force as may be necessary to bring the witness before the court-martial or other proceeding or to compel production of the subpoenaed evidence may be used to execute the warrant. A witness attached under this rule shall be brought before the court-martial or proceeding without delay and shall testify or provide the subpoenaed evidence as soon as practicable and be released.

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.

(v) *Definition.* For purposes of subsection (g)(3)(I)"military judge" does not include a summary court-martial.

(4) *Preservation requests.* In the case of evidence under control of the Government as well as evidence not under control of the Government, the person seeking production of the evidence may include with any request for evidence or subpoena a request that the custodian of the evidence take all necessary steps to preserve specifically described records and other

evidence in its possession until such time as they may be produced or inspected by the parties.

Analysis

2017 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.

R.C.M. 703(g)(3)(C) 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 authorizes the issuance of a pre-referral investigative subpoena under specified circumstances.

R.C.M. 703(g)(3)(G) is amended and implements Article 30a and 46, as amended by Sections 5202 and 5228 of the NDAA FY17, which authorizes a military judge to review requests for relief from subpoenas prior to referral.

Rule 703A. Warrant or Order for Wire or Electronic Communications

(a) *In general.* A military judge detailed in accordance with Article 26 or Article 30a may, upon written application by a federal law enforcement officer, trial counsel, or other authorized counsel for the Government in connection with an ongoing investigation of an offense or offenses under the UCMJ, issue one or more of the following:

(1) A warrant for the disclosure by a provider of electronic communication service of the contents of a wire or electronic communication that is in electronic storage in an electronic communications system for 180 days or less.

(2) A warrant or order for the disclosure by a provider of electronic communication service of the contents of any wire or electronic communication that is in electronic storage in an electronic communications system for more than 180 days.

(3) A warrant or order for the disclosure by a provider of remote computing service of the contents of any wire or electronic communication that is held or maintained on that service—

(A) on behalf of, and received by means of electronic transmission from (or created by means of computer processing of communications received by means of electronic transmission from), a subscriber or customer of such remote computing service; and

(B) solely for the purpose of providing storage or computer processing services to such subscriber or customer, if the provider is not authorized to access the contents of any such communications for purposes of providing any services other than storage or computer processing.

(4) A warrant or order for the disclosure by a provider of electronic communication service or remote computing service of a record or other information pertaining to a subscriber to or customer of such service (not including the contents of communications), to include the subscriber or customer's—

(A) name;

(B) address;

(C) local and long distance telephone connection records, or records of session times and durations;

(D) length of service (including start date) and types of service utilized;

(E) telephone or instrument number or other subscriber number or identity, including any temporarily assigned network address; and

(F) means and source of payment for such service (including any credit card or bank account number).

Discussion

See Article 46(e) 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.

(b) *Warrant procedures.*

(1) *Probable cause required.* A military judge shall issue a warrant authorizing the search for and seizure of information specified in subsection (a) if—

(A) The federal law enforcement officer, trial counsel, or other authorized counsel for the Government applying for the warrant presents an affidavit or sworn testimony, subject to examination by the military judge, in support of the application; and

(B) Based on the affidavit or sworn testimony, the military judge determines that there is probable cause to believe that the information sought contains evidence of a crime.

(2) *Issuing the warrant.* The military judge shall issue the warrant to the federal law enforcement officer, trial counsel, or other authorized Government counsel who applied for the warrant.

(3) *Contents of the warrant.* The warrant shall identify the property to be searched, identify any property or other information to be seized, and designate the military judge to whom the warrant must be returned.

(4) *Executing the warrant.* The presence of the federal law enforcement officer, trial counsel, or other authorized Government counsel identified in the warrant shall not be required for service or execution of a search warrant issued in accordance with this rule requiring disclosure by a provider of electronic communications service or remote computing service of the contents of communications or records or other information pertaining to a subscriber to or customer of such service.

(c) *Order procedures.*

(1) A military judge shall issue an order authorizing the disclosure of information specified in subsection (a)(2), (3), or (4) if the federal law enforcement officer, trial counsel, or other authorized counsel for the Government applying for the order—

(A) Offers specific and articulable facts showing that there are reasonable grounds to believe that the contents of a wire or electronic communication, or the records or other information sought, are relevant and material to an ongoing criminal investigation; and

(B) Except in the case of information specified in subsection (a)(4), has provided prior notice to the subscriber or customer of the application for the order, unless the military judge approves a request for delayed notice under subsection (d).

(2) *Quashing or modifying order.* A military judge issuing an order under subsection (c)(1), on a motion made promptly by the service provider, may quash or modify such order, if the order is determined to be unreasonable or oppressive or prohibited by law.

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.

(d) *Delayed notice of warrant or order.*

(1) A federal law enforcement officer, trial counsel, or other authorized counsel for the Government applying for an order to obtain information specified in subsection (a)(2) or (3) may include in the application a request for an order delaying the notification required under

subsection (c)(1)(B) for a period not to exceed 90 days. The military judge reviewing the application and the request shall grant the request and issue the order for delayed notification if the military judge determines that there is reason to believe that notification of the existence of the order may have an adverse result described in paragraph (4). Extensions of the delay of notification required under subsection (c)(1)(B) of up to 90 days each may be granted by the military judge upon application, but only in accordance with paragraph (2).

(2) A federal law enforcement officer, trial counsel, or other authorized counsel for the Government acting under this rule, when not required to notify the subscriber or customer under subsection (c)(1)(B), or to the extent that delayed notification has been ordered under paragraph (1), may apply to a military judge for an order commanding a provider of electronic communications service or remote computing service to whom a warrant or order under this rule is directed, for such period as the military judge deems appropriate, not to notify any other person of the existence of the warrant or order. The military judge shall issue the order for delayed notification if the military judge determines that there is reason to believe that notification of the existence of the warrant or order will result in an adverse result described in paragraph (4).

(3) Upon expiration of the applicable period of delay of notification under paragraph (2), the federal law enforcement officer, trial counsel, or other authorized Government counsel shall serve upon, or deliver by registered first-class mail to, the customer or subscriber a copy of the process or request together with notice that—

(A) states with reasonable specificity the nature of the law enforcement inquiry; and

(B) informs such customer or subscriber—

(i) that information maintained for such customer or subscriber by the service provider named in such process or request was supplied to or requested by that governmental authority and the date on which the supplying or request took place;

(ii) that notification of such customer or subscriber was delayed;

(iii) which military judge made the determination pursuant to which that delay was made; and

(iv) which provision of this rule allowed such delay.

(4) An adverse result for the purposes of paragraphs (1) and (2) is—

(A) endangering the life or physical safety of an individual;

(B) flight from prosecution;

(C) destruction of or tampering with evidence;

(D) intimidation of potential witnesses; or

(E) otherwise seriously jeopardizing an investigation or unduly delaying a trial.

(e) *No cause of action against a provider disclosing information under this rule.* As provided under 18 U.S.C. § 2703(e), no cause of action shall lie in any court against any provider of wire or electronic communication service, its officers, employees, agents, or other specified persons for providing information, facilities, or assistance in accordance with the terms of a warrant or order under this rule.

(f) *Requirement to preserve evidence.* To the same extent as provided in 18 U.S.C. § 2703(f)—

(1) A provider of wire or electronic communication services or a remote computing service, upon the request of a federal law enforcement officer, trial counsel, or other authorized Government counsel, shall take all necessary steps to preserve records and other evidence in its possession pending the issuance of an order or other process; and

(2) Shall retain such records and other evidence for a period of 90 days, which shall be

extended for an additional 90-day period upon a renewed request by the governmental entity.
(g) *Definition.* As used in this rule, the term "federal law enforcement officer" includes an employee of the Army Criminal Investigation Command, the Naval Criminal Investigative Service, the Air Force Office of Special Investigations, or the Coast Guard Investigative Service, who has authority to request a search warrant.

Analysis
2017 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.

Rule 704. Immunity
(a) *Types of immunity.* Two types of immunity may be granted under this rule.

(1) *Transactional immunity.* A person may be granted transactional immunity from trial by court-martial for one or more offenses under the UCMJ.

(2) *Testimonial immunity.* A person may be granted immunity from the use of testimony, statements, and any information directly or indirectly derived from such testimony or statements by that person in a later court-martial.

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.

(b) *Scope.* Nothing in this rule bars:

(1) A later court-martial for perjury, false swearing, making a false official statement, or failure to comply with an order to testify; or

(2) Use in a court-martial under subsection (b)(1) of this rule of testimony or statements derived from such testimony or statements.

(c) *Authority to grant immunity.* A general court-martial convening authority, or designee, may grant immunity, and may do so only in accordance with this rule.

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 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.

(1) *Persons subject to the UCMJ.* A general court-martial convening authority, or designee, may grant immunity to a person subject to the UCMJ. However, a general court-martial convening authority, or designee, may grant immunity to a person subject to the UCMJ extending to a prosecution in a United States District Court only when specifically authorized to do so by the Attorney General of the United States or other authority designated under chapter 601 of title 18 of the U.S. Code.

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.

(2) *Persons not subject to the UCMJ.* A general court-martial convening authority, or designee, may grant immunity to persons not subject to the UCMJ only when specifically authorized to do so by the Attorney General of the United States or other authority designated chapter 601 of title 18 of the U.S. Code.

Discussion

See the discussion under subsection (c)(1) of this rule concerning forwarding a request for authorization to grant immunity to the Attorney General.

(3) *Other limitations.* Subject to Service regulations, the authority to grant immunity under this rule may be delegated in writing at the discretion of the general court-martial convening authority to a subordinate special court-martial convening authority. Further delegation is not permitted. The authority to grant or delegate immunity may be limited by superior authority.

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."

(d) *Procedure.* A grant of immunity shall be written and signed by the convening authority who issues it. The grant shall include a statement of the authority under which it is made and shall identify the matters to which it extends.

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. *See* Mil. R. Evid. 301(c). 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(c)(2).

(e) *Decision to grant immunity.* Unless limited by superior competent authority, the decision to grant immunity is a matter within the sole discretion of the general court-martial convening authority or designee. However, if a defense request to immunize a witness has been denied, the military judge may, upon motion by the defense, grant appropriate relief directing that either an appropriate convening authority grant testimonial immunity to a defense witness or, as to the affected charges and specifications, the proceedings against the accused be abated, upon findings that:

(1) The witness intends to invoke the right against self-incrimination to the extent permitted by law if called to testify; and

(2) The Government has engaged in discriminatory use of immunity to obtain a tactical advantage, or the Government, through its own overreaching, has forced the witness to invoke the privilege against self-incrimination; and

(3) The witness' testimony is material, clearly exculpatory, not cumulative, not obtainable from any other source and does more than merely affect the credibility of other witnesses.

Analysis

This rule is taken from Rule 704 of the MCM (2016 edition) as amended by Executive Order XXXXX without further amendments.

Rule 705. Plea agreements

(a) *In general.* Subject to such limitations as the Secretary concerned may prescribe, an accused and the convening authority may enter into a plea agreement in accordance with this rule.

Discussion

The authority of convening authorities to refer cases to trial and approve plea agreements extends only to trials by courts-martial. To ensure that such actions do not preclude appropriate action by federal civilian authorities in cases likely to be prosecuted in the Unites 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.

(b) *Nature of agreement.* A plea agreement may include:

(1) A promise by the accused to plead guilty to, or to enter a confessional stipulation as to one or more charges and specifications, and to fulfill such additional terms or conditions that may be included in the agreement and that are not prohibited under this rule; and

(2) A promise by the convening authority to do one or more of the following:

(A) Refer the charges to a certain type of court-martial;

(B) Refer a capital offense as noncapital;

(C) Withdraw one or more charges or specifications from the court-martial;

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.

(D) Have the trial counsel present no evidence as to one or more specifications or portions thereof; and

(E) Limit the sentence that may be adjudged by the court-martial for one or more charges and specifications in accordance with subsection (d).

(c) *Terms and conditions.*

(1) *Prohibited terms and conditions*.

(A) *Not voluntary.* A term or condition in a plea agreement shall not be enforced if the accused did not freely and voluntarily agree to it.

(B) *Deprivation of certain rights.* A term or condition in a plea agreement shall not be enforced if it deprives the accused of: the right to counsel; the right to due process; the right to challenge the jurisdiction of the court-martial; the right to a speedy trial; the right to complete presentencing proceedings proceedings; the complete and effective exercise of post-trial and appellate rights.

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), may be improper.

(2) *Permissible terms and conditions*. Subject to paragraph (1)(A), paragraph (1)(B) does not prohibit either party from proposing the following additional conditions:

(A) A promise to enter into a stipulation of fact concerning offenses to which a plea of guilty or to which a confessional stipulation will be entered;

(B) A promise to testify as a witness in the trial of another person;

(C) A promise to provide restitution;

(D) A promise to conform the accused's conduct to certain conditions of probation before action by the convening authority in a summary court-martial or before entry of judgment in a general or special court-martial as well as during any period of suspension of the sentence,

provided that the requirements of R.C.M. 1108 must be complied with before an alleged violation of such terms may relieve the convening authority of the obligation to fulfill the agreement;

(E) A promise to waive procedural requirements such as the Article 32 preliminary hearing, the right to trial by court-martial composed of members, the right to request trial by military judge alone, the right to elect sentencing by members, or the opportunity to obtain the personal appearance of witnesses at presentencing proceedings;

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.

(F) When applicable, a provision requiring that the sentences to confinement or fines adjudged by the military judge for two or more charges or specifications be served concurrently or consecutively. Such an agreement shall specifically identify the charges or specifications that will be served concurrently or consecutively; and

Discussion

A provision requiring the sentences to confinement or fines be served concurrently or consecutively is applicable only to plea agreements in which an accused has waived the right to request trial by a court-martial composed of members or the right to elect sentencing by members.

(G) Any other term or condition that is not contrary to or inconsistent with this rule.

(d) *Sentence limitations.*

(1) *In general.* A plea agreement that limits the sentence that can be adjudged by the court-martial for one or more charges and specifications may contain:

(A) a limitation on the maximum punishment that can be imposed by the court-martial;

(B) a limitation on the minimum punishment that can be imposed by the court-martial;

(C) limitations on the maximum and minimum punishments that can be imposed by the court-martial.

(2) *Confinement and fines.*

(A) G*eneral or special courts-martial.*

(i) In a plea agreement in which the accused waives the right to elect sentencing by members and agrees to a limitation on the confinement or the amount of a fine that may be imposed by the military judge for more than one charge or specification under paragraph (1), the agreement shall include separate limitations, as applicable, for each charge or specification.

(ii) In a plea agreement in which the convening authority and accused agree to sentencing by members, limitations on the sentence that may be adjudged shall be expressed as limitations on the total punishment that may be imposed by the members.

(B) *Summary court-martial.* A plea agreement involving limitations on the sentence that may be adjudged shall be expressed as limitations on the total punishment that may be imposed by the court-martial.

(3) *Other punishments.* A plea agreement may include a limitation as to other authorized punishments as set forth in R.C.M. 1003.

(4) *Capital cases.* A sentence limitation under paragraph (1) may not include the possibility of a sentence of death.

(5) *Mandatory minimum punishments for certain offenses.* A sentence limitation under paragraph (1) may not provide for a sentence less than the applicable mandatory minimum sentence for an offense referred to in Article 56(b)(2), except as follows:

(A) If the accused pleads guilty to the offense, the agreement may have the effect of reducing a mandatory dishonorable discharge to a bad-conduct discharge.

(B) Upon recommendation of the trial counsel, in exchange for substantial assistance by the accused in the investigation or prosecution of another person who has committed an offense, a plea agreement may provide for a sentence that is less than the mandatory minimum sentence for the offense charged.

(e) *Procedure.*

(1) *Negotiation*. Plea agreement negotiations may be initiated by the accused, defense counsel, trial counsel, the staff judge advocate, convening authority, or their duly authorized representatives. Either the defense or the Government may propose any term or condition not prohibited by law or public policy. Government representatives shall negotiate with defense counsel unless the accused has waived the right to counsel.

(2) *Formal submission*. After negotiation, if any, under paragraph (1), if the accused elects to propose a plea agreement, the defense shall submit a written offer. All terms, conditions, and promises between the parties shall be written. The proposed agreement shall be signed by the accused and defense counsel, if any.

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.

(3) *Acceptance by the convening authority*.

(A) *In general*. The convening authority may either accept or reject an offer of the accused to enter into a plea agreement or may propose by counteroffer any terms or conditions not prohibited by law or public policy. The decision whether to accept or reject an offer is within the sole discretion of the convening authority. When the convening authority has accepted a plea agreement, the agreement shall be signed by the convening authority or by a person, such as the staff judge advocate or trial counsel, who has been authorized by the convening authority to sign.

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.

(B) *Victim consultation*. Whenever practicable, prior to the convening authority accepting a plea agreement the victim shall be provided an opportunity to submit views concerning the plea agreement terms and conditions in accordance with regulations prescribed by the Secretary concerned. The convening authority shall consider any such views provided prior to accepting a

plea agreement. For purposes of this rule, a "victim" is an individual who is alleged to have suffered direct physical, emotional, or pecuniary harm as a result of the matters set forth in a charge or specification under consideration and is named in one of the specifications under consideration.

(4) *Withdrawal*.

(A) *By accused*. The accused may withdraw from a plea agreement at any time prior to its acceptance by the military judge. Additionally, the accused may withdraw a plea of guilty or a confessional stipulation entered pursuant to a plea agreement only as provided in R.C.M. 910(h) or 811(d).

(B) *By convening authority*. The convening authority may withdraw from a plea agreement at any time before substantial performance by the accused of promises contained in the agreement, upon the failure by the accused to fulfill any material promise or condition in the agreement, when inquiry by the military judge discloses a disagreement as to a material term in the agreement, or if findings are set aside because a plea of guilty entered pursuant to the agreement is held improvident on appellate review.

(f) *Nondisclosure of existence of a plea agreement.* No court-martial member shall be informed of the existence of a plea agreement, except upon request of the accused or when the military judge finds that disclosure of the existence of the plea agreement is manifestly necessary in the interest of justice because of circumstances arising during the proceeding. In addition, except as provided in Mil. R. Evid. 410, the fact that an accused offered to enter into a plea agreement, and any statements made by an accused in connection therewith, whether during negotiations or during a providence inquiry, shall not be otherwise disclosed to the members.

Discussion

See R.C.M. 1002 and 1005.

Analysis

This rule is taken from Rule 705 of the MCM (2016 edition) with the following amendments.

2017 Amendment: R.C.M. 705 is substantially amended and implements Article 53a as enacted 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), and Articles 56 and 60, as amended by Sections 5301 and 5321 of the NDAA FY17.

R.C.M. 705(f) 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.

Rule 706. Inquiry into the mental capacity or mental responsibility of the accused

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

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.

(b) *Ordering an inquiry.*

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

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

(c) *Inquiry.*

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

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

(A) At the time of the alleged criminal conduct, did the accused have a severe mental disease or defect? (The term "severe mental disease or defect" does not include an abnormality manifested only by repeated criminal or otherwise antisocial conduct, or minor disorders such as nonpsychotic behavior disorders and personality defects.)

(B) What is the clinical psychiatric diagnosis?

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

(D) Is the accused presently suffering from a mental disease or defect rendering the accused unable to understand the nature of the proceedings against the accused or to conduct or cooperate intelligently in the defense?

Other appropriate questions may also be included.

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

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

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

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

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.

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

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

Discussion

See Mil. R. Evid. 302.

Analysis

This rule is taken from Rule 706 of the MCM (2016 edition) without substantive amendment.

Rule 707. Speedy trial

(a) *In general.* The accused shall be brought to trial within 120 days after the earlier of:

(1) Preferral of charges;

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.

(2) The imposition of restraint under R.C.M. 304(a)(2)–(4); or

(3) Entry on active duty under R.C.M. 204.

(b) *Accountability*.

(1) *In general*. The date of preferral of charges, the date on which pretrial restraint under R.C.M. 304 (a)(2)-(4) is imposed, or the date of entry on active duty under R.C.M. 204 shall not count for purpose of computing time under subsection (a) of this rule. The date on which the accused is brought to trial shall count. The accused is brought to trial within the meaning of this rule at the time of arraignment under R.C.M. 904.

(2) *Multiple Charges.* When charges are preferred at different times, accountability for each charge shall be determined from the appropriate date under subsection (a) of this rule for that charge.

(3) *Events which effect time periods.*

(A) *Dismissal or mistrial.* In the event of dismissal of charges or mistrial, a new 120-day period begins as follows:

(i) For an accused under pretrial restraint under R.C.M. 304(a)(2)-(4) at the time of the dismissal or mistrial, a new 120-day period begins on the date of the dismissal or mistrial.

(ii) For an accused not under pretrial restraint at the time of dismissal or mistrial, a new 120-day period begins on the earliest of:

(I) the date on which charges are preferred anew;

(II) the date of imposition of restraint under R.C.M. 304(a)(2)-(4); or

(III) in the case of a mistrial in which charges are not dismissed or preferred anew, the date of the mistrial.

(iii) In a case in which it is determined that charges were dismissed for an improper purpose or for subterfuge, the time period determined under subsection (a) shall continue to run.

(B) *Release from restraint.* If the accused is released from pretrial restraint for a significant period, the 120-day time period under this rule shall begin on the earlier of

(i) the date of preferral of charges;

(ii) the date on which restraint under R.C.M. 304(a) (2)-(4) is reimposed; or

(iii) date of entry on active duty under R.C.M. 204.

(C) *Government appeals*. If notice of appeal under R.C.M. 908 is filed, a new 120-day time period under this rule shall begin, for all charges neither proceeded on nor severed under R.C.M. 908(b)(4), on the date of notice to the parties under R.C.M. 908(b)(8) or 908(c)(3), unless it is determined that the appeal was filed solely for the purpose of delay with the knowledge that it was totally frivolous and without merit. After the decision of the Court of Criminal Appeals under R.C.M. 908, if there is a further appeal to the Court of Appeals for the Armed Forces or, subsequently, to the Supreme Court, a new 120-day time period under this rule shall begin on the date the parties are notified of the final decision of the Court of Appeals for the Armed Forces, or, if appropriate, the Supreme Court.

(D) *Rehearings*. If a rehearing is ordered or authorized by an appellate court, a new 120-day time period under this rule shall begin on the date that the responsible convening authority receives the record of trial and the opinion authorizing or directing a rehearing. An accused is brought to trial within the meaning of this rule at the time of arraignment under R.C.M. 904 or, if arraignment is not required (such as in the case of a sentence-only rehearing), at the time of the first session under R.C.M. 803.

(E) *Commitment of the incompetent accused*. If the accused is committed to the custody of the Attorney General for hospitalization as provided in R.C.M. 909(f), all periods of such commitment shall be excluded when determining whether the period in subsection (a) of this rule has run. If, at the end of the period of commitment, the accused is returned to the custody of the general court-martial convening authority, a new 120-day time period under this rule shall begin on the date of such return to custody.

(c) *Excludable delay*. All periods of time during which appellate courts have issued stays in the proceedings, or the accused is absent without authority, or the accused is hospitalized due to incompetence, or is otherwise in the custody of the Attorney General, shall be excluded when determining whether the period in subsection (a) of this rule has run. All other pretrial delays approved by a military judge or the convening authority shall be similarly excluded.

(1) *Procedure.* Prior to referral, all requests for pretrial delay, together with supporting reasons, will be submitted to the convening authority or, if authorized under regulations prescribed by the Secretary concerned, to a military judge for resolution. After referral, such requests for pretrial delay will be submitted to the military judge for resolution.

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, for example, include 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.

(2) *Motions.* Upon accused's timely motion to a military judge under R.C.M. 905 for speedy trial relief, counsel should provide the court a chronology detailing the processing of the case. This chronology should be made a part of the appellate record.

(d) *Remedy.* A failure to comply with this rule will result in dismissal of the affected charges, or, in a sentence-only rehearing, sentence relief as appropriate.

(1) *Dismissal.* Dismissal will be with or without prejudice to the government's right to reinstitute court-martial proceedings against the accused for the same offense at a later date. The charges must be dismissed with prejudice where the accused has been deprived of his or her constitutional right to a speedy trial. In determining whether to dismiss charges with or without prejudice, the court shall consider, among others, each of the following factors: the seriousness of the offense; the facts and circumstances of the case that lead to dismissal; the impact of a re-prosecution on the administration of justice; and any prejudice to the accused resulting from the denial of a speedy trial.

(2) *Sentence relief.* In determining whether or how much sentence relief is appropriate, the military judge shall consider, among others, each of the following factors: the length of the delay, the reasons for the delay, the accused's demand for speedy trial, and any prejudice to the accused from the delay. Any sentence relief granted will be applied against the sentence approved by the convening authority.

Discussion

See subsection (c)(1) and the accompanying Discussion concerning reasons for delay and procedures for parties to request delay.

(e) *Waiver*. Except as provided in R.C.M. 910(a)(2), a plea of guilty which results in a finding of guilty waives any speedy trial issue as to that offense.

Discussion

Speedy trial issues may also be waived by a failure to raise the issue at trial. *See* R.C.M. 905(e) and 907(b)(2).

(f) *Priority*. When considering the disposition of charges and the ordering of trials, a convening authority shall give priority to cases in which the accused is held under pretrial restraint under R.C.M. 304(a)(3)-(4). Trial and other disposition of charges of any accused held in arrest or confinement pending trial shall be accorded priority.

Analysis

This rule is taken from Rule 707 of the MCM (2016 edition) with the following amendments.

2017 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 is under pretrial restraint and the

circumstance where the accused is not under pretrial restraint on the date of dismissal or mistrial. *See United States v. Anderson*, 50 M.J. 447 (C.A.A.F. 1997).

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. The new paragraph is 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).

Rule 801. Military judge's responsibilities; other matters

(a) *Responsibilities of military judge.* The military judge is the presiding officer in a court-martial.

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 military judge shall:

(1) Determine the time and uniform for each session of a court-martial;

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).

(2) Ensure that the dignity and decorum of the proceedings are maintained;

Discussion

See also 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.

(3) Subject to the UCMJ and this Manual, exercise reasonable control over the proceedings to promote the purposes of these rules and this Manual;

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.

(4) Rule on all interlocutory questions and all questions of law raised during the court-martial as provided under subsection (e); and

(5) Instruct the members on questions of law and procedure which may arise.

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.

(6) In the case of a victim of an offense under the UCMJ who is under 18 years of age and not a member of the armed forces, or who is incompetent, incapacitated, or deceased, the legal guardians of the victim or the representatives of the victim's estate, family members, or any other person designated as suitable by the military judge, may assume the victim's rights under the UCMJ.

(A) The military judge is not required to hold a hearing before determining whether a designation is required or before making such a designation under this rule.

(B) If the military judge determines a hearing under Article 39(a), UCMJ, is necessary, the victim shall be notified of the hearing and afforded the right to be present at the hearing.

(C) The individual designated shall not be the accused.

(D) At any time after appointment, a designee shall be excused upon request by the designee or a finding of good cause by the military judge.

(E) If the individual appointed to assume the victim's rights is excused, the military may designate a successor consistent with this rule.

Discussion

The term "victim of an offense under the UCMJ" has the same meaning as in Article 6b.

(b) *Rules of court; contempt.* The military judge may:

(1) Subject to R.C.M. 108, promulgate and enforce rules of court.

(2) Subject to R.C.M. 809, exercise contempt power.

(c) *Obtaining evidence.* The court-martial may act to obtain evidence in addition to that presented by the parties. The right of the members to have additional evidence obtained is subject to an interlocutory ruling by the military judge.

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.

(d) *Uncharged offenses.* If during the trial there is evidence that the accused may be guilty of an untried offense not alleged in any specification before the court-martial, the court-martial shall proceed with the trial of the offense charged.

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.

(e) *Interlocutory questions and questions of law.*

(1) *Rulings by the military judge.*

(A) *Finality of rulings.* Any ruling by the military judge upon a question of law, including a motion for a finding of not guilty, or upon any interlocutory question is final.

(B) *Changing a ruling.* The military judge may change a ruling made by that or another military judge in the case except a previously granted motion for a finding of not guilty, at any time during the trial.

(C) *Article 39(a) sessions.* When required by this Manual or otherwise deemed appropriate by the military judge, interlocutory questions or questions of law shall be presented and decided at sessions held without members under R.C.M. 803.

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.

(2) [Deleted]

(3) [Deleted]

(4) *Standard of proof.* Questions of fact in an interlocutory question shall be determined by a preponderance of the evidence, unless otherwise stated in this Manual. In the absence of a rule in this Manual assigning the burden of persuasion, the party making the motion or raising the objection shall bear the burden of persuasion.

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(e); 311(e); *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*, for example, Mil. R. Evid. 304(e). Others may not be raised until the defense has made an offer of proof or presented evidence in support of its position. *See*, for example, Mil. R. Evid. 311(g)(2). 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.

(5) *Scope.* Subsection (e) of this rule applies to the disposition of questions of law and interlocutory questions arising during trial except the question whether a challenge should be sustained.

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.

(f) *Rulings on record.* All sessions involving rulings or instructions made or given by the military judge shall be made a part of the record. All rulings and instructions shall be made or given in open session in the presence of the parties and the members, except as otherwise may be determined in the discretion of the military judge.

Discussion

See R.C.M. 808 and 1112 concerning preparation of the record of trial.

(g) *Effect of failure to raise defenses or objections*. Failure by a party to raise defenses or objections or to make requests or motions which must be made at the time set by this Manual or by the military judge under authority of this Manual, or prior to any extension thereof made by the military judge, shall constitute forfeiture thereof, but the military judge for good cause shown may grant relief from the forfeiture.

Analysis

This rule is taken from Rule 801 of the MCM (2016 edition) with the following amendments:
2017 Amendment: The existing analysis to R.C.M. 801(d) is renumbered as R.C.M. 801(e) to correct a typographical error.

R.C.M. 801(a)(6) is amended and implements Article 6b, 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).

R.C.M. 801(e) and (f) are amended is amended and reflects the elimination of special courts-martial without a military judge. See Section 5161 of the NDAA for FY17.

Rule 802. Conferences

(a) *In general*. The military judge may, upon request of any party or *sua sponte*, order one or more conferences with the parties to consider such matters as will promote a fair and expeditious trial. Such conferences may take place before or after referral, as applicable.

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. See subsection (c) of this rule. No party may be compelled to resolve any matter at a conference.

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 subsection (b) of this rule.

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.

(b) *Matters on record.* Conferences need not be made part of the record, but matters agreed upon at a conference shall be included in the record orally or in writing. Failure of a party to object at trial to failure to comply with this subsection shall forfeit this requirement.

(c) *Rights of parties.* No party may be prevented under this rule from presenting evidence or from making any argument, objection, or motion at trial.

(d) *Accused's presence.* The presence of the accused is neither required nor prohibited at a conference.

Discussion

Normally the defense counsel may be presumed to speak for the accused.

(e) *Admission.* No admissions made by the accused or defense counsel at a conference shall be used against the accused unless the admissions are reduced to writing and signed by the accused and defense counsel.

(f) *Limitations.* This rule shall not be invoked in the case of an accused who is not represented by counsel.

Analysis

This rule is taken from Rule 802 of the MCM (2016 edition) with the following amendments.

2017 Amendment: R.C.M. 802(a) is amended and implements Article 30a, as enacted 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 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 Section 5161 of the NDAA for FY17. The subsection is based on the last sentence in Fed. R. Crim. P. 17.1.

Rule 803. Court-martial sessions without members under Article 39(a)

A military judge who has been detailed to the court-martial may, under Article 39(a), after service of charges, call the court-martial into session without the presence of members. Such sessions may be held before and after assembly of the court-martial, and when authorized in these rules, after adjournment and before entry of the judgment in the record. All such sessions are a part of the trial and shall be conducted in the presence of the accused, defense counsel, and trial counsel, in accordance with R.C.M. 804 and 805, and shall be made a part of the record.

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, for example, 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.

Analysis

This rule is taken from Rule 803 of the MCM (2016 edition) with the following amendments. *2017 Amendment*: R.C.M. 803 is amended and implements Article 60c, as enacted 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 Section 5121 of the NDAA for FY17.

Rule 804. Presence of the accused at trial proceedings

(a) *Presence required*. The accused shall be present at the arraignment, the time of the plea, every stage of the trial including sessions conducted under Article 39(a), voir dire and challenges of members, the return of the findings, presentencing proceedings, and post-trial sessions, if any, except as otherwise provided by this rule.

(b) *Presence by remote means.* The military judge may order the use of audiovisual technology, such as video teleconferencing technology, between the parties and the military judge for purposes of Article 39(a) sessions. Use of such audiovisual technology will satisfy the 'presence' requirement of the accused only when the accused has a defense counsel physically present at his location or when the accused consents to presence by remote means with the opportunity for confidential consultation with defense counsel during the proceeding. Such technology may include two or more remote sites as long as all parties can see and hear each other. The defense counsel must be physically present at the accused's location during an inquiry prior to the acceptance of a plea under R.C.M. 910(d), (e) and (f). Presence by remote means is not authorized during presentencing proceedings under R.C.M. 1001.

(c) *Continued presence not required*. The further progress of the trial to and including the return of the findings and, if necessary, determination of a sentence shall not be prevented and the accused shall be considered to have waived the right to be present whenever an accused, initially present:

(1) Is voluntarily absent after arraignment (whether or not informed by the military judge of the obligation to remain during the trial); or

(2) After being warned by the military judge that disruptive conduct will cause the accused to be removed from the courtroom, persists in conduct which is such as to justify exclusion from the courtroom.

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.

(d) *Voluntary absence for limited purpose of child testimony.*

(1) *Election by accused.* Following a determination by the military judge that remote live testimony of a child is appropriate pursuant to Mil. R. Evid. 611(d)(3), the accused may elect to

voluntarily absent himself from the courtroom in order to preclude the use of procedures described in R.C.M. 914A.

(2) *Procedure.* The accused's absence will be conditional upon his being able to view the witness' testimony from a remote location. Normally, transmission of the testimony will include a system that will transmit the accused's image and voice into the courtroom from a remote location as well as transmission of the child's testimony from the courtroom to the accused's location. A one-way transmission may be used if deemed necessary by the military judge. The accused will also be provided private, contemporaneous communication with his counsel. The procedures described herein shall be employed unless the accused has made a knowing and affirmative waiver of these procedures.

(3) *Effect on accused's rights generally.* An election by the accused to be absent pursuant to subsection (c)(1) shall not otherwise affect the accused's right to be present at the remainder of the trial in accordance with this rule.

(e) *Appearance and security of accused*.

(1) *Appearance.* The accused shall be properly attired in the uniform or dress prescribed by the military judge. An accused servicemember shall wear the insignia of grade and may wear any decorations, emblems, or ribbons to which entitled. The accused and defense counsel are responsible for ensuring that the accused is properly attired; however, upon request, the accused's commander shall render such assistance as may be reasonably necessary to ensure that the accused is properly attired.

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.

(2) *Custody.* Responsibility for maintaining custody or control of an accused before and during trial may be assigned, subject to R.C.M. 304 and 305, and subsection (c)(3) of this rule, under such regulations as the Secretary concerned may prescribe.

(3) *Restraint.* Physical restraint shall not be imposed on the accused during open sessions of the court-martial unless prescribed by the military judge.

Analysis

This rule is taken from Rule 804 of the MCM (2016 edition) with the following amendments. *2017 Amendment*: R.C.M. 804(b) is amended and reflects circumstances in which the accused may consent to participate in trial proceedings by remote means without having defense counsel physically present at the accused's location but with the ability to have confidential consultation with the defense counsel.

Rule 805. Presence of military judge, members, and counsel

(a) *Military judge.* No court-martial proceeding, except the deliberations of the members, may take place in the absence of the military judge. For purposes of Article 39(a) sessions solely, the presence of the military judge at Article 39(a) sessions may be satisfied by the use of audiovisual technology, such as video teleconferencing technology.

(b) *Members*. Unless the accused is tried or sentenced by military judge alone, no court-martial proceeding may take place in the absence of any detailed member except: Article 39(a) sessions under R.C.M. 803; examination of members under R.C.M. 912(d); when the member has been

excused under R.C.M. 505 or 912(f); or as otherwise provided in R.C.M. 1104.

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.

(c) *Counsel*. As long as at least one qualified counsel for each party is present, other counsel for each party may be absent from a court-martial session. An assistant counsel who lacks the qualifications necessary to serve as counsel for a party may not act at a session in the absence of such qualified counsel. For purposes of Article 39(a) sessions, other than presentencing proceedings under R.C.M. 1001, the presence of counsel at Article 39(a) sessions may be satisfied by the use of audiovisual technology, such as video teleconferencing technology.

Discussion

See R.C.M. 504(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)(6) and 505(d)(2) concerning withdrawal or substitution of counsel. See R.C.M. 506(d) concerning the right of the accused to proceed without counsel.

(d) *Effect of replacement of member or military judge*.

(1) *Members*. When after presentation of evidence on the merits has begun, a new member is impaneled under R.C.M. 912A, trial may not proceed unless the testimony and evidence previously admitted on the merits, if recorded verbatim, is read to or played for the new member in the presence of the military judge, the accused, and counsel for both sides, or, if not recorded verbatim, and in the absence of a stipulation as to such testimony and evidence, the trial proceeds as if no evidence has been presented.

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.

(2) *Military judge*. When, after the presentation of evidence on the merits has begun in trial before military judge alone, a new military judge is detailed under R.C.M. 505(e)(2) trial may not proceed unless the accused requests, and the military judge approves, trial by military judge alone, and a verbatim record of the testimony and evidence or a stipulation thereof is read to or played for the military judge in the presence of the accused and counsel for both sides, or the trial proceeds as if no evidence had been presented.

Analysis

This rule is taken from Rule 805 of the MCM (2016 edition) with the following amendments.

2017 Amendment: R.C.M. 805(a) is amended and reflects the elimination of special courts-martial without a military judge. See 5121of 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. 805(b) is amended and implements Articles 16 and 25, as amended by Sections 5161 and 5182 of the NDAA for FY17, 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(d) is amended and implements Article 54, as amended by Section 5238 of the NDAA for FY17, which provides the option of playing an audio recording of the trial to newly detailed panel members and judges.

Rule 806. Public trial

(a) *In general.* Except as otherwise provided in this rule, courts-martial shall be open to the public. For purposes of this rule, "public" includes members of both the military and civilian communities.

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 subsection (b) of this rule. 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.

(b) *Control of spectators and closure*.

(1) *Limitation on number of spectators.* In order to maintain the dignity and decorum of the proceedings or for other good cause, the military judge may reasonably limit the number of spectators in, and the means of access to, the courtroom, and exclude specific persons from the courtroom.

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.

For purposes of this rule, the term "victim of an alleged offense" means a person who has suffered direct physical, emotional, or pecuniary harm as a result of the commission of an offense under the UCMJ.

(2) *Exclusion of spectators*. When excluding specific persons, the military judge must make findings on the record establishing the reason for the exclusion, the basis for the military

judge's belief that exclusion is necessary, and that the exclusion is as narrowly tailored as possible.

(3) *Right of victim not to be excluded.* A victim of an alleged offense committed by the accused may not be excluded from any public hearing or proceeding in a court-martial relating to the offense unless the military judge, after receiving clear and convincing evidence, determines that testimony by the victim would be materially altered if the victim heard other testimony at that hearing or proceeding.

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.

(4) *Closure.* Courts-martial shall be open to the public unless (A) there is a substantial probability that an overriding interest will be prejudiced if the proceedings remain open; (B) closure is no broader than necessary to protect the overriding interest; (C) reasonable alternatives to closure were considered and found inadequate; and (D) the military judge makes case-specific findings on the record justifying closure.

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), 505(i), 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.

(c) *Photography and broadcasting prohibited.* Video and audio recording and the taking of photographs—except for the purpose of preparing the record of trial—in the courtroom during the proceedings and radio or television broadcasting of proceedings from the courtroom shall not be permitted. However, the military judge may, as a matter of discretion permit contemporaneous closed-circuit video or audio transmission to permit viewing or hearing by an accused removed under R.C.M. 804 or by spectators when courtroom facilities are inadequate to accommodate a reasonable number of spectators.

(d) *Protective orders.* The military judge may, upon request of any party or *sua sponte*, issue an appropriate protective order, in writing, to prevent parties and witnesses from making

extrajudicial statements that present a substantial likelihood of material prejudice to a fair trial by impartial members.

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

Analysis

This rule is taken from Rule 806 of the MCM (2016 edition) with the following amendments.

2017 Amendment: R.C.M. 806(b)(2), (3) and (4) are deleted and are replaced with a new R.C.M. 806(b)(3) and the Discussion immediately following it.

R.C.M. 806(d) is amended and reflects the elimination of special courts-martial without a military judge. See 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).

Rule 807. Oaths

(a) *Definition.* "Oath" includes "affirmation."

(b) *Oaths in courts-martial.*

(1) *Who must be sworn.*

(A) *Court-martial personnel.* The military judge, members of a general or special court-martial, trial counsel, assistant trial counsel, defense counsel, associate defense counsel, assistant defense counsel, reporter, interpreter, and escort shall take an oath to perform their duties faithfully. For purposes of this rule, "defense counsel," "associate defense counsel," and "assistant defense counsel," include detailed and individual military and civilian counsel.

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.

(B) *Witnesses.* Each witness before a court-martial shall be examined on oath.

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).

(2) Procedure for administering oaths. Any procedure which appeals to the conscience of the person to whom the oath is administered and which binds that person to speak the truth, or, in the case of one other than a witness, properly to perform certain duties, is sufficient.

Discussion

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)?"

See Article 136 concerning persons authorized to administer oaths.

Analysis

This rule is taken from Rule 807 of the MCM (2016 edition) without substantive amendment.

Rule 808. Record of trial

The trial counsel of a general or special court-martial shall take such action as may be necessary to ensure that a record that will meet the requirements of R.C.M. 1112 can be prepared.

Analysis

This rule is taken from Rule 808 of the MCM (2016 edition) with the following amendments.

2017 Amendment: R.C.M. 808 is amended by striking "R.C.M. 1103" and inserting "R.C.M. 1112."

The Discussion accompanying R.C.M. 808 is deleted in its entirety and the subject matter is covered by the 2017 amendments to R.C.M. 1112.

Rule 809. Contempt proceedings

(a) *In general.* The contempt power under Article 48 may be exercised by a judicial officer specified under subsection (a)(2) of that article.

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 subsection (b)(2) of this rule.

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.

(b) *Method of disposition.*

(1) *Summary disposition*. When conduct constituting contempt is directly witnessed by the judicial officer during the proceeding, the conduct may be punished summarily; otherwise, the provisions of subsection (b)(2) shall apply. If a contempt is punished summarily, the judicial officer shall ensure that the record accurately reflects the misconduct that was directly witnessed by the judicial officer during the proceeding.

(2) *Disposition upon notice and hearing*. When the conduct apparently constituting contempt is not directly witnessed by the judicial officer, the alleged offender shall be brought before the judicial officer outside the presence of any members and informed orally or in writing of the alleged contempt. The alleged offender shall be given a reasonable opportunity to present evidence, including calling witnesses. The alleged offender shall have the right to be represented by counsel and shall be so advised. The contempt must be proved beyond a

reasonable doubt before it may be punished.

(c) *Procedure.* The judicial officer shall in all cases determine whether to punish for contempt and, if so, what the punishment shall be. The judicial officer shall also determine when during the court-martial or other proceeding the contempt proceedings shall be conducted. In the case of a court of inquiry, the judicial officer shall consult with the appointed legal advisor or a judge advocate before imposing punishment for contempt.

(d) *Record; review.*

(1) *Record.* A record of the contempt proceedings shall be part of the record of the court-martial or other proceeding during which it occurred. If the person was held in contempt, then a separate record of the contempt proceedings shall be prepared and forwarded for review in accordance with paragraph (2) or (3), as applicable.

(2) *Review by convening authority.* If the contempt punishment was imposed by a court of inquiry, the contempt proceedings shall be forwarded to the convening authority for review. The convening authority may approve or disapprove the contempt finding and all or part of the sentence. The action of the convening authority is not subject to further review or appeal.

(3) *Review by Court of Criminal Appeals.* If the contempt punishment was imposed by a military judge or military magistrate, the alleged offender may file an appeal to the Court of Criminal Appeals in accordance with the uniform rules of procedure for the Courts of Criminal Appeals. The Court of Criminal Appeals may set aside the finding or the sentence, in whole or in part.

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.

(e) *Sentence.*

(1) *In general.* The place of confinement for a civilian or military person who is held in contempt and is to be punished by confinement shall be designated by the judicial officer who imposed punishment for contempt, in accordance with regulations prescribed by the Secretary concerned. A judicial officer who imposes punishment for contempt may delay announcing the sentence after a finding of contempt to permit the person involved to continue to participate in the proceedings.

(2) *Maximum punishment.* If imposed by a court of inquiry, the maximum punishment that may be imposed for contempt is a fine of $500. Otherwise the maximum punishment that may be imposed for contempt is confinement for 30 days, a fine of $1,000, or both.

(3) *Execution of sentence when imposed by court of inquiry.* A sentence of a fine pursuant to a finding of contempt by a court of inquiry shall not become effective until approved by the convening authority.

(4) *Execution of sentence when imposed by military judge or magistrate.*

(A) A sentence of confinement pursuant to a finding of contempt by a military judge or military magistrate shall begin to run when it is announced unless—

(i) the person held in contempt notifies the judicial officer of an intent to file an appeal; and

(ii) the judicial officer, in the exercise of the judicial officer's discretion, defers the sentence pending action by the Court of Criminal Appeals under subsection (d)(3).

(B) A sentence of a fine pursuant to a finding of contempt by a military judge or military magistrate shall become effective when it is announced.

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.

(f) *Informing person held in contempt.* The person held in contempt shall be informed by the judicial officer in writing of the holding and sentence, if any, of the judicial officer, and of the applicable procedures and regulations concerning execution and review of the contempt punishment. The reviewing authority shall notify the person held in contempt and of the action of the reviewing authority upon the sentence.

Analysis

This rule is taken from Rule 809 of the MCM (2016 edition) with the following amendments.

2017 Amendment: R.C.M. 809(a) is amended and implements 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 is amended and reflects the 2011 amendments to Article 48 that revised the contempt power to include "indirect" contempts in addition to "direct" contempts, and that raised the maximum monetary punishment for contempt to $1,000.

R.C.M. 809(c) is amended and reflects the 2011 amendments to Article 48 that made the military judge the sole contempt authority and removed members from the contempt adjudication process. *See* Ike Skelton National Defense Authorization Act for Fiscal Year 2011, Pub. L. No. 111-383, § 542, 124 Stat. 4218 (2011).

R.C.M. 809(d) is amended and implements Article 48, as amended by Section 5230 of the NDAA for FY17, 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.

Rule 810. Procedures for rehearings, new trials, other trials, and remands

(a) *In general.*

(1) *Rehearings in full and new or other trials.* In rehearings which require findings on all charges and specifications referred to a court-martial and in new or other trials, the procedure shall be the same as in an original trial except as otherwise provided in this rule.

(2) *Rehearings on sentence only.* In a rehearing on sentence only, the procedure shall be the same as in an original trial, except that the portion of the procedure which ordinarily occurs after challenges and through and including the findings is omitted, and except as otherwise provided in this rule

(A) *Contents of the record.* The contents of the record of the original trial consisting of evidence properly admitted on the merits relating to each offense of which the accused stands convicted but not sentenced may be established by any party whether or not testimony so read is

otherwise admissible under Mil. R. Evid. 804(b)(1) and whether or not it was given through an interpreter.

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 ordered by a Judge Advocate General 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.

(B) *Plea.* The accused at a rehearing only on sentence may not withdraw any plea of guilty upon which findings of guilty are based.

(3) *Combined rehearings.* When a rehearing on sentence is combined with a trial on the merits of one or more specifications referred to the court-martial, whether or not such specifications are being tried for the first time or reheard, the trial will proceed first on the merits. Reference to the offenses being reheard on sentence is permissible only as provided for by the Military Rules of Evidence. The presentencing proceedings procedure shall be the same as at an original trial, except as otherwise provided in this rule.

(4) *Additional charges.* A convening authority may refer additional charges for trial together with charges as to which a rehearing has been directed.

(5) *Rehearing impracticable.* If a rehearing was authorized on one or more findings, the convening authority may dismiss the affected charges if the convening authority determines that a rehearing is impracticable. If the convening authority dismisses such charges, a rehearing may proceed on any remaining charges not dismissed by the convening authority.

(6) *Forwarding.* When a rehearing, new trial, other trial, or remand is ordered, a military judge shall be detailed to the proceeding, and the matter forwarded to the military judge. In the case of a summary court-martial, when any proceeding is ordered, a new summary court-martial officer shall be detailed.

(b) *Composition.*

(1) *Members.* No member of the court-martial which previously heard the case may sit as a member of the court-martial at any rehearing, new trial, or other trial of the same case.

(2) *Military judge.* The military judge at a rehearing may be the same military judge who presided over a previous trial of the same case. The existence or absence of a request for trial by military judge alone at a previous hearing shall have no effect on the composition of a court-martial on rehearing.

(3) *Accused's election.* The accused at a rehearing or new or other trial shall have the same right to request enlisted members, an all-officer panel, or trial by military judge alone as the accused would have at an original trial.

Discussion

See R.C.M. 902; 903; and 1002(b).

(c) *Examination of record of former proceedings.* No member may, upon a rehearing or upon a new or other trial, examine the record of any former proceedings in the same case except when permitted to do so by the military judge after such matters have been received in evidence.

(d) *Sentence limitations.*

(1) *In general.* Sentences at rehearings, new trials, or other trials shall be adjudged within the limitations set forth in R.C.M. 1003. Except as otherwise provided in subsection (d)(2), the new adjudged sentence for offenses on which a rehearing, new trial, or other trial has been ordered shall not exceed or be more severe than the original sentence as set forth in the judgment under R.C.M. 1111. When a rehearing or sentencing is combined with trial on new charges, the maximum punishment that may be imposed shall be the maximum punishment under R.C.M. 1003 for the offenses being reheard as limited in this rule, plus the total maximum punishment under R.C.M. 1003 for any new charges of which the accused has been found guilty.

(2) *Exceptions.* A rehearing, new trial, or other trial may adjudge any lawful sentence, without regard to the sentence of the previous hearing or trial when, as to any offense—

(A) the sentence prescribed for the offense is mandatory;

(B) in the case of an "other trial," if the original trial was invalid because a summary or special court-martial tried an offense involving mandatory punishment, an offense for which only a general court-martial has jurisdiction, or one otherwise considered capital;

(C) the rehearing was ordered or authorized for any charge or specification for which a plea of guilty was entered at the first hearing or trial and a plea of not guilty was entered at the second hearing or trial to that same charge or specification;

(D) the rehearing was ordered or authorized for any charge or specification for which the sentence announced or adjudged by the first court-martial was in accordance with a plea agreement and at the rehearing, the accused does not comply with the terms of the agreement; or

(E) the rehearing was ordered or authorized after an appeal by the Government under R.C.M. 1117.

(e) *Definition.* "Other trial" means another trial of a case in which the original proceedings were declared invalid because of lack of jurisdiction or failure of a charge to state an offense. The authority ordering an "other trial" shall state in the action the basis for declaring the proceedings invalid.

(f) *Remands.*

(1) *In general.* A Court of Criminal Appeals may order a remand for additional fact finding, or for other reasons, in order to address a substantial issue on appeal. A remand under this subsection is generally not appropriate to determine facts or investigate matters which could, through a party's exercise of reasonable diligence, have been investigated or considered at trial. Such orders shall be directed to the Chief Trial Judge. The Judge Advocate General, or his or her delegate, shall designate a general court-martial convening authority who shall provide support for the hearing.

(2) *Detailing of military judge.* When the Court of Criminal Appeals orders a remand, the Chief Trial Judge shall detail an appropriate military judge to the matter and shall notify the commanding officer exercising general court-martial convening authority over the accused of the remand.

(3) *Remand impracticable.* If the general court-martial convening authority designated under paragraph (3) determines that the remand is impractical due to military exigencies or other reasons, a Government appellate attorney shall so notify the Court of Criminal Appeals. Upon receipt of such notification, the Court of Criminal Appeals may take any action authorized by law that does not materially prejudice the substantial rights of the accused.

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).

Analysis

This rule is taken from Rule 810 of the MCM (2016 edition) with the following amendments: *2017 Amendment*: The Discussion to R.C.M. 810(a) is amended and addresses the differences between "rehearings," "new trials," "other trials," and "remands."

R.C.M. 810(d) is amended and implements Article 63, as amended 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), which amended the limitations on sentences at rehearings.

R.C.M. 810(f) is new and implements Article 66(f)(3), as amended by Section 5330 of the NDAA for FY17, 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).

Rule 811. Stipulations

(a) *In general.* The parties may make an oral or written stipulation to any fact, the contents of a document, or the expected testimony of a witness.

(b) *Authority to reject.* The military judge may, in the interest of justice, decline to accept a stipulation.

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 subsection (c) of this rule. If a stipulation is rejected, the parties may be entitled to a continuance.

(c) *Requirements.* Before accepting a stipulation in evidence, the military judge must be satisfied that the parties consent to its admission.

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.

(d) *Withdrawal.* A party may withdraw from an agreement to stipulate or from a stipulation at any time before a stipulation is accepted; the stipulation may not then be accepted. After a stipulation has been accepted a party may withdraw from it only if permitted to do so in the discretion of the military judge.

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.

(e) *Effect of stipulation.* Unless properly withdrawn or ordered stricken from the record, a stipulation of fact that has been accepted is binding on the court-martial and may not be contradicted by the parties thereto. The contents of a stipulation of expected testimony or of a document's contents may be attacked, contradicted, or explained in the same way as if the witness had actually so testified or the document had been actually admitted. The fact that the parties so stipulated does not admit the truth of the indicated testimony or document's contents, nor does it add anything to the evidentiary nature of the testimony or document. The Military Rules of Evidence apply to the contents of stipulations.

(f) *Procedure.* When offered, a written stipulation shall be presented to the military judge and shall be included in the record whether accepted or not. Once accepted, a written stipulation of expected testimony shall be read to the members, if any, but shall not be presented to them; a written stipulation of fact or of a document's contents may be read to the members, if any, presented to them, or both. Once accepted, an oral stipulation shall be announced to the members, if any.

Analysis

This rule is taken from Rule 811 of the MCM (2016 edition) without substantive amendment.

Rule 812. Joint and common trials

In joint trials and in common trials, each accused shall be accorded the rights and privileges as if tried separately.

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, 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.

Analysis

This rule is taken from Rule 812 of the MCM (2016 edition) with the following amendments. *2017 Amendment*: The Discussion of 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).

Rule 813. Announcing personnel of the court-martial and the accused.

(a) *Opening sessions.* When the court-martial is called to order for the first time in a case, the military judge shall ensure that the following is announced:

(1) The order, including any amendment, by which the court is convened;
(2) The name, rank, and unit or address of the accused;
(3) The name and rank of the military judge presiding;
(4) The names and ranks of the members, if any, who are present;
(5) The names and ranks of members who are absent, if presence of members is required;
(6) The names and ranks (if any) of counsel who are present;
(7) The names and ranks (if any) of counsel who are absent; and
(8) The name and rank (if any) of any detailed court reporter.

(b) *Later proceedings*. When the court-martial is called to order after a recess or adjournment or after it has been closed for any reason, the military judge shall ensure that the record reflects whether all parties and members who were present at the time of the adjournment or recess, or at the time the court-martial closed, are present.

(c) *Additions, replacement, and absences of personnel.* Whenever there is a replacement of the military judge, any member, or counsel, either through the appearance of new personnel or personnel previously absent or through the absence of personnel previously present, the military judge shall ensure the record reflects the change and the reason for it.

Analysis

This rule is taken from Rule 813 of the MCM (2016 edition) with the following amendments. *2017 Amendment*: R.C.M. 813(a)(3) is amended and reflects the elimination of special courts-martial without a military judge. *See* 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).

Rule 901. Opening session

(a) *Call to order.* A court-martial is in session when the military judge so declares.

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.

(b) *Announcement of parties*. After the court-martial is called to order, the presence or absence of the parties, military judge, and members shall be announced.

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).

(c) *Swearing reporter and interpreter*. After the personnel have been accounted for as required in subsection (b) of this rule, the trial counsel shall announce whether the reporter and interpreter, if any is present, have been properly sworn. If not sworn, the reporter and interpreter, if any, shall be sworn.

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.

(d) *Counsel*.

(1) *Trial counsel*. The trial counsel shall announce the legal qualifications and status as to oaths of the members of the prosecution and whether any member of the prosecution has acted in any manner which might tend to disqualify that counsel.

(2) *Defense counsel.*

(A) *In general*. The detailed defense counsel shall announce the legal qualifications and status as to oaths of the detailed members of the defense and whether any member of the defense has acted in any manner that might tend to disqualify that counsel. Any defense counsel not detailed shall state that counsel's legal qualifications and whether that counsel has acted in any manner that might tend to disqualify the counsel.

(B) *Capital cases*. A defense counsel who has been detailed to a capital case as a counsel learned in the law applicable to such cases shall, in addition to the requirements of subparagraph (A), state such qualifications and assignment.

(3) *Disqualification*. If it appears that any counsel may be disqualified, the military judge shall decide the matter and take appropriate action.

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 of capital cases.

(4) *Inquiry*. The military judge shall, in open session:

(A) Inform the accused of the rights to be represented by military counsel detailed to the defense; or by individual military counsel requested by the accused, if such military counsel is reasonably available; and by civilian counsel, either alone or in association with military counsel, if such civilian counsel is provided at no expense to the United States;

(B) Inform the accused that, if afforded individual military counsel, the accused may request retention of detailed counsel as associate counsel, which request may be granted or denied in the sole discretion of the authority who detailed the counsel;

(C) Ascertain from the accused whether the accused understands these rights;

(D) Promptly inquire, whenever two or more accused in a joint or common trial are represented by the same detailed or individual military or civilian counsel, or by civilian counsel who are associated in the practice of law, with respect to such joint representation and shall personally advise each accused of the right to effective assistance of counsel, including separate representation. Unless it appears that there is good cause to believe no conflict of interest is likely to arise, the military judge shall take appropriate measures to protect each accused's right to counsel; and

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.

(E) Ascertain from the accused by whom the accused chooses to be represented.

(5) *Unsworn counsel.* The military judge shall administer the oath to any counsel not sworn.

Discussion

See R.C.M. 807.

(e) *Presence of members.* The procedures described in R.C.M. 901 through 910 shall be conducted without members present in accordance with R.C.M. 803.

Analysis

This rule is taken from Rule 901 of the MCM (2016 edition) with the following amendments.

2017 Amendment: R.C.M. 901(d)(2) 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).

R.C.M. 901(e) is amended and provides for the conduct of designated procedures without the members present.

Rule 902. Disqualification of military judge

(a) *In general.* Except as provided in subsection (e) of this rule, a military judge shall disqualify himself or herself in any proceeding in which that military judge's impartiality might reasonably be questioned.

(b) *Specific grounds.* A military judge shall also disqualify himself or herself in the following

circumstances:

(1) Where the military judge has a personal bias or prejudice concerning a party or personal knowledge of disputed evidentiary facts concerning the proceeding.

(2) Where the military judge has acted as counsel, preliminary hearing officer, investigating officer, legal officer, staff judge advocate, or convening authority as to any offense charged or in the same case generally.

(3) Where the military judge has been or will be a witness in the same case, is the accuser, has forwarded charges in the case with a personal recommendation as to disposition, or, except in the performance of duties as military judge in a previous trial of the same or a related case, has expressed an opinion concerning the guilt or innocence of the accused.

(4) Where the military judge is not eligible to act because the military judge is not qualified under R.C.M. 502(c) or not detailed under R.C.M. 503(b).

(5) Where the military judge, the military judge's spouse, or a person within the third degree of relationship to either of them or a spouse of such person:

(A) Is a party to the proceeding;

(B) Is known by the military judge to have an interest, financial or otherwise, that could be substantially affected by the outcome of the proceeding; or

(C) Is to the military judge's knowledge likely to be a material witness in the proceeding.

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.

(c) *Definitions.* For the purposes of this rule the following words or phrases shall have the meaning indicated—

(1) "Proceeding" includes pretrial (to include pre-referral), trial, post-trial, appellate review, or other stages of litigation.

(2) The "degree of relationship" is calculated according to the civil law system

Discussion

Relatives within the third degree of relationship are children, grandchildren, great grandchildren, parents, grandparents, great grandparents, brothers, sisters, uncles, aunts, nephews, and nieces.

(d) *Procedure*.

(1) The military judge shall, upon motion of any party or *sua sponte*, decide whether the military judge is disqualified.

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.

(2) Each party shall be permitted to question the military judge and to present evidence regarding a possible ground for disqualification before the military judge decides the matter.

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.

(3) Except as provided under subsection (e) of this rule, if the military judge rules that the military judge is disqualified, the military judge shall recuse himself or herself.

(e) *Waiver*. No military judge shall accept from the parties to the proceeding a waiver of any ground for disqualification enumerated in subsection (b) of this rule. Where the ground for disqualification arises only under subsection (a) of this rule, waiver may be accepted provided it is preceded by a full disclosure on the record of the basis for disqualification.

Analysis

This rule is taken from Rule 908 of the MCM (2016 edition) with the following amendments.

2017 Amendment: R.C.M. 902(c)(1) is amended and implements Article 30a, as enacted 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 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* Section 5163 of the NDAA for FY17.

Rule 903. Accused's elections on composition of court-martial

(a) *In general*.

(1) Except in a special court-martial consisting of a military judge alone under Article 16(c)(2)(A), before the end of the initial Article 39(a) session or, in the absence of such a session, before assembly, the military judge shall ascertain, as applicable:

(A) In the case of an enlisted accused, whether the accused elects to be tried by a court-martial composed of—

(i) at least one-third enlisted members; or

(ii) all officer members.

(B) In all noncapital cases, whether the accused requests trial by military judge alone.

(2) The accused may defer requesting trial by military judge alone until any time before assembly.

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.

(b) *Form of election.* The accused's election or request, if any, under subsection (a), shall be in writing and signed by the accused or shall be made orally on the record.

(c) *Action on election.*

(1) *Request for specific panel composition*. If an enlisted accused makes a timely election under subsection (a)(1)(A), the convening authority, unless a sufficient number of members have already been detailed, shall detail a sufficient number of additional members to the court-

martial in accordance with R.C.M. 503 or prepare a detailed written statement explaining why physical conditions or military exigencies prevented such detail. Proceedings that require the presence of members shall not proceed until this is done.

(2) *Request for military judge alone.* Upon receipt of a timely request for trial by military judge alone the military judge shall:

(A) Ascertain whether the accused has consulted with defense counsel and has been informed of the identity of the military judge and of the right to trial by members; and

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.

(B) Approve or disapprove the request, in the military judge's discretion.

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.

(3) *Composition*. For purposes of assembly under R.C.M. 911, the court-martial shall be composed of members detailed by the convening authority, subject to subsection (a)(1).

(d) *Right to withdraw request*.

(1) *Specific panel composition.* An election by an enlisted accused under subsection (a)(1)(A) may be withdrawn by the accused as a matter of right any time before the end of the initial Article 39(a) session, or, in the absence of such a session, before assembly.

(2) *Military judge.* A request for trial by military judge alone may be withdrawn by the accused as a matter of right any time before it is approved, or even after approval, if there is a change of the military judge

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.

(e) *Untimely requests.* Failure to request, or failure to withdraw a request for a specific panel composition or trial by military judge alone in a timely manner shall waive the right to submit or to withdraw such a request. However, the military judge may until the beginning of the introduction of evidence on the merits, as a matter of discretion, approve an untimely request or withdrawal of a request.

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

Analysis

This rule is taken from Rule 903 of the MCM (2016 edition) with the following amendments.
2017 Amendment: R.C.M. 903 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 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.

Rule 904. Arraignment

Arraignment shall be conducted in a court-martial session and shall consist of reading the charges and specifications to the accused and calling on the accused to plead. The accused may waive the reading.

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).

Analysis

This rule is taken from Rule 904 of the MCM (2016 edition) with the following amendment
2017 Amendment: The Discussion is amended and reflects the elimination of special courts-martial without a military judge. *See* 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).

Rule 905. Motions generally

(a) *Definitions and form.* A motion is an application to the military judge for particular relief. Motions may be oral or, at the discretion of the military judge, written. A motion shall state the grounds upon which it is made and shall set forth the ruling or relief sought. The substance of a motion, not its form or designation, shall control.

(b) *Pretrial motions.* Any defense, objection, or request which is capable of determination without the trial of the general issue of guilt may be raised before trial. The following must be raised before a plea is entered:

(1) Defenses or objections based on defects (other than jurisdictional defects) in the preferral, forwarding, or referral of charges, or in the preliminary hearing;

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).

(2) Defenses or objections based on defects in the charges and specifications (other than any failure to show jurisdiction or to charge an offense, which objections shall be resolved by the military judge at any time during the pendency of the proceedings);

Discussion

See R.C.M. 307; 906(b)(4).

(3) Motions to suppress evidence;

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(c); 104(a) and (c).

(4) Motions for discovery under R.C.M. 701 or for production of witnesses or evidence;

Discussion

See also R.C.M. 703; 1001(f).

(5) Motions for severance of charges or accused; or

Discussion

See R.C.M. 812; 906(b)(9) and (10).

(6) Objections based on denial of request for individual military counsel or for retention of detailed defense counsel when individual military counsel has been granted.

Discussion

See R.C.M. 506(b); 906(b)(2).

(c) *Burden of proof.*

(1) *Standard.* Unless otherwise provided in this Manual, the burden of proof on any factual issue the resolution of which is necessary to decide a motion shall be by a preponderance of the evidence.

Discussion

See Mil. R. Evid. 104(a) concerning the applicability of the Military Rules of Evidence to certain preliminary questions

(2) *Assignment.*

(A) Except as otherwise provided in this Manual the burden of persuasion on any factual issue the resolution of which is necessary to decide a motion shall be on the moving party.

Discussion

See, for example, subparagraph (c)(2)(B) of this rule, 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.

(B) In the case of a motion to dismiss for lack of jurisdiction, denial of the right to speedy trial under R.C.M. 707, or the running of the statute of limitations, the burden of persuasion shall be upon the prosecution.

(d) *Ruling on motions.* A motion made before pleas are entered shall be determined before pleas are entered unless, if otherwise not prohibited by this Manual, the military judge for good cause orders that determination be deferred until trial of the general issue or after findings, but no such determination shall be deferred if a party's right to review or appeal is adversely affected. Where factual issues are involved in determining a motion, the military judge shall state the essential findings on the record.

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.

(e) *Effect of failure to raise defenses or objections*.

(1) Failure by a party to raise defenses or objections or to make motions or requests which must be made before pleas are entered under subsection (b) of this rule shall constitute waiver. The military judge for good cause shown may permit a party to raise a defense or objection or make a motion or request outside of the timelines permitted under subsection (b) of this rule.

(2) Other motions, requests, defenses, or objections, except lack of jurisdiction or failure of a charge to allege an offense, must be raised before the court-martial is adjourned for that case. Failure to raise such other motions, requests, defenses, or objections, shall constitute forfeiture, unless the applicable rule provides that such failure constitutes waiver, or otherwise provided in this Manual.

Discussion

See also R.C.M. 910(j) concerning matters waived by a plea of guilty.

(f) *Reconsideration*. On request of any party or *sua sponte*, the military judge may, prior to entry of judgment, reconsider any ruling, other than one amounting to a finding of not guilty, made by the military judge.

Discussion

Subsection (f) permits the military judge to 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).

(g) *Effect of final determinations*. Any matter put in issue and finally determined by a court-martial, reviewing authority, or appellate court which had jurisdiction to determine the matter may not be disputed by the United States in any other court-martial of the same accused, except that, when the offenses charged at one court-martial did not arise out of the same transaction as those charged at the court-martial at which the determination was made, a determination of law and the application of law to the facts may be disputed by the United States. This rule also shall apply to matters which were put in issue and finally determined in any other judicial proceeding in which the accused and the United States or a federal governmental unit were parties.

Discussion

See also 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*, for example, 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.

(h) *Written motions.* Written motions may be submitted to the military judge after referral and when appropriate they may be supported by affidavits, with service and opportunity to reply to the opposing party. Such motions may be disposed of before arraignment and without a session. Either party may request an Article 39(a) session to present oral argument or have an evidentiary hearing concerning the disposition of written motions.

(i) *Service*. Written motions shall be served on all other parties. Unless otherwise directed by the military judge, the service shall be made upon counsel for each party.

(j) *Application to convening authority*. Except as otherwise provided in this Manual, any matters which may be resolved upon motion without trial of the general issue of guilt may be submitted by a party to the convening authority before trial for decision. Submission of such

matter to the convening authority is not, except as otherwise provided in this Manual, required, and is, in any event, without prejudice to the renewal of the issue by timely motion before the military judge.
(k) *Production of statements on motion to suppress*. Except as provided in this subsection, R.C.M. 914 shall apply at a hearing on a motion to suppress evidence under subsection (b)(3) of this rule. For purposes of this subsection, a law enforcement officer shall be deemed a witness called by the Government, and upon a claim of privilege the military judge shall excise portions of the statement containing privileged matter.

Analysis
This rule is taken from Rule 905 of the MCM (2016 edition) with the following amendment.
2017 Amendment: This rule is taken from Rule 905 of the MCM (2016 edition) with the following amendment: R.C.M. 905(h) is amended and provide the military judge the authority to determine whether an Article 39(a) session is necessary for the resolution of a motion.

Rule 906. Motions for appropriate relief
(a) *In general*. A motion for appropriate relief is a request for a ruling to cure a defect which deprives a party of a right or hinders a party from preparing for trial or presenting its case.
(b) Grounds for appropriate relief. The following may be requested by motion for appropriate relief. This list is not exclusive.
(1) *Continuances*. A continuance may be granted only by the military judge.

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. 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.

(2) *Record of denial of individual military counsel or of denial of request to retain detailed counsel when a request for individual military counsel granted*. If a request for military counsel was denied, which denial was upheld on appeal (if available) or if a request to retain detailed counsel was denied when the accused is represented by individual military counsel, and if the accused so requests, the military judge shall ensure that a record of the matter is included in the record of trial, and may make findings. The trial counsel may request a continuance to inform the convening authority of those findings. The military judge may not dismiss the charges or otherwise effectively prevent further proceedings based on this issue. However, the military judge may grant reasonable continuances until the requested military counsel can be made available if the unavailability results from temporary conditions or if the decision of unavailability is in the process of review in administrative channels.
(3) Correction of defects in the Article 32 preliminary hearing or pretrial advice.

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.

(4) *Amendment of charges or specifications.* After referral, a charge or specification may not be amended over the accused's objection subject to R.C.M. 603(d) and (e).

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* subparagraph (b)(6) of this rule) 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).

(5) Severance of a duplicitous specification into two or more specifications.

Discussion

Each specification may state only one offense. 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* subparagraph (b)(3) of this rule. *See also* R.C.M. 907(b)(3).

(6) *Bill of particular*. A bill of particulars may be amended at any time, subject to such conditions as justice permits.

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.

(7) *Discovery and production of evidence and witnesses*.

Discussion

See R.C.M. 701 concerning discovery. *See* R.C.M. 703, 914 and 1001(f) concerning production of evidence and witnesses.

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

Discussion

See R.C.M. 305(j).

(9) Severance of multiple accused, if it appears that an accused or the Government is prejudiced by a joint or common trial. In a common trial, a severance shall be granted whenever any accused, other than the moving accused, faces charges unrelated to those charged against the moving accused.

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)(1). 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.

(10) *Severance of offenses*.

(A) *In general.* Offenses may be severed, but only to prevent manifest injustice.

(B) *Capital cases.* In a capital case, if the joinder of unrelated non-capital offenses appears to prejudice the accused, the military judge may sever the non-capital offenses from the capital offenses.

Discussion

Ordinarily, all known charges should be tried at a single court-martial. 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.

(11) *Change of place of trial*. The place of trial may be changed when necessary to prevent prejudice to the rights of the accused or for the convenience of the Government if the rights of the accused are not prejudiced thereby.

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.

(12) *Unreasonable multiplication of charges*. The military judge may provide a remedy, as described in this rule, if he or she finds there has been an unreasonable multiplication of charges as applied to findings or sentence.

(A) *As applied to findings*. Charges that arise from substantially the same transaction, while not legally multiplicious, may still be unreasonably multiplied as applied to findings. When the military judge finds, in his or her discretion, that the offenses have been unreasonably multiplied, the appropriate remedy shall be dismissal of the lesser offenses or merger of the offenses into one specification.

(B) *As applied to sentence*. Where the military judge finds that the unreasonable multiplication of charges requires a remedy that focuses more appropriately on punishment than

on findings, he or she may find that there is an unreasonable multiplication of charges as applied to sentence. If the military judge makes such a finding and sentencing is by members, the maximum punishment for those offenses determined to be unreasonably multiplied shall be the maximum authorized punishment of the offense carrying the greatest maximum punishment. If the military judge makes such a finding and sentencing is by military judge, the remedy shall be as set forth in R.C.M. 1002(d)(2).

Discussion

A ruling on this motion ordinarily should be deferred until after findings are entered.

(13) Preliminary ruling on admissibility of evidence.

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(e)(2); 311(e); 321(d)(2). Reviewability of preliminary rulings will be controlled by the Supreme Court's decision in *Luce v. United States*, 469 U.S. 38 (1984).

(14) Motions relating to mental capacity or responsibility of the accused.

Discussion

See R.C.M. 706, 909, and 916(k) regarding procedures and standards concerning the mental capacity or responsibility of the accused.

Analysis

This rule is taken from Rule 906 of the MCM (2016 edition) with the following amendments.

2017 Amendment: This rule is taken from Rule 906 of the MCM (2016 edition) with the following amendments:

R.C.M. 906(b)(4) is amended and clarifies the provisions governing amendment of charges after referral.

R.C.M. 906(b)(10) and its Discussion are amended and address the standards applicable to severance of charges in capital and non-capital cases.

R.C.M. 906(b)(12) is amended and clarifies the remedies available to address findings of unreasonable multiplication of charges in light of the amendments to Articles 25 and 53.

The Discussion to R.C.M. 906(b)(12) is deleted.

Rule 907. Motions to dismiss

(a) *In general*. A motion to dismiss is a request to terminate further proceedings as to one or more charges and specifications on grounds capable of resolution without trial of the general issue of guilt.

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 subsection (b)(1) or (b)(3)(A) of this rule 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 subsection (b)(2) of this rule.

See R.C.M. 916 concerning defenses.

(b) *Grounds for dismissal.* Grounds for dismissal include the following—

(1) *Nonwaivable grounds.* A charge or specification shall be dismissed at any stage of the proceedings if the court-martial lacks jurisdiction to try the accused for the offense.

(2) *Waivable grounds.* A charge or specification shall be dismissed upon motion made by the accused before the final adjournment of the court-martial in that case if:

(A) Dismissal is required under R.C.M. 707;

(B) The statute of limitations (Article 43) has run, provided that, if it appears that the accused is unaware of the right to assert the statute of limitations in bar of trial, the military judge shall inform the accused of this right;

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 is 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.

(C) The accused has previously been tried by court-martial or federal civilian court for the same offense, provided that

(i) No court-martial proceeding is a trial in the sense of this rule unless—

(I) In the case of a trial by military judge alone presentation of the evidence on the general issue of guilt has begun;

(II) In the case of a trial with a military judge and members, the members have been impaneled; or

(III) In the case of a summary court-martial, presentation of the evidence on the general issue of guilt has begun.

(ii) No court-martial proceeding which has been terminated under R.C.M. 604(b) or R.C.M. 915 shall bar later prosecution for the same offense or offenses, if so provided in those rules;

(iii) No court-martial proceeding in which an accused has been found guilty of any charge or specification is a trial in the sense of this rule until the finding of guilty has become final after review of the case has been fully completed; and

(iv) No court-martial proceeding which lacked jurisdiction to try the accused for the offense is a trial in the sense of this rule.

Discussion

Subparagraph (C)(i)(I) includes special courts-martial consisting of a military judge alone under Article 16(c)(2)(A).

(D) Prosecution is barred by:

(i) A pardon issued by the President;

(ii) Immunity from prosecution granted by a person authorized to do so; or

Discussion

See R.C.M. 704.

(iii) Prior punishment under Article 13 or 15 for the same offense, if that offense was punishable by confinement of one year or less.

Discussion

See Article 13 and Appendix 12, Maximum Punishment Chart.

(E) The specification fails to state an offense.

(3) *Permissible grounds.* A specification may be dismissed upon timely motion by the accused if one of the following is applicable:

(A) *Defective.* When the specification is so defective that it substantially misled the accused, and the military judge finds that, in the interest of justice, trial should proceed on any remaining charges and specifications without undue delay; or

(B) *Multiplicity.* When the specification is multiplicious with another specification, is unnecessary to enable the prosecution to meet the exigencies of proof through trial, review, and appellate action, and should be dismissed in the interest of justice. A charge is multiplicious if the proof of such charge also proves every element of another charge.

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 multiplicious 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.

Analysis

This rule is taken from Rule 907 of the MCM (2016 edition) with the following amendments *2017 Amendment*: R.C.M. 907(b)(2)(C) is amended and implements Article 44 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), regarding

the point when jeopardy attaches in a court-martial.

Rule 908. Appeal by the United States

(a) *In general.* The United States may appeal an order or ruling by a military judge that terminates the proceedings with respect to a charge or specification, or excludes evidence that is substantial proof of a fact material in the proceedings, or directs the disclosure of classified information, or that imposes sanctions for nondisclosure of classified information. The United States may also appeal a refusal by the military judge to issue a protective order sought by the United States to prevent the disclosure of classified information or to enforce such an order that has previously been issued by the appropriate authority. The United States may not appeal an order or ruling that is, or amounts to, a finding of not guilty with respect to the charge or specification except when the military judge enters a finding of not guilty with respect to a charge or specification following the return of a guilty verdict by the members.

Discussion

See R.C.M. 917.

(b) *Procedure.*

(1) *Delay.* After an order or ruling which may be subject to an appeal by the United States, the court-martial may not proceed, except as to matters unaffected by the ruling or order, if the trial counsel requests a delay to determine whether to file notice of appeal under this rule. Trial counsel is entitled to no more than 72 hours under this subsection.

(2) *Decision to appeal.* The decision whether to file notice of appeal under this rule shall be made within 72 hours of the ruling or order to be appealed. If the Secretary concerned so prescribes, the trial counsel shall not file notice of appeal unless authorized to do so by a person designated by the Secretary concerned.

(3) *Notice of appeal.* If the United States elects to appeal, the trial counsel shall provide the military judge with written notice to this effect not later than 72 hours after the ruling or order. Such notice shall identify the ruling or order to be appealed and the charges and specifications affected. Trial counsel shall certify that the appeal is not taken for the purpose of delay and (if the order or ruling appealed is one which excludes evidence) that the evidence excluded is substantial proof of a fact material in the proceeding.

(4) *Effect on the court-martial.* Upon written notice to the military judge under subsection (b)(3) of this rule, the ruling or order that is the subject of the appeal is automatically stayed and no session of the court-martial may proceed pending disposition by the Court of Criminal Appeals of the appeal, except that solely as to charges and specifications not affected by the ruling or order:

(A) Motions may be litigated, in the discretion of the military judge, at any point in the proceedings;

(B) When trial on the merits has not begun,

(i) a severance may be granted upon request of all the parties;

(ii) a severance may be granted upon request of the accused and when appropriate under R.C.M. 906(b)(10); or

(C) When trial on the merits has begun but has not been completed, a party may, on that party's request and in the discretion of the military judge, present further evidence on the merits.

(5) *Record.* Upon written notice to the military judge under subsection (b)(3), trial counsel shall cause a record of the proceedings to be prepared. Such record shall be verbatim and

complete to the extent necessary to resolve the issues appealed. The record shall be certified in accordance with R.C.M. 1112, and shall be reduced to a written transcript if required under R.C.M. 1114. The military judge or the Court of Criminal Appeals may direct that additional parts of the proceeding be included in the record.

(6) *Forwarding.* Upon written notice to the military judge under subsection (b)(3) of this rule, trial counsel shall promptly and by expeditious means forward the appeal to a representative of the Government designated by the Judge Advocate General. The matter forwarded shall include: a statement of the issues appealed; the record of the proceedings or, if preparation of the record has not been completed, a summary of the evidence; and such other matters as the Secretary concerned may prescribe. The person designated by the Judge Advocate General shall promptly decide whether to file the appeal with the Court of Criminal Appeals and notify the trial counsel of that decision.

(7) *Appeal filed.* If the United States elects to file an appeal, it shall be filed directly with the Court of Criminal Appeals, in accordance with the rules of that court.

Discussion

When the Government files an appeal with the Court of Criminal Appeals under this subsection the Court maintains jurisdiction to review the case under Article 66(b) regardless of the sentence imposed.

(8) *Appeal not filed.* If the United States elects not to file an appeal, trial counsel promptly shall notify the military judge and the other parties.

(9) *Pretrial confinement of accused pending appeal.* If an accused is in pretrial confinement at the time the United States files notice of its intent to appeal under subsection (3) of this rule, the commander, in determining whether the accused should be confined pending the outcome of an appeal by the United States, should consider the same factors which would authorize the imposition of pretrial confinement under R.C.M. 305(h)(2)(B).

(c) *Appellate proceedings.*

(1) *Appellate counsel.* The parties shall be represented before appellate courts in proceedings under this rule as provided in R.C.M. 1202. Appellate Government counsel shall diligently prosecute an appeal under this rule.

(2) Court of Criminal Appeals. An appeal under Article 62 shall, whenever practicable, have priority over all other proceedings before the Court of Criminal Appeals. In determining an appeal under Article 62, the Court of Criminal Appeals may take action only with respect to matters of law.

(3) *Action following decision of Court of Criminal Appeals.* After the Court of Criminal Appeals has decided any appeal under Article 62, the accused may petition for review by the Court of Appeals for the Armed Forces, or the Judge Advocate General may certify a question to the Court of Appeals for the Armed Forces. The parties shall be notified of the decision of the Court of Criminal Appeals promptly. If the decision is adverse to the accused, the accused shall be notified of the decision and of the right to petition the Court of Appeals for the Armed Forces for review within 60 days orally on the record at the court-martial or in accordance with R.C.M. 1203(d). If the accused is notified orally on the record, trial counsel shall forward by expeditious means a certificate that the accused was so notified to the Judge Advocate General, who shall forward a copy to the clerk of the Court of Appeals for the Armed Forces when required by the Court. If the decision by the Court of Criminal Appeals permits it, the court-martial may proceed as to the affected charges and specifications pending further review by the Court of Appeals for the Armed Forces or the Supreme Court, unless either court orders the proceedings stayed.

Unless the case is reviewed by the Court of Appeals for the Armed Forces, it shall be returned to the military judge or the convening authority for appropriate action in accordance with the decision of the Court of Criminal Appeals. If the case is reviewed by the Court of Appeals for the Armed Forces, R.C.M. 1204 and 1205 shall apply.

Discussion

The United States may appeal a sentence in accordance with Article 56(d) and the procedures set forth in R.C.M. 1117.

Analysis

This rule is taken from Rule 908 of the MCM (2016 edition) with the following amendments *2017 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), which authorizes a Government appeal when a military judge sets aside a panel's guilty verdict.

R.C.M. 908(b)(5) is amended and implements Article 54, as amended by Section 5238 of the NDAA for FY17, which requires the certification of the record of trial.

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* Section 5163 of the NDAA for FY17.

Rule 909. Capacity of the accused to stand trial by court-martial

(a) *In general.* No person may be brought to trial by court-martial if that person is presently suffering from a mental disease or defect rendering him or her mentally incompetent to the extent that he or she is unable to understand the nature of the proceedings against them or to conduct or cooperate intelligently in the defense of the case.

Discussion

See also R.C.M. 916(k).

(b) *Presumption of capacity.* A person is presumed to have the capacity to stand trial unless the contrary is established.

(c) *Determination before referral.* If an inquiry pursuant to R.C.M. 706 conducted before referral concludes that an accused is suffering from a mental disease or defect that renders him or her mentally incompetent to stand trial, the convening authority before whom the charges are pending for disposition may disagree with the conclusion and take any action authorized under R.C.M. 401, including referral of the charges to trial. If that convening authority concurs with the conclusion, he or she shall forward the charges to the general court-martial convening authority. If, upon receipt of the charges, the general court-martial convening authority similarly concurs, then he or she shall commit the accused to the custody of the Attorney General. If the general court-martial convening authority does not concur, that authority may take any action that he or she deems appropriate in accordance with R.C.M. 407, including referral of the charges to trial.

(d) *Determination after referral.* After referral, the military judge may conduct a hearing to determine the mental capacity of the accused, either *sua sponte* or upon request of either party. If an inquiry pursuant to R.C.M. 706 conducted before or after referral concludes that an accused is suffering from a mental disease or defect that renders him or her mentally incompetent to stand trial, the military judge shall conduct a hearing to determine the mental capacity of the accused. Any such hearing shall be conducted in accordance with paragraph (e) of this rule.

(e) *Incompetence determination hearing.*

(1) *Nature of issue.* The mental capacity of the accused is an interlocutory question of fact.

(2) *Standard.* Trial may proceed unless it is established by a preponderance of the evidence that the accused is presently suffering from a mental disease or defect rendering him or her mentally incompetent to the extent that he or she is unable to understand the nature of the proceedings or to conduct or cooperate intelligently in the defense of the case. In making this determination, the military judge is not bound by the rules of evidence except with respect to privileges.

(3) If the military judge finds the accused is incompetent to stand trial, the judge shall report this finding to the general court-martial convening authority, who shall commit the accused to the custody of the Attorney General.

(f) *Hospitalization of the accused.* An accused who is found incompetent to stand trial under this rule shall be hospitalized by the Attorney General as provided in section 4241(d) of title 18, United States Code. If notified that the accused has recovered to such an extent that he or she is able to understand the nature of the proceedings and to conduct or cooperate intelligently in the defense of the case, then the general court-martial convening authority shall promptly take custody of the accused. If, at the end of the period of hospitalization, the accused's mental condition has not so improved, action shall be taken in accordance with section 4246 of title 18, United States Code.

Discussion

Under section 4241(d) of title 18, 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 section 4246 of title 18.

(g) *Excludable delay.* All periods of commitment shall be excluded as provided by R.C.M. 707(c). The 120-day time period under R.C.M. 707 shall begin anew on the date the general court-martial convening authority takes custody of the accused at the end of any period of commitment.

Analysis

This rule is taken from Rule 909 of MCM (2016. edition) without amendment.

Rule 910. Pleas

(a) *Alternatives.*

(1) *In general.* An accused may plead as follows:

(A) guilty;

(B) not guilty to an offense as charged, but guilty of a named lesser included offense;

(C) guilty with exceptions, with or without substitutions, not guilty of the exceptions, but guilty of the substitutions, if any; or

(D) not guilty.

A plea of guilty may not be received as to an offense for which a sentence of death is mandatory.

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 subsection (g) of this rule.

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.

(2) *Conditional pleas.* With the approval of the military judge and the consent of the Government, an accused may enter a conditional plea of guilty, reserving the right, on further review or appeal, to review of the adverse determination of any specified pretrial motion. If the accused prevails on further review or appeal, the accused shall be allowed to withdraw the plea of guilty. The Secretary concerned may prescribe who may consent for Government; unless otherwise prescribed by the Secretary concerned, the trial counsel may consent on behalf of the Government.

(b) *Refusal to plead; irregular plea.* If an accused fails or refuses to plead, or makes an irregular plea, the military judge shall enter a plea of not guilty for the accused.

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.

(c) *Advice to accused.* Before accepting a plea of guilty, the military judge shall address the accused personally and inform the accused of, and determine that the accused understands, the following:

(1) The nature of the offense to which the plea is offered, the mandatory minimum penalty, if any, provided by law, the maximum possible penalty provided by law, and if applicable, the effect of any sentence limitation(s) provided for in a plea agreement on the minimum or maximum possible penalty that may be adjudged including the effect of any concurrent or consecutive sentence limitations;

Discussion

The elements of each offense to which the accused has pleaded guilty should be described to the accused. *See also* subsection (e) of this rule. 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.

(2) In a general or special court-martial, if the accused is not represented by counsel, that the accused has the right to be represented by counsel at every stage of the proceedings;

Discussion

In a general or special court-martial, if the accused is not represented by counsel, a plea of guilty should not be accepted.

(3) That the accused has the right to plead not guilty or to persist in that plea if already made, and that the accused has the right to be tried by a court-martial, and that at such trial the accused has the right to confront and cross-examine witnesses against the accused, and the right against self-incrimination;

(4) That if the accused pleads guilty, there will not be a trial of any kind as to those offenses to which the accused has so pleaded, so that by pleading guilty the accused waives the rights described in subsection (c)(3) of this rule;

(5) That if the accused pleads guilty, the military judge will question the accused about the offenses to which the accused has pleaded guilty, and, if the accused answers these questions under oath, on the record, and in the presence of counsel, the accused's answers may later be used against the accused in a prosecution for perjury or false statement; and

Discussion

The advice in paragraph (5) is inapplicable in a court-martial in which the accused is not represented by counsel.

(6) That if an election by the accused to be tried by military judge alone has been approved, the accused will be sentenced by the military judge.

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.

(d) *Ensuring that the plea is voluntary.* The military judge shall not accept a plea of guilty without first, by addressing the accused personally, determining that the plea is voluntary and not the result of force or threats or of promises apart from a plea agreement under R.C.M. 705. The military judge shall also inquire whether the accused's willingness to plead guilty results from prior discussions between the convening authority, a representative of the convening authority, or trial counsel, and the accused or defense counsel.

(e) *Determining accuracy of plea.* The military judge shall not accept a plea of guilty without making such inquiry of the accused as shall satisfy the military judge that there is a factual basis for the plea. The accused shall be questioned under oath about the offenses.

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.

(f) *Plea agreement inquiry.*

(1) *In general*. A plea agreement may not be accepted if it does not comply with R.C.M. 705.

(2) *Notice*. The parties shall inform the military judge if a plea agreement exists.

Discussion

The military judge should ask whether a plea agreement exists. *See* subsection (d) of this rule. 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).

(3) *Disclosure*. If a plea agreement exists, the military judge shall require disclosure of the entire agreement before the plea is accepted.

(4) *Inquiry.*

(A) The military judge shall inquire to ensure:

(i) that the accused understands the agreement; and

(ii) that the parties agree to the terms of the agreement.

(B) If the military judge determines that the accused does not understand the material terms of the agreement, or that the parties disagree as to such terms, the military judge shall:

(i) conform, with the consent of the Government, the agreement to the accused's understanding; or

(ii) permit the accused to withdraw the plea.

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.

(5) *Sentence limitations in plea agreements.* If a plea agreement contains limitations on the punishment that may be imposed, the court-martial, subject to paragraph (4)(B) and R.C.M. 705, shall sentence the accused in accordance with the agreement.

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).

(6) *Rejected plea agreement*. If the military judge does not accept a plea agreement, the military judge shall—

(A) issue a statement explaining the basis for the rejection;

(B) allow the accused to withdraw any plea; and

(C) inform the accused that if the plea is not withdrawn the court-martial may impose any lawful punishment.

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.

(g) *Findings.* Findings based on a plea of guilty may be entered immediately upon acceptance of the plea at an Article 39(a) session unless the plea is to a lesser included offense and the prosecution intends to proceed to trial on the offense as charged.

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.

(h) *Later action.*

(1) *Withdrawal by the accused.* If after acceptance of the plea but before the sentence is announced the accused requests to withdraw a plea of guilty and substitute a plea of not guilty or a plea of guilty to a lesser included offense, the military judge may as a matter of discretion permit the accused to do so.

(2) *Statements by accused inconsistent with plea.* If after findings but before the sentence is announced the accused makes a statement to the court-martial, in testimony or otherwise, or presents evidence which is inconsistent with a plea of guilty on which a finding is based, the military judge shall inquire into the providence of the plea. If, following such inquiry, it appears that the accused entered the plea improvidently or through lack of understanding of its meaning and effect a plea of not guilty shall be entered as to the affected charges and specifications.

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.

(i) [Deleted]

(j) *Waiver and forfeiture.* Except as provided in subsection (a)(2) of this rule, a plea of guilty which results in a finding of guilty waives any objection previously raised and forfeits objections not previously raised, insofar as the objection relates to the factual issue of guilt of the offense(s) to which the plea was made. An error that is not brought to the attention of the court prior to entry of judgment is forfeited.

Analysis

This rule is taken from Rule 910 of the MCM (2016 edition) with the following amendments. *2017 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.

R.C.M. 910(c)(1) and (6) are amended and implement Articles 53a and 56, as amended by Sections 5237 and 5301 of the NDAA FY17..

R.C.M. 910(g) is amended and implements Articles 45 and 19, as amended by Sections 5227 and 5163 of the NDAA FY17, 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.

Rule 911. Assembly of the court-martial

The military judge shall announce the assembly of the court-martial.

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)(1); R.C.M. 903(d)).

Analysis

This rule is taken from Rule 911 of the MCM (2016 edition) with the following amendments.

2017 Amendment: The Discussion to R.C.M. 911 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), 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.

Rule 912. Challenge of selection of members; examination and challenges of members

(a) *Pretrial matters.*

(1) *Questionnaires.* Before trial the trial counsel may, and shall upon request of the defense counsel, submit to each member written questions requesting the following information:

(A) Date of birth;

(B) Sex;

(C) Race;

(D) Marital status and sex, age, and number of dependents;

(E) Home of record;

(F) Civilian and military education, including, when available, major areas of study, name of school or institution, years of education, and degrees received;

(G) Current unit to which assigned;

(H) Past duty assignments;

(I) Awards and decorations received;

(J) Date of rank; and

(K) Whether the member has acted as accuser, counsel, preliminary hearing officer, investigating officer, convening authority, or legal officer or staff judge advocate for the convening authority in the case, or has forwarded the charges with a recommendation as to disposition.

Additional information may be requested with the approval of the military judge. Each member's responses to the questions shall be written and signed by the member. For purposes of this rule, the term "members" includes any alternate members.

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).

(2) *Other materials.* A copy of any written materials considered by the convening authority in selecting the members detailed to the court-martial shall be provided to any party upon request, except that such materials pertaining solely to persons who were not selected for detail as members need not be provided unless the military judge, for good cause, so directs.

(b) *Challenge of selection of members.*

(1) *Motion.* Before the examination of members under subsection (d) of this rule begins, or at the next session after a party discovered or could have discovered by the exercise of diligence, the grounds therefor, whichever is earlier, that party may move to stay the proceedings on the ground that members were selected improperly.

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.

(2) *Procedure.* Upon a motion under subsection (b)(1) of this rule containing an offer of proof of matters which, if true, would constitute improper selection of members, the moving party shall be entitled to present evidence, including any written materials considered by the convening authority in selecting the members. Any other party may also present evidence on the matter. If the military judge determines that the members have been selected improperly, the military judge shall stay any proceedings requiring the presence of members until members are properly selected.

(3) *Forfeiture.* Failure to make a timely motion under this subsection shall forfeit the improper selection unless it constitutes a violation of R.C.M. 501(a), 502(a)(1), or 503(a)(2).

(c) *Stating grounds for challenge.* The trial counsel shall state any ground for challenge for cause against any member of which the trial counsel is aware.

(d) *Examination of members.* The military judge may permit the parties to conduct examination of members or may personally conduct examination. In the latter event the military judge shall permit the parties to supplement the examination by such further inquiry as the military judge deems proper or the military judge shall submit to the members such additional questions by the parties as the military judge deems proper. A member may be questioned outside the presence of other members when the military judge so directs.

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.

(e) *Evidence.* Any party may present evidence relating to whether grounds for challenge exist against a member.

(f) *Challenges and removal for cause.*

(1) *Grounds.* A member shall be excused for cause whenever it appears that the member:

(A) Is not competent to serve as a member under Article 25(a), (b), or (c);

(B) Has not been properly detailed as a member of the court-martial;

(C) Is an accuser as to any offense charged;

(D) Will be a witness in the court-martial;

(E) Has acted as counsel for any party as to any offense charged;

(F) Has been an a preliminary hearing officer as to any offense charged;

(G) Has acted in the same case as convening authority or as the legal officer or staff judge advocate to the convening authority;

(H) Will act in the same case as reviewing authority or as the legal officer or staff judge advocate to the reviewing authority;

(I) Has forwarded charges in the case with a personal recommendation as to disposition;

(J) Upon a rehearing or new or other trial of the case, was a member of the court-martial which heard the case before;

(K) Is junior to the accused in grade or rank, unless it is established that this could not be avoided;

(L) Is in arrest or confinement;

(M) Has formed or expressed a definite opinion as to the guilt or innocence of the accused as to any offense charged;

(N) Should not sit as a member in the interest of having the court-martial free from substantial doubt as to legality, fairness, and impartiality.

Discussion

Examples of matters which may be grounds for challenge under subsection (N) 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.

(2) *When made.*

(A) *Upon completion of examination.* Upon completion of any examination under subsection (d) of this rule and the presentation of evidence, if any, on the matter, each party shall state any challenges for cause it elects to make.

(B) *Other times.* A challenge for cause may be made at any other time during trial when it becomes apparent that a ground for challenge may exist. Such examination of the member and presentation of evidence as may be necessary may be made in order to resolve the matter.

(3) *Procedure.* Each party shall be permitted to make challenges outside the presence of the members. The party making a challenge shall state the grounds for it. Ordinarily the trial counsel shall enter any challenges for cause before the defense counsel. The military judge shall rule finally on each challenge. The burden of establishing that grounds for a challenge exist is upon the party making the challenge. A member successfully challenged shall be excused.

(4) *Waiver.* The grounds for challenge in subsection (f)(1)(A) of this rule may not be waived. Notwithstanding the absence of a challenge or waiver of a challenge by the parties, the military judge may, in the interest of justice, excuse a member against whom a challenge for cause would lie. When a challenge for cause has been denied, the successful use of a peremptory challenge by either party, excusing the challenged member from further participation in the court-martial, shall preclude further consideration of the challenge of that excused member upon later review. Further, failure by the challenging party to exercise a peremptory challenge against any member shall constitute waiver of further consideration of the challenge upon later review.

Discussion

See Mil. R. Evid. 606 regarding when a member may be a witness.

(g) *Peremptory challenges.*

(1) *Procedure.* Each party may challenge one member peremptorily. Any member so challenged shall be excused. No party may be required to exercise a peremptory challenge before the examination of members and determination of any challenges for cause has been completed. Ordinarily the trial counsel shall enter any peremptory challenge before the defense.

Discussion`

Generally, no reason is necessary for a peremptory challenge. *But see Batson v. Kentucky* 476 U.S. 79 (1986); *United States v. Curtis*, 33 M.J. 101 (C.M.A. 1991), *cert. denied*, 112 S.Ct. 1177 (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).

(2) *Waiver.* Failure to exercise a peremptory challenge when properly called upon to do so shall waive the right to make such a challenge. The military judge may, for good cause shown, grant relief from the waiver, but a peremptory challenge may not be made after the presentation of evidence before the members has begun. However, nothing in this subsection shall bar the exercise of a previously unexercised peremptory challenge against a member newly detailed under R.C.M. 505(c)(2)(B), even if presentation of evidence on the merits has begun.

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.

(h) *Definitions.*

(1) *Witness.* For purposes of this rule, "witness" includes one who testifies at a court-martial and anyone whose declaration is received in evidence for any purpose, including written declarations made by affidavit or otherwise.

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.

(2) *Preliminary hearing officer*. For purposes of this rule, "preliminary hearing officer" includes any person who has examined charges under R.C.M. 405 and any person who was counsel for a member of a court of inquiry, or otherwise personally has conducted an investigation of the general matter involving the offenses charged.

Analysis

This rule is taken from Rule 912 of the MCM (2016 edition) with the following amendments.

2017 Amendment: 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.

R.C.M. 912(h) is deleted and reflects the elimination of special courts-martial without a military judge. *See* Section 5163 of the NDAA for FY17

R.C.M. 912(i) is redesignated as subsection (h).

[Multiple possible rules for removing excess panel members are set out below. The most significant differences among these rules are in subparagraph (d). The Department of Defense invites the public to comment as to the optimal rule for removing excess panel members consistent with Article 36 of the UCMJ. Under Article 36, court-martial procedural rules prescribed by the President must be uniform across all Military Services insofar as practicable and must, to the extent the President considers practicable and to the extent not inconsistent with the UCMJ, apply the principles of law generally recognized in the trial of criminal cases in the United States district courts. Thus, a non-uniform version of Rule 912A may be adopted only if no uniform version would be practicable.]

Proposal #1—Rule 912A. Impaneling members and alternate members

(a) *In general*. After challenges for cause and peremptory challenges are exercised, the military judge of a general or special court-martial with members shall impanel the members, and, if authorized by the convening authority, alternate members, in accordance with the following numerical requirements:

(1) *Capital cases*. In a general court-martial in which the charges were referred with a special instruction that the case be tried as a capital case, the number of members impaneled, subject to paragraph (4) of this subsection, shall be twelve.

(2) *General courts-martial*. In a general court-martial other than as described in paragraph (1) of this subsection, the number of members impaneled, subject to paragraph (4) of this

rule, shall be eight.

(3) *Special courts-martial*. In a special court-martial, the number of members impaneled, subject to paragraph (4) of this subsection, shall be four.

(4) *Alternate members*. A convening authority may authorize the military judge to impanel alternate members. When authorized by the convening authority, the military judge shall designate which of the impaneled members are alternate members in accordance with these rules and consistent with the instructions of the convening authority.

(A) If the convening authority authorizes the military judge to impanel a specific number of alternate members, the number of members impaneled shall be the number of members required under paragraphs (1), (2), or (3) of this subsection, as applicable, plus the number of alternate members specified by the convening authority. The military judge shall not impanel the court-martial until the specified number of alternate members have been identified. New members may be detailed in order to impanel the specified number of alternate members.

(B) If the convening authority does not authorize the military judge to impanel a specific number of alternate members, and instead authorizes the military judge to impanel alternate members only if, after the exercise of all challenges, excess members remain, the number of members impaneled shall be the number of members required under paragraphs (1), (2), or (3) of this rule and no more than three alternate members. New members shall not be detailed in order to impanel alternate members.

Discussion

See Article 29(c); R.C.M. 503(a)(1); and subsection (d) of this rule.

(b) *Enlisted accused*. In the case of an enlisted accused, the members shall be impaneled under subsection (a) of this rule in such numbers and proportion that—

(1) If the accused elected to be tried by a court-martial composed of at least one-third enlisted members, the membership of the panel includes at least one-third enlisted members; and

(2) If the accused elected to be tried by a court-martial composed of all officer members, the membership of the panel includes all officer members.

(c) *Number of members detailed insufficient*. If, after the exercise of all challenges, the number of detailed members remaining is fewer than the number of members required for the court-martial under subsections (a) and (b) of this rule, the convening authority shall detail new members under R.C.M. 503.

(d) *Excess members following the exercise of all challenges*. If the number of members remaining after the exercise of all challenges is greater than the number of members required for the court-martial under subsections (a) and (b) of this rule, the military judge shall use the following procedures to identify the members who will be impaneled—

(1) *Enlisted panel*. In a case in which the accused has elected to be tried by a panel consisting of at least one-third enlisted members under R.C.M. 503(a)(2), the military judge shall—

(A) first identify the one-third enlisted members required under subsections (a) and (b) of this rule in numerical order beginning with the lowest random number assigned pursuant to R.C.M. 912(f)(5); and

(B) then identify the remaining members required for the court-martial under subsections (a) and (b) of this rule, in numerical order beginning with the lowest random

number assigned pursuant to R.C.M. 912(f)(5).

(2) *Other panels*. For all other panels, the military judge shall identify the number of members required under subsections (a) and (b) of this rule in numerical order beginning with the lowest random number assigned pursuant to R.C.M. 912(f)(5).

(3) *Alternate Members*.

(A) If the convening authority authorizes the military judge to impanel a specific number of alternate members, the specified number of alternate members shall be identified in numerical order beginning with the lowest remaining random number assigned pursuant to R.C.M. 912(f)(5), after first identifying members under paragraph (1) or (2) of this subsection.

(B) If the convening authority does not authorize the military judge to impanel a specific number of alternate members, and instead authorizes the military judge to impanel alternate members only if, after the exercise of all challenges, excess members remain, alternate members shall be identified in numerical order beginning with the lowest remaining random number assigned pursuant to R.C.M. 912(f)(5), after first identifying the members under paragraph (1) or (2) of this rule. The military judge shall identify no more than three alternate members.

(4) The military judge shall excuse any members not identified as members or alternate members, if any.

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, if after the exercise of all challenges the number of members is greater than eight, the military judge first identifies the three enlisted members assigned the three lowest numbers during voir dire. The military judge then identifies the next five members, regardless of rank, assigned the next 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 identifies 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 rank, assigned the next lowest numbers as alternate members.

All members not identified as members or alternate members are then excused by the military judge.

(e) *Lowest number*. The lowest number means the number with the lowest numerical value.

Discussion

For example, the following numbers are listed numerically from lowest to highest: 1, 2, 3, and 4.

(f) *Announcement*. After identifying the members to be impaneled in accordance with this rule, and after excusing any excess members, the military judge shall announce that the members are impaneled.

Analysis

2017 Amendment: R.C.M. 912A 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 establishes the process by which members and any alternate members will be impaneled after all challenges are exercised.

Proposal #1 for impaneling members includes the following conforming proposed changes:

(a) Rule 503(a)(1)(C) would be amended to read as follows:

"(C) state whether the military judge is—

(i) authorized to impanel a specified number of alternate members; or

(ii) authorized to impanel alternate members only if, after the exercise of all challenges, excess members remain."

(b) Rule 504(d) would be amended to read as follows:

"(d) Convening orders.

(1) General and special courts-martial.

(A) A convening order for a general or special court-martial shall—

(i) designate the type of court-martial; and

(ii) detail the members in accordance with R.C.M. 503(a);

(B) A convening order may designate where the court-martial will meet.

(C) If the convening authority has been designated by the Secretary concerned, the convening order shall so state."

(**c) Rule 912(f)(5) and the subsequent Discussion** would be added and would read as follows:

"(5) Following the exercise of challenges for cause, if any, and prior to the exercise of peremptory challenges under subsection (g) of this rule, the military judge, or a designee thereof, shall randomly assign numbers to the remaining members for purposes of impaneling members in accordance with R.C.M. 912A.

Discussion

Random numbers are assigned to the members in order to organize and identify the members to be impaneled under R.C.M. 912A."

(c) Rule 912B(b) and the subsequent Discussion would be amended to read as follows:

"(b) Alternate members available. An excused member shall be replaced with an impaneled alternate member, if an alternate member is available. The alternate member with the lowest random number assigned pursuant to R.C.M. 912(f)(5) shall replace the excused member, unless, in the case of an enlisted accused, the use of such member would be inconsistent with the forum composition established under R.C.M. 903.

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."

Proposal #2—Rule 912A. Impaneling members and alternate members

(a) *In general*. After challenges for cause and peremptory challenges are exercised, the military judge of a general or special court-martial with members shall impanel the members, and, if authorized by the convening authority, alternate members, in accordance with the following numerical requirements:

(1) *Capital cases*. In a general court-martial in which the charges were referred with a special instruction that the case be tried as a capital case, the number of members impaneled, subject to paragraph (4) of this subsection, shall be twelve.

(2) *General courts-martial*. In a general court-martial other than as described in paragraph (1) of this subsection, the number of members impaneled, subject to paragraph (4) of this subsection, shall be eight.

(3) *Special courts-martial*. In a special court-martial, the number of members impaneled, subject to paragraph (4) of this subsection, shall be four.

(4) *Alternate members*. In a court-martial in which the convening authority authorizes alternate members, the number of members impaneled shall be the number of members required under paragraphs (1), (2), or (3) of this subsection, as applicable, plus the number of alternate members specified by the convening authority. The military judge shall designate which of the impaneled members are alternate members in accordance with instructions of the convening authority.

(b) *Enlisted accused*. In the case of an enlisted accused, the members shall be impaneled under subsection (a) of this rule in such numbers and proportion that—

(1) If the accused elected to be tried by a court-martial composed of at least one-third enlisted members, the membership of the panel includes at least one-third enlisted members; and

(2) If the accused elected to be tried by a court-martial composed of all officer members, the membership of the panel includes all officer members.

(c) *Number of members detailed insufficient*. If, after the exercise of all challenges, the number of detailed members remaining is fewer than the number of members required for the court-martial under subsections (a) and (b) of this rule, the convening authority shall detail additional members under R.C.M. 503.

(d) *Excess members following the exercise of all challenges*. If the number of members remaining after the exercise of all challenges is greater than the number of members required for impanelment of the court-martial under subsections (a) and (b) of this rule, the military judge shall issue additional peremptory challenges to both parties. The parties shall alternate the exercise of such additional peremptory challenges until such time as the numerical requirements of subsection (a) are met. Ordinarily the defense counsel shall enter any additional peremptory challenge before trial counsel.

Discussion

Generally, no reason is necessary for exercising an additional peremptory challenge. *But see Batson v. Kentucky*, 476 U.S. 79 (1986); *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).

(f) Announcement. After impaneling the members and excusing any excess members, the military judge shall announce that the members are impaneled.

Analysis

2017 Amendment: R.C.M. 912A 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).

Proposal #2 for impaneling members includes the following conforming proposed changes:

(a) **Rule 503(a)(1)(C)** would be amended to read as follows:
"(C) state whether the military judge is authorized to impanel alternate members."

(b) Rule 504(d) would be amended to read as follows:
"(d) Convening orders.
(1) General and special courts-martial.
(A) A convening order for a general or special court-martial shall—
(i) designate the type of court-martial; and
(ii) detail the members, if any, in accordance with R.C.M. 503(a);
(B) A convening order may provide instructions to the military judge for excusing members when, after the exercise of all challenges, the number of detailed members, to include alternate members when authorized, exceeds the number of members required under R.C.M. 501(a), as applicable."

(c) Rule 912(g) and the subsequent Discussion would be amended to read as follows:
"(g) *Peremptory challenges*.
(1) *Procedure*. Each party is initially entitled to challenge one member peremptorily. Any member so challenged shall be excused. No party may be required to exercise a peremptory challenge before the examination of members and determination of any challenges for cause has been completed. Ordinarily the trial counsel shall enter a peremptory challenge before the defense.

Discussion
Generally, no reason is necessary for a peremptory challenge. *But see Batson v. Kentucky*, 476 U.S. 79 (1986); *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). Additional peremptory challenges may be authorized by the military judge to excuse excess members. *See* R.C.M. 912A(e). In the case of additional peremptory challenges under R.C.M. 912A(e), defense counsel enters an additional peremptory challenge before the trial counsel."

(d) Rule 912B(b) and the subsequent Discussion would be amended to read as follows:
"(b) *Alternate members available*. An excused member shall be replaced with an impaneled alternate member, if an alternate member is available in accordance with the instructions of the convening authority, unless, in the case of an enlisted accused, the use of such member would be inconsistent with the forum composition established under R.C.M. 903.

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."

Rule 912B. Excusal and replacement of members after impanelment

(a) *In general*. A member who has been excused after impanelment shall be replaced in accordance with the regulations prescribed by the Secretary concerned. Alternate members excused after impanelment shall not be replaced.

(b) *Alternate members not available*.

(1) *Detailing of new members not required*. In a general court-martial in which a sentence of death may not be adjudged, if, after impanelment, a court-martial member is excused and alternate members are not available, the court-martial may proceed if—

(A) There are at least six members; and

(B) In the case of an enlisted accused, the remaining panel composition is consistent with the forum established under R.C.M. 903.

(2) *Detailing of new members required*. In all cases other than those described in paragraph (1), if an impaneled member is excused and no alternate member is available to replace the excused member, the court-martial may not proceed until the convening authority details sufficient new members.

Discussion

See R.C.M. 901.

Analysis

2017 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).

Proposal #3—Rule 912A. Impaneling members and alternate members

(a) *In general*. After challenges for cause and peremptory challenges are exercised, the military judge of a general or special court-martial with members shall impanel the members, and, if authorized by the convening authority, alternate members, in accordance with the following numerical requirements:

(1) *Capital cases*. In a general court-martial in which the charges were referred with a special instruction that the case be tried as a capital case, the number of members impaneled, subject to paragraph (4) of this subsection, shall be twelve.

(2) *General courts-martial*. In a general court-martial other than as described in paragraph (1) of this subsection, the number of members impaneled, subject to paragraph (4) of this subsection, shall be eight.

(3) *Special courts-martial*. In a special court-martial, the number of members impaneled, subject to paragraph (4) of this subsection, shall be four.

(4) *Alternate members*. In a court-martial in which the convening authority authorizes alternate members, the number of members impaneled shall be the number of members required under paragraphs (1), (2), or (3) of this subsection, as applicable, plus the number of alternate members specified by the convening authority. The military judge shall designate which of the impaneled members are alternate members in accordance with instructions of the convening authority.

(b) *Enlisted accused*. In the case of an enlisted accused, the members shall be impaneled under subsection (a) of this rule in such numbers and proportion that—

(1) If the accused elected to be tried by a court-martial composed of at least one-third enlisted members, the membership of the panel includes at least one-third enlisted members;

and

(2) If the accused elected to be tried by a court-martial composed of all officer members, the membership of the panel includes all officer members.

(c) *Number of members detailed insufficient*. If, after the exercise of all challenges, the number of detailed members remaining is fewer than the number of members required for the court-martial under subsections (a) and (b) of this rule, the convening authority shall detail additional members under R.C.M. 503.

(d) *Excess members following the exercise of all challenges*. If the number of members remaining after the exercise of all challenges is greater than the number of members required for impanelment of the court-martial under subsections (a) and (b) of this rule, the military judge shall impanel members, and excuse the excess members, in accordance with instructions provided by the convening authority, if any.

(e) *Additional peremptory challenges*. If the convening authority does not provide instructions for excusing excess members under subsection (d), the military judge shall issue additional peremptory challenges to both parties. The parties shall alternate the exercise of such additional peremptory challenges until such time as the numerical requirements of subsection (a) are met. Ordinarily the defense counsel shall enter any additional peremptory challenge before trial counsel.

Discussion

Generally, no reason is necessary for exercising an additional peremptory challenge. *But see Batson v. Kentucky*, 476 U.S. 79 (1986); 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).

(f) *Announcement*. After impaneling the members and excusing any excess members, the military judge shall announce that the members are impaneled.

Analysis

2017 Amendment: R.C.M. 912A 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).

Proposal #3 for impaneling members includes the following conforming proposed changes:

(a) Rule 503(a)(1)(C) would be amended to read as follows:

"(C) state whether the military judge is authorized to impanel alternate members."

(b) Rule 504(d) would be amended to read as follows:

"(d) *Convening orders*.

(1) General and special courts-martial.

(A) A convening order for a general or special court-martial shall—

(i) designate the type of court-martial; and

(ii) detail the members, if any, in accordance with R.C.M. 503(a);

(B) A convening order may provide instructions to the military judge for excusing members when, after the exercise of all challenges, the number of detailed members, to

include alternate members when authorized, exceeds the number of members required under R.C.M. 501(a), as applicable."

(c) Rule 912(g) and the subsequent Discussion would be amended to read as follows:
"(g) *Peremptory challenges.*

(1) *Procedure*. Each party is initially entitled to challenge one member peremptorily. Any member so challenged shall be excused. No party may be required to exercise a peremptory challenge before the examination of members and determination of any challenges for cause has been completed. Ordinarily the trial counsel shall enter a peremptory challenge before the defense.

Discussion

Generally, no reason is necessary for a peremptory challenge. *But see Batson v. Kentucky*, 476 U.S. 79 (1986); *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). Additional peremptory challenges may be authorized by the military judge to excuse excess members. *See* R.C.M. 912A(e). In the case of additional peremptory challenges under R.C.M. 912A(e), defense counsel enters an additional peremptory challenge before the trial counsel."

(**d) Rule 912B(b) and the subsequent Discussion** would be amended to read as follows:
"(b) Alternate members available. An excused member shall be replaced with an impaneled alternate member, if an alternate member is available in accordance with the instructions of the convening authority, unless, in the case of an enlisted accused, the use of such member would be inconsistent with the forum composition established under R.C.M. 903.

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."

Rule 912B. Excusal and replacement of members after impanelment

(a) *In general*. A member who has been excused after impanelment shall be replaced in accordance with the regulations prescribed by the Secretary concerned. Alternate members excused after impanelment shall not be replaced.

(b) *Alternate members not available*.

(1) Detailing of new members not required. In a general court-martial in which a sentence of death may not be adjudged, if, after impanelment, a court-martial member is excused and alternate members are not available, the court-martial may proceed if—

(A) There are at least six members; and

(B) In the case of an enlisted accused, the remaining panel composition is consistent with the forum established under R.C.M. 903.

(2) *Detailing of new members required*. In all cases other than those described in paragraph (1), if an impaneled member is excused and no alternate member is available to replace the excused member, the court-martial may not proceed until the convening authority details sufficient new members.

Discussion

See R.C.M. 901.

Analysis
2017 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).

Proposal #4—Rule 912A. Impaneling members and alternate members
(a) *In general.* After challenges for cause and peremptory challenges are exercised, the military judge of a general or special court-martial with members shall impanel the members, and, if authorized by the convening authority, alternate members, in accordance with the following numerical requirements:

(1) *Capital cases.* In a general court-martial in which the charges were referred with a special instruction that the case be tried as a capital case, the number of members impaneled, subject to paragraph (4) of this subsection, shall be twelve.

(2) *General courts-martial.* In a general court-martial other than as described in paragraph (1) of this subsection, the number of members impaneled, subject to paragraph (4) of this subsection, shall be eight.

(3) *Special courts-martial.* In a special court-martial, the number of members impaneled, subject to paragraph (4) of this subsection, shall be four.

(4) *Alternate members.* A convening authority may authorize the military judge to impanel alternate members. When authorized by the convening authority, the military judge shall designate which of the impaneled members are alternate members in accordance with these rules and consistent with the instructions of the convening authority.

(A) If the convening authority authorizes the military judge to impanel a specific number of alternate members, the number of members impaneled shall be the number of members required under paragraphs (1), (2), or (3) of this subsection, as applicable, plus the number of alternate members specified by the convening authority. The military judge shall not impanel the court-martial until the specified number of alternate members have been identified. New members may be detailed in order to impanel the specified number of alternate members.

(B) If the convening authority does not authorize the military judge to impanel a specific number of alternate members, and instead authorizes the military judge to impanel alternate members only if, after the exercise of all challenges, excess members remain, the number of members impaneled shall be the number of members required under paragraphs (1), (2), or (3) of this rule and no more than three alternate members. New members shall not be detailed in order to impanel alternate members.

Discussion
See Article 29(c); R.C.M. 503(a)(1); and subsection (d) of this rule.

(b) *Enlisted accused.* In the case of an enlisted accused, the members shall be impaneled under subsection (a) of this rule in such numbers and proportion that—

(1) If the accused elected to be tried by a court-martial composed of at least one-third enlisted members, the membership of the panel includes at least one-third enlisted members; and

(2) If the accused elected to be tried by a court-martial composed of all officer members, the membership of the panel includes all officer members.

(c) *Number of members detailed insufficient.* If, after the exercise of all challenges, the number of detailed members remaining is fewer than the number of members required for the court-martial under subsections (a) and (b) of this rule, the convening authority shall detail new members under R.C.M. 503.
(d) *Excess members following the exercise of all challenges.* The Secretary concerned shall prescribe uniform regulations, setting forth procedures consistent with R.C.M. 903 for impanelment of members by the military judge when the number of members remaining after the exercise of all challenges is greater than the number of members required for the court-martial under subsections (a) and (b) of this rule. In accordance with the regulations prescribed by the Secretary concerned, the military judge shall—

(1) identify for impanelment the number of members required under subsections (a) and (b) of this rule and, if authorized by the convening authority, alternate members; and

(2) excuse any remaining members.

(e) *Announcement.* After identifying the members to be impaneled in accordance with this rule, and after excusing any excess members, the military judge shall announce that the members are impaneled.

Analysis

2017 Amendment: R.C.M. 912A 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).

Rule 912B. Excusal and replacement of members after impanelment

(a) *In general.* A member who has been excused after impanelment shall be replaced in accordance with the regulations prescribed by the Secretary concerned. Alternate members excused after impanelment shall not be replaced.
(b) *Alternate members not available.*

(1) *Detailing of new members not required.* In a general court-martial in which a sentence of death may not be adjudged, if, after impanelment, a court-martial member is excused and alternate members are not available, the court-martial may proceed if—

(A) There are at least six members; and

(B) In the case of an enlisted accused, the remaining panel composition is consistent with the forum established under R.C.M. 903.

(2) *Detailing of new members required.* In all cases other than those described in paragraph (1), if an impaneled member is excused and no alternate member is available to replace the excused member, the court-martial may not proceed until the convening authority details sufficient new members.

Discussion

See R.C.M. 901.

Analysis

2017 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.

[End of multiple proposals for revising Rule 912A]

Rule 913. Presentation of the case on the merits

(a) *Preliminary instructions*. The military judge may give such preliminary instructions as may be appropriate. If mixed pleas have been entered, the military judge should ordinarily defer informing the members of the offenses to which the accused pleaded guilty until after the findings on the remaining contested offenses have been entered.

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.

(b) *Opening statements*. Each party may make one opening statement to the court-martial before presentation of evidence has begun. The defense may elect to make its statement after the prosecution has rested, before the presentation of evidence for the defense. The military judge may, as a matter of discretion, permit the parties to address the court-martial at other times.

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.

(c) *Presentation of evidence.* Each party shall have full opportunity to present evidence.

(1) *Order of presentation.* Ordinarily the following sequence shall be followed:

(A) Presentation of evidence for the prosecution;

(B) Presentation of evidence for the defense;

(C) Presentation of prosecution evidence in rebuttal;

(D) Presentation of defense evidence in surrebuttal;

(E) Additional rebuttal evidence in the discretion of the military judge; and

(F) Presentation of evidence requested by the military judge or members

Discussion

See R.C.M. 801(a) and Mil. R. Evid. 611 concerning control by the military judge over the order of proceedings.

(2) *Taking testimony.* The testimony of witnesses shall be taken orally in open session, unless otherwise provided in this Manual.

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.

(3) *Views and inspections.* The military judge may, as a matter of discretion, permit the court-martial to view or inspect premises or a place or an article or object. Such a view or inspection shall take place only in the presence of all parties, the members (if any), and the military judge. A person familiar with the scene may be designated by the military judge to escort the court-martial. Such person shall perform the duties of escort under oath. The escort shall not testify, but may point out particular features prescribed by the military judge. Any statement made at the view or inspection by the escort, a party, the military judge, or any member shall be made part of the record.

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.

(4) Evidence subject to exclusion. When offered evidence would be subject to exclusion upon objection, the military judge may, as a matter of discretion, bring the matter to the attention of the parties and may, in the interest of justice, exclude the evidence without an objection by a party.

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.

(5) Reopening case. The military judge may, as a matter of discretion, permit a party to reopen its case after it has rested.

Analysis

This rule is taken from Rule 913 of the MCM (2016 edition) with the following amendments.

2017 Amendment: The Discussion to R.C.M. 913(c)(2) is amended by striking the reference to "1103(b)(2)(C), (c)" and replacing it with "1112".

The Discussion to R.C.M. 913(c)(3) is amended by deleting the first sentence.

Rule 914. Production of statements of witnesses

(a) *Motion for production.* After a witness other than the accused has testified on direct examination, the military judge, on motion of a party who did not call the witness, shall order the party who called the witness to produce, for examination and use by the moving party, any statement of the witness that relates to the subject matter concerning which the witness has testified, and that is:

(1) In the case of a witness called by the trial counsel, in the possession of the United States; or

(2) In the case of a witness called by the defense, in the possession of the accused or defense counsel.

Discussion

See also R.C.M. 701 (Discovery).

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.

(b) *Production of entire statement.* If the entire contents of the statement relate to the subject matter concerning which the witness has testified, the military judge shall order that the statement be delivered to the moving party.

(c) *Production of excised statement.* If the party who called the witness claims that the statement contains matter that does not relate to the subject matter concerning which the witness has testified, the military judge shall order that it be delivered to the military judge. Upon inspection, the military judge shall excise the portions of the statement that do not relate to the subject matter concerning which the witness has testified, and shall order that the statement, with such material excised, be delivered to the moving party. Any portion of a statement that is withheld from an accused over objection shall be preserved by the trial counsel, and, in the event of a conviction, shall be made available to the reviewing authorities for the purpose of determining the correctness of the decision to excise the portion of the statement.

(d) *Recess for examination of the statement.* Upon delivery of the statement to the moving party, the military judge may recess the trial for the examination of the statement and preparation for its use in the trial.

(e) *Remedy for failure to produce statement.* If the other party elects not to comply with an order to deliver a statement to the moving party, the military judge shall order that the testimony of the witness be disregarded by the trier of fact and that the trial proceed, or, if it is the trial counsel who elects not to comply, shall declare a mistrial if required in the interest of justice.

(f) *Definition.* As used in this rule, a "statement" of a witness means:

(1) A written statement made by the witness that is signed or otherwise adopted or approved by the witness;

(2) A substantially verbatim recital of an oral statement made by the witness that is recorded contemporaneously with the making of the oral statement and contained in a recording or a transcription thereof; or

(3) A statement, however taken or recorded, or a transcription thereof, made by the witness to a federal grand jury.

Analysis

This rule is taken from Rule 914 of MCM (2016 edition) without substantive amendment.

914A. Use of remote live testimony of a child

(a) *General procedures.* A child shall be allowed to testify out of the presence of the accused after the military judge has determined that the requirements of Mil. R. Evid. 611(d)(3) have been satisfied. The procedure used to take such testimony will be determined by the military

judge based upon the exigencies of the situation. At a minimum, the following procedures shall be observed:

(1) The witness shall testify from a remote location outside the courtroom;

(2) Attendance at the remote location shall be limited to the child, counsel for each side (not including an accused pro se), equipment operators, and other persons, such as an attendant for the child, whose presence is deemed necessary by the military judge;

(3) Sufficient monitors shall be placed in the courtroom to allow viewing and hearing of the testimony by the military judge, the accused, the members, the court reporter, and the public;

(4) The voice of the military judge shall be transmitted into the remote location to allow control of the proceedings; and

(5) The accused shall be permitted private, contemporaneous communication with his counsel.

(b) *Definition.* As used in this rule, "remote live testimony" includes, but is not limited to, testimony by videoteleconference, closed circuit television, or similar technology.

(c) *Prohibitions.* The procedures described in this rule shall not be used where the accused elects to absent himself from the courtroom pursuant to R.C.M. 804(c)(1).

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.

Analysis

This rule is taken from Rule 914A of the MCM (2016 edition) without amendment.

Rule 914B. Use of remote testimony

(a) *General procedures.* The military judge shall determine the procedures used to take testimony via remote means. At a minimum, all parties shall be able to hear each other, those in attendance at the remote site shall be identified, and the accused shall be permitted private, contemporaneous communication with his counsel.

(b) *Definition.* As used in this rule, testimony via "remote means" includes, but is not limited to, testimony by videoteleconference, closed circuit television, telephone, or similar technology.

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).

Analysis

This rule is taken from Rule 914B of MCM (2016 edition) without amendment.

Rule 915. Mistrial

(a) *In general*. The military judge may, as a matter of discretion, declare a mistrial when such action is manifestly necessary in the interest of justice because of circumstances arising during the proceedings which cast substantial doubt upon the fairness of the proceedings. A mistrial may be declared as to some or all charges, and as to the entire proceedings or as to only the proceedings after findings.

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, which can be cured; for example, when the referral is jurisdictionally defective. See also R.C.M. 905(g) concerning the effect of rulings in one proceeding on later proceedings.

(b) *Procedure.* On motion for a mistrial or when it otherwise appears that grounds for a mistrial may exist, the military judge shall inquire into the views of the parties on the matter and then decide the matter as an interlocutory question.

(c) Effect of declaration of mistrial.

(1) *Withdrawal of charges.* A declaration of a mistrial shall have the effect of withdrawing the affected charges and specifications from the court-martial.

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.

(2) *Further proceedings.* A declaration of a mistrial shall not prevent trial by another court-martial on the affected charges and specifications except when the mistrial was declared after jeopardy attached and before findings, and the declaration was:

(A) An abuse of discretion and without the consent of the defense; or

(B) The direct result of intentional prosecutorial misconduct designed to necessitate a mistrial.

Analysis

This rule is taken from Rule 915 of the MCM (2016 edition) with the following amendments. *2017 Amendment*: The Discussion after R.C.M. 915(b) is deleted and reflects the elimination of special courts-martial without a military judge. *See* Section 5184 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).

Rule 916. Defenses

(a) *In general.* As used in this rule, "defenses" includes any special defense which, although not denying that the accused committed the objective acts constituting the offense charged, denies, wholly or partially, criminal responsibility for those acts.

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.

(b) *Burden of proof.*

(1) *General rule.* Except as listed in paragraphs (2) and (3) of this rule, the prosecution shall have the burden of proving beyond a reasonable doubt that the defense did not exist.

(2) *Lack of mental responsibility.* The accused has the burden of proving the defense of lack of mental responsibility by clear and convincing evidence.

(3) *Mistake of fact as to age.* In the defense of mistake of fact as to age as described in Article 120b(d)(2) in a prosecution under Article 120b(b) (sexual assault of a child) or Article 120b(c) (sexual abuse of a child), the accused has the burden of proving mistake of fact as to age by a preponderance of the evidence.

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* subsection (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.

(c) *Justification.* A death, injury, or other act caused or done in the proper performance of a legal duty is justified and not unlawful.

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.

(d) *Obedience to orders.* It is a defense to any offense that the accused was acting pursuant to orders unless the accused knew the orders to be unlawful or a person of ordinary sense and understanding would have known the orders to be unlawful.

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* subsection (c) of this rule. 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.

(e) *Self-defense.*

(1) *Homicide or assault cases involving deadly force.* It is a defense to a homicide, assault involving deadly force, or battery involving deadly force that the accused:

(A) Apprehended, on reasonable grounds, that death or grievous bodily harm was about to be inflicted wrongfully on the accused; and

(B) Believed that the force the accused used was necessary for protection against death or grievous bodily harm.

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.

(2) *Certain aggravated assault cases.* It is a defense to assault with a dangerous weapon or means likely to produce death or grievous bodily harm that the accused:

(A) Apprehended, on reasonable grounds, that bodily harm was about to be inflicted wrongfully on the accused; and

(B) In order to deter the assailant, offered but did not actually apply or attempt to apply such means or force as would be likely to cause death or grievous bodily harm.

Discussion

The principles in the discussion of paragraph (e)(1) of this rule concerning reasonableness of the apprehension of bodily harm apply here.

If, as a result of the accused's offer of a means or force likely to produce grievous bodily harm, the victim was killed or injured unintentionally by the accused, this aspect of self-defense may operate in conjunction with the defense of accident (see paragraph (f) of this rule) to excuse the accused's acts. The death or injury must have been an unintended and unexpected result of the accused's exercise of the right of self-defense.

(3) *Other assaults.* It is a defense to any assault punishable under Article 89, 91, or 128 and not listed in subparagraphs (e)(1) or (2) of this rule that the accused:

(A) Apprehended, upon reasonable grounds, that bodily harm was about to be inflicted wrongfully on the accused; and

(B) Believed that the force that accused used was necessary for protection against bodily harm, provided that the force used by the accused was less than force reasonably likely to produce death or grievous bodily harm.

Discussion

The principles in the discussion under subparagraph (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.

(4) *Loss of right to self-defense.* The right to self-defense is lost and the defenses described in paragraphs (e)(1), (2), and (3) of this rule shall not apply if the accused was an aggressor, engaged in mutual combat, or provoked the attack which gave rise to the apprehension, unless the accused had withdrawn in good faith after the aggression, combat, or provocation and before the offense alleged occurred.

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.

(5) *Defense of another.* The principles of self-defense under subparagraphs (e)(1) through (4) of this rule apply to defense of another. It is a defense to homicide, attempted homicide, assault with intent to kill, or any assault under Article 89, 91, or 128 that the accused acted in defense of another, provided that the accused may not use more force than the person defended was lawfully entitled to use under the circumstances.

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.

(f) *Accident.* A death, injury, or other event which occurs as the unintentional and unexpected result of doing a lawful act in a lawful manner is an accident and excusable.

Discussion

The defense of accident is not available when the act which caused the death, injury, or event was a negligent act.

(g) *Entrapment.* It is a defense that the criminal design or suggestion to commit the offense originated in the Government and the accused had no predisposition to commit the offense.

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).

(h) *Coercion or duress.* It is a defense to any offense except killing an innocent person that the accused's participation in the offense was caused by a reasonable apprehension that the accused or another innocent person would be immediately killed or would immediately suffer serious bodily injury if the accused did not commit the act. The apprehension must reasonably continue throughout the commission of the act. If the accused has any reasonable opportunity to avoid committing the act without subjecting the accused or another innocent person to the harm threatened, this defense shall not apply.

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.

(i) *Inability.* It is a defense to refusal or failure to perform a duty that the accused was, through no fault of the accused, not physically or financially able to perform the duty.

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.

(j) *Ignorance or mistake of fact.*

(1) *Generally.* Except as otherwise provided in this subsection, it is a defense to an offense that the accused held, as a result of ignorance or mistake, an incorrect belief of the true circumstances such that, if the circumstances were as the accused believed them, the accused would not be guilty of the offense. If the ignorance or mistake goes to an element requiring premeditation, specific intent, willfulness, or knowledge of a particular fact, the ignorance or mistake need only have existed in the mind of the accused. If the ignorance or mistake goes to any other element requiring only general intent or knowledge, the ignorance or mistake must have existed in the mind of the accused and must have been reasonable under all the circumstances. However, if the accused's knowledge or intent is immaterial as to an element, then ignorance or mistake is not a defense.

(2) *Child Sexual Offenses.* It is a defense to a prosecution under Article 120b(b), sexual assault of a child, and Article 120b(c), sexual abuse of a child, that, at the time of the offense, the child was at least 12 years of age, and the accused reasonably believed that the child had attained the age of 16 years. The accused must prove this defense by a preponderance of the evidence.

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*, for example, 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' 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 paragraph (l)(1) of this rule concerning ignorance or mistake of law.

(k) *Lack of mental responsibility.*

(1) *Lack of mental responsibility.* It is an affirmative defense to any offense that, at the time of the commission of the acts constituting the offense, the accused, as a result of a severe mental disease or defect, was unable to appreciate the nature and quality or the wrongfulness of his or her acts. Mental disease or defect does not otherwise constitute a defense.

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.

(2) *Partial mental responsibility.* A mental condition not amounting to a lack of mental responsibility under paragraph (k)(1) of this rule is not an affirmative defense.

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).

(3) *Procedure.*

(A) *Presumption.* The accused is presumed to have been mentally responsible at the time of the alleged offense. This presumption continues until the accused establishes, by clear and convincing evidence, that he or she was not mentally responsible at the time of the alleged offense.

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 subsection (b) of this rule.

(B) *Inquiry.* If a question is raised concerning the mental responsibility of the accused, the military judge shall rule finally whether to direct an inquiry under R.C.M. 706.

Discussion

If an inquiry is directed, priority should be given to it.

(C) *Determination.* The issue of mental responsibility shall not be considered as an interlocutory question.

(l) *Not defenses generally.*

(1) *Ignorance or mistake of law.* Ignorance or mistake of law, including general orders or regulations, ordinarily is not a defense.

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.

(2) *Voluntary intoxication.* Voluntary intoxication, whether caused by alcohol or drugs, is not a defense. However, evidence of any degree of voluntary intoxication may be introduced for the purpose of raising a reasonable doubt as to the existence of actual knowledge, specific intent, willfulness, or a premeditated design to kill, if actual knowledge, specific intent, willfulness, or premeditated design to kill is an element of the offense.

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

Analysis

This rule is taken from Rule 916 of MCM (2016 edition) with the following amendments. *2017 Amendment*: R.C.M. 916(k)(3)(B) and the discussion following it are amended and reflect the elimination of special courts-martial without a military judge. *See* Section 5184 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).

Rule 917. Motion for a finding of not guilty

(a) *In general.*

(1) In any case, the military judge, on motion by the accused or *sua sponte*, shall enter a finding of not guilty of one or more offenses charged after the evidence on either side is closed if the evidence is insufficient to sustain a conviction of the offense affected.

(2) In a case with members, the military judge, on motion by the accused or *sua sponte*, shall enter a finding of not guilty of one or more offenses charged after the members return with a finding of guilty if the evidence is legally insufficient to sustain a conviction for the offense affected.

Discussion

See R.C.M. 908 on appeals by the United States when the military judge sets aside a panel's finding of guilty.

(b) *Form of motion.* The motion shall specifically indicate wherein the evidence is insufficient.

(c) *Procedure.* Before ruling on a motion for a finding of not guilty, whether made by counsel or *sua sponte*, the military judge shall give each party an opportunity to be heard on the matter.

Discussion

For a motion made under paragraph (a)(1) of this rule, the military judge ordinarily should permit the trial counsel to reopen the case as to the insufficiency specified in the motion. See R.C.M. 1104(b)(1)(B) regarding post-trial motions to set aside a finding of guilty.

(d) *Standard.* A motion for a finding of not guilty shall be granted only in the absence of some evidence which, together with all reasonable inferences and applicable presumptions, could reasonably tend to establish every essential element of an offense charged. The evidence shall be viewed in the light most favorable to the prosecution, without an evaluation of the credibility of witnesses.

(e) *Motion as to greater offense.* A motion for a finding of not guilty may be granted as to part of a specification and, if appropriate, the corresponding charge, as long as a lesser offense charged is alleged in the portion of the specification as to which the motion is not granted. In such cases, the military judge shall announce that a finding of not guilty has been granted as to specified language in the specification and, if appropriate, corresponding charge. In cases before members, the military judge shall instruct the members accordingly, so that any findings later announced will not be inconsistent with the granting of the motion.

(f) *Effect of ruling*. Except as provided in R.C.M. 908(a), a ruling granting a motion for a

finding of not guilty is final when announced and may not be reconsidered. Such a ruling is a finding of not guilty of the affected specification, or affected portion thereof, and, when appropriate, of the corresponding charge. A ruling denying a motion for a finding of not guilty may be reconsidered at any time before entry of judgment.

(g) *Effect of denial on review.* If all the evidence admitted before findings, regardless by whom offered, is sufficient to sustain findings of guilty, the findings need not be set aside upon review solely because the motion for finding of not guilty should have been granted upon the state of the evidence when it was made.

Analysis

This rule is taken from Rule 917 of the MCM (2016 edition) with the following amendments.

2017 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 to R.C.M. 917(a) is added 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.

The Discussion of R.C.M. 917(c) is amended and reflects the elimination of special courts-martial without a military judge. *See* Section 5184 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. 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.

Rule 918. Finding

(a) *General findings.* The general findings of a court-martial state whether the accused is guilty of each charge and specification. If two or more accused are tried together, separate findings as to each shall be made.

(1) *As to a specification.* General findings as to a specification may be:

(A) guilty;

(B) not guilty of an offense as charged, but guilty of a named lesser included offense;

(C) guilty with exceptions, with or without substitutions, not guilty of the exceptions, but guilty of the substitutions, if any;

(D) not guilty only by reason of lack of mental responsibility; or

(E) not guilty.

Exceptions and substitutions may not be used to substantially change the nature of the offense or to increase the seriousness of the offense or the maximum punishment for it.

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); 907(b)(3)(B).

(2) *As to a charge*. General findings as to a charge may be:

(A) guilty;

(B) not guilty, but guilty of a violation of Article _____;

(C) not guilty only by reason of lack of mental responsibility; or

(D) not guilty.

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.

(b) *Special findings*. In a trial by court-martial composed of military judge alone, the military judge shall make special findings upon request by any party. Special findings may be requested only as to matters of fact reasonably in issue as to an offense and need be made only as to offenses of which the accused was found guilty. Special findings may be requested at any time before general findings are announced. Only one set of special findings may be requested by a party in a case. If the request is for findings on specific matters, the military judge may require that the request be written. Special findings may be entered orally on the record at the court-martial or in writing during or after the court-martial, but in any event shall be made before entry of judgment and included in the record of trial.

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(d)(4); 311(d)(4); 321(f) concerning other findings to be made by the military judge.

Members may not make special findings

(c) *Basis of findings.* Findings may be based on direct or circumstantial evidence. Only matters properly before the court-martial on the merits of the case may be considered. A finding of guilty of any offense may be reached only when the factfinder is satisfied that guilt has been proved beyond a reasonable doubt

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.

Analysis

This rule is taken from Rule 918 of the MCM (2016 edition) with the following amendments. *2017 Amendment*: The Discussion after 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.

R.C.M. 918(b) is amended and requires the entry of special findings prior to the entry of judgment.

Rule 919. Argument by counsel on findings

(a) *In general*. After the closing of evidence, trial counsel shall be permitted to open the argument. The defense counsel shall be permitted to reply. Trial counsel shall then be permitted to reply in rebuttal.

(b) *Contents*. Arguments may properly include reasonable comment on the evidence in the case, including inferences to be drawn therefrom, in support of a party's theory of the case.

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 unrebutted 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.

(c) *Forfeiture of objection to improper argument*. Failure to object to improper argument before the military judge begins to instruct the members on findings shall constitute forfeiture of the objection.

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.

Analysis

This rule is taken from Rule 919 of the MCM (2016 edition) with the following amendments. *2017 Amendment*: R.C.M. 919(c) is amended and addresses the consequences of a failure to object to error in argument.

Rule 920. Instructions on findings

(a) *In general*. The military judge shall give the members appropriate instructions on findings.

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.

(b) *When given*. Instructions on findings shall be given before or after arguments by counsel, or at both times, and before the members close to deliberate on findings, but the military judge may, upon request of the members, any party, or *sua sponte*, give additional instructions at a later time.

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

(c) *Request for instructions*. At the close of the evidence or at such other time as the military judge may permit, any party may request that the military judge instruct the members on the law as set forth in the request. The military judge may require the requested instruction to be written. Each party shall be given the opportunity to be heard on any proposed instruction on findings before it is given. The military judge shall inform the parties of the proposed action on such requests before their closing arguments.

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.

(d) *How given*. Instructions on findings shall be given orally on the record in the presence of all parties and the members. Written copies of the instructions, or, unless a party objects, portions of them, may also be given to the members for their use during deliberations.

Discussion

A copy of any written instructions delivered to the members should be marked as an appellate exhibit.

(e) Required instructions. Instructions on findings shall include:

(1) A description of the elements of each offense charged, unless findings on such offenses are unnecessary because they have been entered pursuant to a plea of guilty;

(2) A description of the elements of each lesser included offense in issue, unless trial of a lesser included offense is barred by the statute of limitations (Article 43) and the accused refuses to waive the bar;

(3) A description of any special defense under R.C.M. 916 in issue;

(4) A direction that only matters properly before the court-martial may be considered;

(5) A charge that—

(A) The accused must be presumed to be innocent until the accused's guilt is established by legal and competent evidence beyond reasonable doubt;

(B) In the case being considered, if there is a reasonable doubt as to the guilt of the accused, the doubt must be resolved in favor of the accused and the accused must be acquitted;

(C) If, when a lesser included offense is in issue, there is a reasonable doubt as to the degree of guilt of the accused, the finding must be in a lower degree as to which there is not reasonable doubt; and

(D) The burden of proof to establish the guilt of the accused is upon the Government. [When the issue of lack of mental responsibility is raised, add: The burden of proving the defense of lack of mental responsibility by clear and convincing evidence is upon the accused. When the issue of mistake of fact under R.C.M. 916(j)(2) is raised, add: The accused has the burden of proving the defense of mistake of fact as to consent or age by a preponderance of the evidence.]

(6) Directions on the procedures under R.C.M. 921 for deliberations and voting; and

(7) Such other explanations, descriptions, or directions as may be necessary and which are properly requested by a party or which the military judge determines, *sua sponte*, should be given.

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 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 of 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

(f) *Forfeiture and objections.* Failure to object to an instruction or to omission of an instruction before the members close to deliberate forfeits the objection. The parties shall be given the opportunity to be heard on any objection to or request for instructions outside the presence of the members. When a party objects to an instruction, the military judge may require the party objecting to specify of what respect the instructions given were improper.

Analysis
2017 Amendment: This rule is taken from Rule 920 of the MCM (2016 edition) with the following amendments.

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.

Rule 921. Deliberations and voting on findings
(a) *In general*. After the military judge instructs the members on findings, the members shall deliberate and vote in a closed session. Only the members shall be present during deliberations and voting. Superiority in rank shall not be used in any manner in an attempt to control the independence of members in the exercise of their judgment.
(b) *Deliberations*. Deliberations properly include full and free discussion of the merits of the case. Unless otherwise directed by the military judge, members may take with them in deliberations their notes, if any, any exhibits admitted in evidence, and any written instructions. Members may request that the court-martial be reopened and that portions of the record be read to them or additional evidence introduced. The military judge may, in the exercise of discretion, grant such request.
(c) *Voting*.

(1) *Secret ballot.* Voting on the findings for each charge and specification shall be by secret written ballot. All members present shall vote.

(2) *Numbers of votes required to convict.* A finding of guilty results only if at least three-fourths of the members present vote for a finding of guilty.

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.

(3) *Acquittal.* If fewer than three-fourths of the members present vote for a finding of guilty, a finding of not guilty has resulted as to the charge or specification on which the vote was taken.

(4) *Not guilty only by reason of lack of mental responsibility.* When the defense of lack of mental responsibility is in issue under R.C.M. 916(k)(1), the members shall first vote on whether the prosecution has proven the elements of the offense beyond a reasonable doubt. If at least three-fourths of the members present vote for a finding of guilty, then the members shall vote on whether the accused has proven lack of mental responsibility. If a majority of the members

present concur that the accused has proven lack of mental responsibility by clear and convincing evidence, a finding of not guilty only by reason of lack of mental responsibility results. If the vote on lack of mental responsibility does not result in a finding of not guilty only by reason of lack of mental responsibility, then the defense of lack of mental responsibility has been rejected and the finding of guilty stands.

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.

(5) *Included offenses*. Members shall not vote on a lesser included offense unless a finding of not guilty of the offense charged has been reached. If a finding of not guilty of an offense charged has been reached the members shall vote on each included offense on which they have been instructed, in order of severity beginning with the most severe. The members shall continue the vote on each included offense on which they have been instructed until a finding of guilty results or findings of not guilty have been reached as to each such offense.

(6) *Procedure for voting*.

(A) *Order.* Each specification shall be voted on separately before the corresponding charge. The order of voting on several specifications under a charge or on several charges shall be determined by the president unless a majority of the members object.

(B) *Counting votes.* The junior member shall collect the ballots and count the votes. The president shall check the count and inform the other members of the result.

Discussion

Once findings have been reached, they may be reconsidered only in accordance with R.C.M. 924.

(d) *Action after findings are reached*. After the members have reached findings on each charge and specification before them, the court-martial shall be opened and the president shall inform the military judge that findings have been reached. The military judge may, in the presence of the parties, examine any writing which the president intends to read to announce the findings and may assist the members in putting the findings in proper form. Neither that writing nor any oral or written clarification or discussion concerning it shall constitute announcement of the findings.

Discussion

Ordinarily a findings worksheet should be provided to the members as an aid to putting the findings in proper form. See Appendix 10 for a format for findings. 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.

Analysis

This rule is taken from Rule 921 of the MCM (2016 edition) with the following amendments. *2017 Amendment*: R.C.M. 921(c) 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), concerning voting on findings in a non-capital case.

Rule 922. Announcement of findings

(a) *In general*. Findings shall be announced in the presence of all parties promptly after they have been determined.

Discussion

See Appendix 10. A finding of an offense about which no instructions were given is not proper.

(b) *Findings by members.* The president shall announce the findings by the members. In a capital case, if a finding of guilty is unanimous with respect to a capital offense, the president shall so state.

Discussion

If the findings announced are ambiguous, the military judge should seek clarification. *See also* R.C.M. 924.

(c) *Findings by military judge*. The military judge shall announce the findings when trial is by military judge alone or in accordance with R.C.M. 910(g).

(d) *Erroneous announcement.* If an error was made in the announcement of the findings of the court-martial, the error may be corrected by a new announcement in accordance with this rule. The error must be discovered and the new announcement made before the final adjournment of the court-martial in the case.

Discussion

See R.C.M. 1104 concerning the action to be taken if the error in the announcement is discovered after final adjournment.

(e) *Polling prohibited*. Except as provided in Mil. R. Evid. 606, members may not be questioned about their deliberations and voting.

Analysis

This rule is taken from Rule 922 of the MCM (2016 edition) with the following amendments.

2017 Amendment: R.C.M. 922(b) is amended and conforms to changes regarding the acceptance of guilty pleas by the military judge and the announcement of findings by the members.

Rule 923. Impeachment of findings

Findings that are proper on their face may be impeached only when extraneous prejudicial information was improperly brought to the attention of a member, outside influence was improperly brought to bear upon any member, or unlawful command influence was brought to bear upon any member.

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.

Analysis

This rule is taken from Rule 923 of MCM (2016 edition) without substantive amendment.

Rule 924. Reconsideration of findings

(a) *Time for reconsideration*. Members may reconsider any finding reached by them before such finding is announced in open session.
(b) *Procedure.* Any member may propose that a finding be reconsidered. If such a proposal is made in a timely manner, the question whether to reconsider shall be determined in closed session by secret written ballot. Any finding of not guilty shall be reconsidered if a majority vote for reconsideration. Any finding of guilty shall be reconsidered if more than one-fourth of the members vote for reconsideration. Any finding of not guilty only by reason of lack of mental responsibility shall be reconsidered on the issue of the finding of guilty of the elements if more than one-fourth of the members vote for reconsideration, and on the issue of mental responsibility if a majority vote for reconsideration. If a vote to reconsider a finding succeeds, the procedures in R.C.M. 921 shall apply.

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.

(c) *Military judge sitting alone.* In trial by military judge alone, the military judge may reconsider:

(1) any finding of guilty at any time before announcement of sentence; and

(2) the issue of the finding of guilty of the elements in a finding of not guilty only by reason of lack of mental responsibility at any time before announcement of sentence or, in the case of a complete acquittal, entry of judgment.

Analysis

This rule is taken from Rule 924 of the MCM (2016 edition) with the following amendments.
2017 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 by striking "authentication of the record of trial" and inserting "entry of judgment."

Rule 1001. Presentencing procedure

(a) *In general.*

(1) *Procedure.* After findings of guilty have been announced, and the accused has had the opportunity to make a sentencing forum election under R.C.M. 1002(b), the prosecution and defense may present matters pursuant to this rule to aid the court-martial in determining an appropriate sentence. Such matters shall ordinarily be presented in the following sequence—

(A) Presentation by trial counsel of:

(i) service data relating to the accused taken from the charge sheet;

(ii) personal data relating to the accused and of the character of the accused's prior service as reflected in the personnel records of the accused;

(iii) evidence of prior convictions, military or civilian;

(iv) evidence of aggravation; and

(v) evidence of rehabilitative potential.

(B) Crime victim's right to be reasonably heard.

(C) Presentation by the defense of evidence in extenuation or mitigation or both.

(D) Rebuttal.

(E) Argument by trial counsel on sentence.

(F) Argument by defense counsel on sentence.

(G) Rebuttal arguments in the discretion of the military judge.

(2) *Adjudging sentence.* A sentence shall be adjudged in all cases without unreasonable delay.

(3) *Advice and inquiry.*

(A) *Crime victim.* At the beginning of the presentencing proceeding, the military judge shall announce that any crime victim who is present at the presentencing proceeding has the right to be reasonably heard, including the right to make a sworn statement, unsworn statement, or both. Prior to the conclusion of the presentencing proceeding, the military judge shall ensure that any such crime victim was afforded the opportunity to be reasonably heard.

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).

(B) *Accused.* The military judge shall personally inform the accused of the right to present matters in extenuation and mitigation, including the right to make a sworn or unsworn statement or to remain silent, and shall ask whether the accused chooses to exercise those rights.

(b) *Matters to be presented by the prosecution.*

(1) *Service data from the charge sheet.* Trial counsel shall inform the court-martial of the data on the charge sheet relating to the pay and service of the accused and the duration and nature of any pretrial restraint. In the discretion of the military judge, this may be done by reading the material from the charge sheet or by giving the court-martial a written statement of such matter. If the defense objects to the data as being materially inaccurate or incomplete, or containing specified objectionable matter, the military judge shall determine the issue. Objections not asserted are forfeited.

(2) *Personal data and character of prior service of the accused.* Under regulations of the Secretary concerned, trial counsel may obtain and introduce from the personnel records of the accused evidence of the accused's marital status; number of dependents, if any; and character of prior service. Such evidence includes copies of reports reflecting the past military efficiency, conduct, performance, and history of the accused and evidence of any disciplinary actions including punishments under Article 15. "Personnel records of the accused" includes any records made or maintained in accordance with departmental regulations that reflect the past military efficiency, conduct, performance, and history of the accused. If the accused objects to a particular document as inaccurate or incomplete in a specified respect, or as containing matter that is not admissible under the Military Rules of Evidence, the matter shall be determined by the military judge. Objections not asserted are forfeited.

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 subsection (b).

(3) *Evidence of prior convictions of the accused.*

(A) *In general.* The trial counsel may introduce evidence of prior military or civilian convictions of the accused. For purposes of this rule, there is a "conviction" in a court-martial

case when a sentence has been adjudged. In a civilian case, a "conviction" includes any disposition following an initial judicial determination or assumption of guilt, such as when guilt has been established by guilty plea, trial, or plea of nolo contendere, regardless of the subsequent disposition, sentencing procedure, or final judgment. A "conviction" does not include a diversion from the judicial process without a finding or admission of guilt; expunged convictions; juvenile adjudications; minor traffic violations; foreign convictions; tribal court convictions; or convictions reversed, vacated, invalidated or pardoned.

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 subsection (b)(2)of this rule 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.

(B) *Pendency of appeal.* The pendency of an appeal therefrom does not render evidence of a conviction inadmissible except that a conviction by summary court-martial may not be used for purposes of this rule until review has been completed pursuant to Article 64. Evidence of the pendency of an appeal is admissible.

(C) *Method of proof.* Previous convictions may be proved by any evidence admissible under the Military Rules of Evidence.

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 order promulgating the result of trial. *See* DD Form 493 (Extract of Military Records of Previous Convictions).

(4) *Evidence in aggravation.* The trial counsel may present evidence as to any aggravating circumstances directly relating to or resulting from the offenses of which the accused has been found guilty. Evidence in aggravation includes, but is not limited to, evidence of financial, social, psychological, and medical impact on or cost to any person or entity who was the victim of an offense committed by the accused and evidence of significant adverse impact on the mission, discipline, or efficiency of the command directly and immediately resulting from the accused's offense. In addition, evidence in aggravation may include evidence that the accused intentionally selected any victim or any property as the object of the offense because of the actual or perceived race, color, religion, national origin, ethnicity, gender, disability, or sexual orientation of any person. Except in capital cases a written or oral deposition taken in accordance with R.C.M. 702 is admissible in aggravation.

Discussion

See also R.C.M. 1004 concerning aggravating factors in capital cases.

(5) *Evidence of rehabilitative potential.* Rehabilitative potential refers to the accused's potential to be restored, through vocational, correctional, or therapeutic training or other corrective measures to a useful and constructive place in society.

(A) *In general.* The trial counsel may present, by testimony or oral deposition in accordance with R.C.M. 702(g)(1), evidence in the form of opinions concerning the accused's previous performance as a servicemember and potential for rehabilitation.

(B) *Foundation for opinion.* The witness or deponent providing opinion evidence

regarding the accused's rehabilitative potential must possess sufficient information and knowledge about the accused to offer a rationally-based opinion that is helpful to the sentencing authority. Relevant information and knowledge include, but are not limited to, information and knowledge about the accused's character, performance of duty, moral fiber, determination to be rehabilitated, and nature and severity of the offense or offenses.

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.

(C) *Bases for opinion.* An opinion regarding the accused's rehabilitative potential must be based upon relevant information and knowledge possessed by the witness or deponent, and must relate to the accused's personal circumstances. The opinion of the witness or deponent regarding the severity or nature of the accused's offense or offenses may not serve as the principal basis for an opinion of the accused's rehabilitative potential.

(D) *Scope of opinion.* An opinion offered under this rule is limited to whether the accused has rehabilitative potential and to the magnitude or quality of any such potential. A witness may not offer an opinion regarding the appropriateness of a punitive discharge or whether the accused should be returned to the accused's unit.

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 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

(E) *Cross-examination.* On cross-examination, inquiry is permitted into relevant and specific instances of conduct.

(F) *Redirect.* Notwithstanding any other provision in this rule, the scope of opinion testimony permitted on redirect may be expanded, depending upon the nature and scope of the cross-examination

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.

(c) *Crime victim's right to be reasonably heard.*

(1) *In general*. After presentation by the trial counsel, a crime victim of an offense of which the accused has been found guilty has the right to be reasonably heard at the presentencing proceeding relating to that offense. A victim who makes an unsworn statement under subsection (c)(5) is not considered a witness for the purposes of Article 42(b). If the victim exercises the right to be reasonably heard, the victim shall be called by the court-martial. The exercise of the right is independent of whether the victim testified during findings or is called to testify by the government or defense under this rule.

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.

(2) *Definitions.*

(A) *Crime victim.* For purposes of this subsection, a crime victim is an individual who has suffered direct physical, emotional, or pecuniary harm as a result of the commission of an offense of which the accused was found guilty or the crime victim's lawful representative or designee appointed by the military judge under these rules.

(B) *Victim impact.* For purposes of this subsection, victim impact includes any financial, social, psychological, or medical impact on the victim directly relating to or arising from the offense of which the accused has been found guilty.

(C) *Mitigation.* For the purposes of this subsection, mitigation includes a matter to lessen the punishment to be adjudged by the court-martial or to furnish grounds for a recommendation of clemency.

(D) *Right to be reasonably heard.*

(i) *Capital cases.* In capital cases, for purposes of this subsection, the "right to be reasonably heard" means the right to make a sworn statement.

(ii) *Non-capital cases.* In non-capital cases, for purposes of this subsection, the "right to be reasonably heard" means the right to make a sworn statement, an unsworn statement, or both.

(3) *Contents of statement.* The content of statements made under paragraphs (4) and (5) may include victim impact and matters in mitigation. The statement may not include a recommendation of a specific sentence.

(4) *Sworn statement.* The crime victim may make a sworn statement and shall be subject to cross-examination concerning it by the trial counsel and the defense counsel or examination on it by the court-martial.

(5) *Unsworn statement.*

(A) *In general.* The crime victim may make an unsworn statement and may not be cross-examined by the trial counsel or the defense counsel, or examined upon it by the court-martial. The prosecution or defense may, however, rebut any statements of fact therein. The unsworn statement may be oral, written, or both.

(B) *Procedure.* After the announcement of findings, a crime victim who elects to present an unsworn statement shall provide a written proffer of the matters that will be addressed in the statement to trial counsel and defense counsel. The military judge may waive this requirement for good cause shown. Upon good cause shown, the military judge may permit the victim's counsel, if any, to deliver all or part of the victim's unsworn statement.

Discussion

A victim's unsworn statement should not exceed what is permitted under R.C.M. 1001(c)(3). Upon objection by either party or *sua sponte*, a military judge may stop or interrupt a victim's unsworn 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 unsworn statement, a copy of the statement satisfies the requirement for a written proffer.

(C) *New factual matters in unsworn statement*. If during the presentencing proceeding a crime victim makes an unsworn statement containing factual matters not previously disclosed under subparagraph (5)(B), the military judge shall take appropriate action within the military judge's discretion.

(d) *Matter to be presented by the defense.*

(1) *In general.* The defense may present matters in rebuttal of any material presented by the prosecution and the crime victim, if any, and may present matters in extenuation and mitigation regardless whether the defense offered evidence before findings.

(A) *Matter in extenuation.* Matter in extenuation of an offense serves to explain the circumstances surrounding the commission of an offense, including those reasons for committing the offense which do not constitute a legal justification or excuse.

(B) *Matter in mitigation.* Matter in mitigation of an offense is introduced to lessen the punishment to be adjudged by the court-martial, or to furnish grounds for a recommendation of clemency. It includes the fact that nonjudicial punishment under Article 15 has been imposed for an offense growing out of the same act or omission that constitutes the offense of which the accused has been found guilty, particular acts of good conduct or bravery and evidence of the reputation or record of the accused in the service for efficiency, fidelity, subordination, temperance, courage, or any other trait that is desirable in a servicemember.

(2) *Statement by the accused.*

(A) *In general.* The accused may testify, make an unsworn statement, or both in extenuation, in mitigation, to rebut matters presented by the prosecution, or to rebut statements of fact contained in any crime victim's sworn or unsworn statement, whether or not the accused testified prior to findings. The accused may limit such testimony or statement to any one or more of the specifications of which the accused has been found guilty. The accused may make a request for a specific sentence. This subsection does not permit the filing of an affidavit of the accused.

(B) *Testimony of the accused.* The accused may give sworn oral testimony and shall be subject to cross-examination concerning it by the trial counsel or examination on it by the court-martial, or both.

(C) *Unsworn statement.* The accused may make an unsworn statement and may not be cross-examined by the trial counsel upon it or examined upon it by the court-martial. The prosecution may, however, rebut any statements of facts therein. The unsworn statement may be oral, written, or both, and may be made by the accused, by counsel, or both.

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.

(3) *Rules of evidence relaxed.* The military judge may, with respect to matters in extenuation or mitigation or both, relax the rules of evidence. This may include admitting letters, affidavits, certificates of military and civil officers, and other writings of similar authenticity and reliability.

(e) *Rebuttal and surrebuttal.* The prosecution may rebut matters presented by the defense. The defense in surrebuttal may then rebut any rebuttal offered by the prosecution. Rebuttal and surrebuttal may continue, in the discretion of the military judge. If the Military Rules of Evidence were relaxed under subsection (d)(3) of this rule, they may be relaxed during rebuttal

and surrebuttal to the same degree.

(f) *Production of witnesses.*

(1) *In general.* During the presentencing proceedings, there shall be much greater latitude than on the merits to receive information by means other than testimony presented through the personal appearance of witnesses. Whether a witness shall be produced to testify during presentencing proceedings is a matter within the discretion of the military judge, subject to the limitations in paragraph (2).

Discussion

See R.C.M. 703 concerning the procedures for production of witnesses for presentencing proceedings.

(2) *Limitations.* A witness may be produced to testify during presentencing proceedings through a subpoena or travel orders at Government expense only if—

(A) the testimony of the witness is necessary for consideration of a matter of substantial significance to a determination of an appropriate sentence;

(B) the weight or credibility of the testimony is of substantial significance to the determination of an appropriate sentence;

(C) the other party refuses to enter into a stipulation of fact containing the matters to which the witness is expected to testify, except in an extraordinary case when such a stipulation of fact would be an insufficient substitute for the testimony;

(D) other forms of evidence, such as oral depositions, written interrogatories, former testimony, or testimony by remote means would not be sufficient to meet the needs of the court-martial in the determination of an appropriate sentence; and

(E) the significance of the personal appearance of the witness to the determination of an appropriate sentence, when balanced against the practical difficulties of producing the witness, favors production of the witness. Factors to be considered include the costs of producing the witness, the timing of the request for production of the witness, the potential delay in the presentencing proceeding that may be caused by the production of the witness, and the likelihood of significant interference with military operational deployment, mission accomplishment, or essential training.

Discussion

The procedures for receiving testimony via remote means and the definition thereof are contained in R.C.M. 914B.

(g) *Additional matters to be considered.* In addition to matters introduced under this rule, the court-martial may consider—

(1) That a plea of guilty is a mitigating factor; and

(2) Any evidence properly introduced on the merits before findings, including:

(A) Evidence of other offenses or acts of misconduct even if introduced for a limited purpose; and

(B) Evidence relating to any mental impairment or deficiency of the accused.

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.

(h) *Argument.* After introduction of matters relating to sentence under this rule, counsel for the

prosecution and defense may argue for an appropriate sentence. Trial counsel may not in argument purport to speak for the convening authority or any higher authority, or refer to the views of such authorities or any policy directive relative to punishment or to any punishment or quantum of punishment greater than the court-martial may adjudge. Trial counsel may, however, recommend a specific lawful sentence and may also refer to the sentencing considerations set forth in R.C.M. 1002(f). Failure to object to improper argument before the military judge begins deliberations, or before the military judge instructs the members on sentencing, shall constitute forfeiture of the objection.

Discussion

A victim, victims' counsel, or designee has no right to present argument under this rule.

Analysis

This rule is taken from Rule 1001 of the MCM (2016 edition) with the following amendments. *2017 Amendment*: R.C.M. 1001 is amended and implements 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).

R.C.M. 1001(c) is new and incorporates R.C.M. 1001A of the MCM (2016 edition).

Rule 1002. Sentencing determination

(a) *Generally*. Subject to limitations in this Manual, the sentence to be adjudged is a matter within the discretion of the court-martial. A court-martial may adjudge any punishment authorized in this Manual in order to achieve the purposes of sentencing under subsection (f), including the maximum punishment or any lesser punishment, or may adjudge a sentence of no punishment except—

(1) When a mandatory minimum sentence is prescribed by the code, the sentence for an offense shall include any punishment that is made mandatory by law for that offense. The sentence for an offense may not be greater than the maximum sentence established by law or by the President for that offense; and

Discussion

See Article 56(a) and R.C.M. 1003.

(2) If the military judge accepts a plea agreement with a sentence limitation, the court-martial shall sentence the accused in accordance with the limits established by the plea agreement.

(b) *Sentencing forum election*. In a general or special court-martial consisting of a military judge and members, upon the announcement of findings and before any matter is presented in the presentencing phase, the military judge shall inquire—

(1) In noncapital cases, whether the accused elects sentencing by members in lieu of sentencing by military judge for all charges and specifications for which the accused was found guilty; and

(2) In capital cases, whether the accused elects sentencing by members in lieu of sentencing by military judge for all charges and specifications for which the accused was found guilty and for which a sentence of death may not be adjudged.

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.

(c) *Form of election.* The accused's election under subsection (b), shall be in writing and signed by the accused or shall be made orally on the record. The military judge shall ascertain whether the accused has consulted with defense counsel and has been informed of the right to make a sentencing forum election under subsection (b).

(d) *Noncapital cases.*

(1) *Sentencing by members*. In a general or special court-martial in which the accused has elected sentencing by members in lieu of sentencing by military judge under subsection (b)(1), the members shall determine a single sentence for all of the charges and specifications of which the accused was found guilty. The military judge announces the sentence determined by the members in accordance with R.C.M. 1007.

(2) *Sentencing by military judge.* Unless a timely election for sentencing by members is made by the accused under subsection (b), the military judge shall determine the sentence of a general or special court-martial in accordance with this paragraph.

(A) *Segmented sentencing for confinement and fines*. The military judge at a general or special court-martial shall determine an appropriate term of confinement and fine, if applicable, for each specification for which the accused was found guilty. Subject to subsection (a), such a determination may include a term of no confinement or no fine when appropriate for the offense.

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.

(B) *Concurrent or consecutive terms of confinement.* If a sentence includes more than one term of confinement, the military judge shall determine whether the terms of confinement will run concurrently or consecutively. For each term of confinement, the military judge shall state whether the term of confinement is to run concurrently or consecutively with any other term or terms of confinement. The terms of confinement for two or more specifications shall run concurrently—

(i) when each specification involves the same victim and the same act or transaction;

(ii) when provided for in a plea agreement;

(iii) when the accused is found guilty of two or more specifications and the military judge finds that the charges or specifications are unreasonably multiplied; or

(iv) when otherwise appropriate under subsection (f); or

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 subsection (f).

See R.C.M. 705(c)(2)(F) and 910(f)(5) regarding plea agreements.

(v) in a special court-martial, to the extent necessary to reduce the total confinement to the maximum confinement authorized under R.C.M. 201(f)(2).

(C) *Unitary sentencing for other forms of punishment*. All punishments other than confinement or fine available under R.C.M. 1003, if any, shall be determined as a single, unitary component of the sentence, covering all of the guilty findings in their entirety. The military judge shall not segment those punishments among the guilty findings.

(e) *Capital cases.* The following applies to cases referred as capital in accordance with R.C.M. 1004(b)(1)(A) that include a finding of guilty for a charge and specification for which death may be adjudged.

(1) *Sentencing by members.*

(A) Where all of the findings of guilty are for charges and specifications for which death may be adjudged, the members shall determine whether the sentence for each such specification shall be death or a lesser punishment. The members shall then determine a single sentence for all charges and specifications for which the accused was found guilty. The military judge shall announce the sentence determined by the members in accordance with R.C.M. 1007.

(B) Where there is a finding of guilty for a specification for which death may be adjudged and a finding of guilty for a specification for which death may not be adjudged, and the accused elects sentencing by members under subsection (b)(2) for those specifications for which a sentence of death may not be adjudged:

(i) The members shall determine whether the sentence for each specification for which death may be adjudged shall be death or a lesser punishment;

(ii) The members shall determine a single, unitary sentence for all the charges and specifications for which the accused was found guilty; and

(iii) The military judge shall announce the sentence determined by the members in accordance with R.C.M. 1007.

(2) *Sentencing by members and military judge.* Unless a timely election for sentencing by members is made by the accused under subsection (b)(2), where there is a finding of guilty for a specification for which death may be adjudged and a finding of guilty for a specification for which death may not be adjudged:

(A) The members shall determine whether the sentence for each specification for which death may be adjudged shall be death or a lesser punishment;

(B) The members shall determine a single, unitary sentence for the specifications for which death may be adjudged;

(C) The military judge shall determine the sentence for all charges and specifications for which death may not be adjudged in accordance with subsection (d)(2); and

(D) If the sentence determined in subparagraphs (B) and (C) include more than one term of confinement, the military judge shall determine, in accordance with subsection (d)(2), whether the terms of confinement, including any term of confinement determined by members, will run concurrently or consecutively.

(E) The military judge shall announce the sentence in accordance with R.C.M. 1007.

(f) *Imposition of sentence.* In sentencing an accused under this rule, the court-martial shall impose punishment that is sufficient, but not greater than necessary, to promote justice and to maintain good order and discipline in the armed forces, taking into consideration—

(1) the nature and circumstances of the offense and the history and characteristics of the accused;

(2) the impact of the offense on—

(A) the financial, social, psychological, or medical well-being of any victim of the offense; and

(B) the mission, discipline, or efficiency of the command of the accused and any victim of the offense;

(3) the need for the sentence to—

(A) reflect the seriousness of the offense;

(B) promote respect for the law;

(C) provide just punishment for the offense;

(D) promote adequate deterrence of misconduct;

(E) protect others from further crimes by the accused;

(F) rehabilitate the accused; and

(G) provide, in appropriate cases, the opportunity for retraining and return to duty to meet the needs of the service; and

(4) the sentences available under these rules.

(g) *Information that may be considered*. The court-martial, in applying the factors listed in subsection (f) to the facts of a particular case, may consider—

(1) Any evidence admitted by the military judge during the presentencing proceeding under R.C.M. 1001; and

(2) Any evidence admitted by the military judge during the findings proceeding.

Analysis

2017 Amendment: This rule amends R.C.M. 1002 of the MCM (2016 edition) in its entirety and implements Articles 25, 53, 53a, and 56, as amended by Section 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.

Rule 1003. Punishments.

(a) *In general*. Subject to the limitations in this Manual, the punishments authorized in this rule may be adjudged in the case of any person found guilty of charges and specifications by a court-martial.

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.

(b) *Authorized punishments*. Subject to the limitations in this Manual, a court-martial may adjudge only the following punishments:

(1) *Reprimand*. A court-martial shall not specify the terms or wording of a reprimand. A reprimand, if approved, shall be issued, in writing, by the convening authority.

Discussion

A reprimand adjudged by a court-martial is a punitive censure. Only the convening authority may specify the terms of the reprimand. Under R.C.M. 1109 or R.C.M. 1110, when a court-martial adjudges a reprimand the convening authority shall issue the reprimand in writing or disapprove the reprimand.

(2) *Forfeiture of pay and allowances.* Unless a total forfeiture is adjudged, a sentence to forfeiture shall state the exact amount in whole dollars to be forfeited each month and the number of months the forfeitures will last.

Allowances shall be subject to forfeiture only when the sentence includes forfeiture of all pay and allowances. The maximum authorized amount of a partial forfeiture shall be determined by using the basic pay, retired pay, or retainer pay, as applicable, or, in the case of reserve component personnel on inactive-duty, compensation for periods of inactive-duty training, authorized by the cumulative years of service of the accused, and, if no confinement is adjudged, any sea or hardship duty pay. If the sentence also includes reduction in grade, expressly or by operation of law, the maximum forfeiture shall be based on the grade to which the accused is reduced. In the case of an accused who is not confined, forfeitures of pay may not exceed two-thirds of pay per month.

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.

(3) *Fine.* Any court-martial may adjudge a fine in lieu of or in addition to forfeitures. In the case of a member of the armed forces, summary and special courts-martial may not adjudge any fine or combination of fine and forfeitures in excess of the total amount of forfeitures that may be adjudged in that case. In the case of a person serving with or accompanying an armed force in the field, a summary court-martial may not adjudge a fine in excess of two-thirds of one month of the highest rate of enlisted pay, and a special court-martial may not adjudge a fine in excess of two-thirds of one year of the highest rate of officer pay. To enforce collection, a fine may be accompanied by a provision in the sentence that, in the event the fine is not paid, the person fined shall, in addition to any period of confinement adjudged, be further confined until a fixed period considered an equivalent punishment to the fine has expired. The total period of confinement so adjudged shall not exceed the jurisdictional limitations of the court-martial

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.

(4) *Reduction in pay grade*. Except as provided in R.C.M. 1301(d), a court-martial may sentence an enlisted member to be reduced to the lowest or any intermediate pay grade;

Discussion

Reduction under Article 58a is not a part of the sentence but is an administrative result thereof.

(5) *Restriction to specified limits*. Restriction may be adjudged for no more than 2 months for each month of authorized confinement and in no case for more than 2 months. Confinement and restriction may be adjudged in the same case, but they may not together exceed the maximum authorized period of confinement, calculating the equivalency at the rate specified in this subsection;

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 subparagraph(c)(1)(A)(ii) of this rule. The sentence adjudged should specify the limits of the restriction.

(6) *Hard labor without confinement*. Hard labor without confinement may be adjudged for no more than 1-1/2 months for each month of authorized confinement and in no case for more than three months. Hard labor without confinement may be adjudged only in the cases of enlisted members. The court-martial shall not specify the hard labor to be performed. Confinement and hard labor without confinement may be adjudged in the same case, but they may not together exceed the maximum authorized period of confinement, calculating the equivalency at the rate specified in this subsection.

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.

(7) *Confinement*. The place of confinement shall not be designated by the court-martial. When confinement for life is authorized, it may be with or without eligibility for parole. A court-martial shall not adjudge a sentence to solitary confinement or to confinement without hard labor;

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.

(8) *Punitive separation*. A court-martial may not adjudge an administrative separation from the service. There are three types of punitive separation.

(A) *Dismissal.* Dismissal applies only to commissioned officers, commissioned warrant officers, cadets, and midshipmen and may be adjudged only by a general court-martial. Regardless of the maximum punishment specified for an offense in Part IV of this Manual, a dismissal may be adjudged for any offense of which a commissioned officer, commissioned warrant officer, cadet, or midshipman has been found guilty;

(B) *Dishonorable discharge.* A dishonorable discharge applies only to enlisted persons and warrant officers who are not commissioned and may be adjudged only by a general court-martial. Regardless of the maximum punishment specified for an offense in Part IV of this Manual, a dishonorable discharge may be adjudged for any offense of which a warrant officer who is not commissioned has been found guilty. A dishonorable discharge should be reserved for those who should be separated under conditions of dishonor, after having been convicted of offenses usually recognized in civilian jurisdictions as felonies, or of offenses of a military nature requiring severe punishment; and

Discussion

See also subparagraph(d)(1) of this rule regarding when a dishonorable discharge is authorized as an additional punishment.

See Article 56a.

(C) *Bad-conduct discharge.* A bad-conduct discharge applies only to enlisted persons and may be adjudged by a general court-martial and by a special court-martial which has met the requirements of R.C.M. 201(f)(2)(B). A bad-conduct discharge is less severe than a dishonorable discharge and is designed as a punishment for bad-conduct rather than as a punishment for serious offenses of either a civilian or military nature. It is also appropriate for an accused who has been convicted repeatedly of minor offenses and whose punitive separation appears to be necessary;

Discussion

See also subparagraphs (d)(2) and (3) of this rule regarding when a bad-conduct discharge is authorized as an additional punishment.

(9) *Death*. Death may be adjudged only in accordance with R.C.M. 1004; and

(10) *Punishments under the law of war*. In cases tried under the law of war, a general court-martial may adjudge any punishment not prohibited by the law of war.

(c) *Limits on punishments*.

(1) *Based on offenses*.

(A) *Offenses listed in Part IV*.

(i) *Maximum punishment.* The maximum limits for the authorized punishments of confinement, forfeitures and punitive discharge (if any) are set forth for each offense listed in Part IV of this Manual. These limitations are for each separate offense, not for each charge. When a dishonorable discharge is authorized, a bad-conduct discharge is also authorized.

(ii) *Other punishments.* Except as otherwise specifically provided in this Manual, the types of punishments listed in subparagraphs (b)(1), (3), (4), (5), (6) and (7) of this rule may be adjudged in addition to or instead of confinement, forfeitures, a punitive discharge (if authorized), and death (if authorized).

(B) *Offenses not listed in Part IV*.

(i) *Included or related offenses.* For an offense not listed in Part IV of this Manual which is included in or closely related to an offense listed therein the maximum punishment shall be that of the offense listed; however if an offense not listed is included in a listed offense, and is closely related to another or is equally closely related to two or more listed offenses, the maximum punishment shall be the same as the least severe of the listed offenses.

(ii) *Not included or related offenses.* An offense not listed in Part IV and not included in or closely related to any offense listed therein is punishable as authorized by the United States Code, or as authorized by the custom of the service. When the United States Code provides for confinement for a specified period or not more than a specified period the maximum punishment by court-martial shall include confinement for that period. If the period is 1 year or longer, the maximum punishment by court-martial also includes a dishonorable discharge and forfeiture of all pay and allowances; if 6 months or more, a bad-conduct discharge and forfeiture of all pay and allowances; if less than 6 months, forfeiture of two-thirds pay per month for the authorized period of confinement.

(C) *Multiple Offenses.* When the accused is found guilty of two or more charges and specifications, the maximum authorized punishment may be imposed for each separate offense, unless the military judge finds that the offenses are unreasonably multiplied.

Discussion

R.C.M. 906(b)(12) provides the available remedies for cases in which a military judge finds an unreasonable multiplication of charges.

(2) *Based on rank of accused*.

(A) *Commissioned or warrant officers, cadets, and midshipmen.*

(i) A commissioned or warrant officer or a cadet, or midshipman may not be reduced in grade by any court-martial. However, in time of war or national emergency the Secretary concerned, or such Under Secretary or Assistant Secretary as may be designated by the Secretary concerned, may commute a sentence of dismissal to reduction to any enlisted grade.

(ii) Only a general court-martial may sentence a commissioned or warrant officer or a cadet, or midshipman to confinement.

(iii) A commissioned or warrant officer or a cadet or midshipman may not be sentenced to hard labor without confinement.

(iv) Only a general court-martial, upon conviction of any offense in violation of the UCMJ, may sentence a commissioned or warrant officer or a cadet or midshipman to be separated from the service with a punitive separation. In the case of commissioned officers, cadets, midshipmen, and commissioned warrant officers, the separation shall be by dismissal. In the case of all other warrant officers, the separation shall by dishonorable discharge.

(B) *Enlisted persons.* See subparagraph (b)(9) of this rule and R.C.M. 1301(d).

(3) *Based on reserve status in certain circumstances*.

(A) *Restriction on liberty.* A member of a reserve component whose order to active duty is approved pursuant to Article 2(d)(5) may be required to serve any adjudged restriction on liberty during that period of active duty. Other members of a reserve component ordered to active duty pursuant to Article 2(d)(1) or tried by summary court-martial while on inactive duty training may not—

(i) by sentenced to confinement; or

(ii) be required to serve a court-martial punishment consisting of any other restriction on liberty except during subsequent periods of inactive-duty training or active duty.

(B) *Forfeiture.* A sentence to forfeiture of pay of a member not retained on active duty after completion of disciplinary proceedings may be collected from active duty and inactive-duty training pay during subsequent periods of duty.

Discussion

For application of this subparagraph, 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

(4) *Based on status as a person serving with or accompanying an armed force in the field.* In the case of a person serving with or accompanying an armed force in the field, no court-martial may adjudge forfeiture of pay and allowances, reduction in pay grade, hard labor without confinement, or a punitive separation.

(5) *Based on other rules.* The maximum limits on punishments in this rule may be further limited by other Rules of Courts-martial.

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)).

(d) *Circumstances permitting increased punishments.*

(1) *Three or more convictions.* If an accused is found guilty of an offense or offenses for none of which a dishonorable discharge is otherwise authorized, proof of three or more previous convictions adjudged by a court-martial during the year next preceding the commission of any offense of which the accused stands convicted shall authorize a dishonorable discharge and forfeiture of all pay and allowances and, if the confinement otherwise authorized is less than 1 year, confinement for 1 year. In computing the 1-year period preceding the commission of any offense, periods of unauthorized absence shall be excluded. For purposes of this subsection, the court-martial convictions must be final.

(2) *Two or more convictions.* If an accused is found guilty of an offense or offenses for none of which a dishonorable or bad-conduct discharge is otherwise authorized, proof of two or more previous convictions adjudged by a court-martial during the 3 years next preceding the commission of any offense of which the accused stands convicted shall authorize a bad-conduct discharge and forfeiture of all pay and allowances and, if the confinement otherwise authorized is less than 3 months, confinement for 3 months. In computing the 3 year period preceding the commission of any offense, periods of unauthorized absence shall be excluded. For purposes of this subsection the court-martial convictions must be final.

(3) *Two or more offenses.* If an accused is found guilty of two or more offenses for none of which a dishonorable or bad-conduct discharge is otherwise authorized, the fact that the authorized confinement for these offenses totals 6 months or more shall, in addition, authorize a bad-conduct discharge and forfeiture of all pay and allowances.

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.

Analysis

This rule is taken from Rule 1003 of the MCM (2016 edition) with the following amendments.

2017 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).

Rule 1004. Capital cases

(a) *In general.* Death may be adjudged only when—

(1) Death is expressly authorized under Part IV of this Manual for an offense of which the accused has been found guilty or is authorized under the law of war for an offense of which the accused has been found guilty under the law of war; and

(2) The accused was convicted of such an offense by either—

(A) the unanimous vote of all twelve members of the court-martial; or

(B) the military judge pursuant to the accused's plea of guilty to such an offense; and

(3) The requirements of subsections (b) and (c) of this rule have been met.

(b) *Procedure.* In addition to the provisions in R.C.M. 1001, the following procedures shall apply in capital cases—

(1) *Notice.*

(A) *Referral.* The convening authority shall indicate that the case is to be tried as a capital case by including a special instruction on the charge sheet. Failure to include this special instruction at the time of the referral shall not bar the convening authority from later adding the required special instruction, provided that—

(i) the convening authority has otherwise complied with the notice requirement of subparagraph (B); and

(ii) if the accused demonstrates specific prejudice from such failure to include the special instruction, the military judge determines that a continuance or a recess is an adequate remedy.

(B) *Arraignment.* Before arraignment, trial counsel shall give the defense written notice of which aggravating factors under subparagraph (c) of this rule the prosecution intends to prove. Failure to provide timely notice under this subsection of any aggravating factors under subparagraph(c) of this rule shall not bar later notice and proof of such additional aggravating factors unless the accused demonstrates specific prejudice from such failure and that a continuance or a recess is not an adequate remedy.

(2) *Evidence of aggravating factors.* Trial counsel may present evidence in accordance with R.C.M. 1001(b)(4) tending to establish one or more of the aggravating factors in subparagraph(c) of this rule.

Discussion

See also subparagraph (b)(5) of this rule.

(3) *Evidence in extenuation and mitigation.* The accused shall be given broad latitude to present evidence in extenuation and mitigation.

Discussion

See R.C.M. 1001(d).

(4) *Necessary findings.* Death may not be adjudged unless—

(A) The members unanimously find that at least one of the aggravating factors under subparagraph(c) existed;

(B) Notice of such factor was provided in accordance with paragraph (1) of this subparagraph and all members concur in the finding with respect to such factor; and

(C) All members concur that any extenuating or mitigating circumstances are substantially outweighed by any aggravating circumstances admissible under R.C.M. 1001(b)(4), including the factors under subparagraph(c) of this rule.

(5) *Basis for findings.* The findings in subparagraph (b)(4) of this rule may be based on evidence introduced before or after findings under R.C.M. 921, or both.

(6) *Instructions.* In addition to the instructions required under R.C.M. 1005, the military judge shall instruct the members of such aggravating factors under subsection (c) of this rule as may be in issue in the case, the charge(s) and specification(s) for which the members shall determine a sentence, and on the requirements and procedures under subparagraphs (b)(4), (5), (7), and (8) of this rule. The military judge shall instruct the members that they must consider all evidence in extenuation and mitigation before a sentence of death may be determined by the members.

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.

(7) *Voting.* In closed session, before voting on a sentence, the members shall vote by secret written ballot separately on each aggravating factor under subparagraph(c) of this rule on which they have been instructed. A sentence of death may not be considered unless the members unanimously concur in a finding of the existence of at least one such aggravating factor and unanimously find that the extenuating and mitigating circumstances are substantially outweighed by any aggravating circumstances, including any relevant aggravating factor(s) under R.C.M. 1004(c). After voting on the necessary findings, the members shall vote on a sentence in accordance with R.C.M. 1006.

(8) *Announcement.* If the members voted unanimously for death, the military judge shall, in addition to complying with R.C.M. 1006(e) and 1007, announce which aggravating factors under R.C.M. 1004(c) the members unanimously found to exist beyond a reasonable doubt.

(c) *Aggravating factors.* Death may be adjudged only if the members find, beyond a reasonable doubt, one or more of the following aggravating factors:

(1) That the offense was committed before or in the presence of the enemy, except that this factor shall not apply in the case of a violation of Article 118;

Discussion

See paragraph 27, Part IV, for a definition of “before or in the presence of the enemy.”

(2) That in committing the offense the accused—

(A) Knowingly created a grave risk of substantial damage to the national security of the United States; or

(B) Knowingly created a grave risk of substantial damage to a mission, system, or function of the United States, provided that this subparagraph shall apply only if substantial damage to the national security of the United States would have resulted had the intended damage been effected;

(3) That the offense caused substantial damage to the national security of the United States, whether or not the accused intended such damage, except that this factor shall not apply in case of a violation of Article 118;

(4) That the offense was committed in such a way or under circumstances that the life of one or more persons other than the victim was unlawfully and substantially endangered, except that this factor shall not apply to a violation of Articles 103a or 103b;

(5) That the accused committed the offense with the intent to avoid hazardous duty;

(6) That, only in the case of a violation of Article 118, the offense was committed in time of war and in territory in which the United States or an ally of the United States was then an occupying power or in which the armed forces of the United States were then engaged in active hostilities;

(7) That, only in the case of a violation of Article 118(1):

(A) The accused was serving a sentence of confinement for 30 years or more or for life at the time of the murder;

(B) The murder was committed: while the accused was engaged in the commission or attempted commission of a separate murder, or any robbery, rape, rape of a child, sexual assault, sexual assault of a child, aggravated sexual contact, sexual abuse of a child, aggravated arson, burglary, kidnapping, mutiny, sedition, or piracy of an aircraft or vessel; or while the accused was engaged in the commission or attempted commission of any offense involving the wrongful distribution, manufacture, or introduction or possession, with intent to distribute, of a controlled substance; or, while the accused was engaged in flight or attempted flight after the commission or attempted commission of any such offense.

(C) The murder was committed for the purpose of receiving money or a thing of value;

(D) The accused procured another by means of compulsion, coercion, or a promise of an advantage, a service, or a thing of value to commit the murder;

(E) The murder was committed with the intent to avoid or to prevent lawful apprehension or effect an escape from custody or confinement;

(F) The victim was the President of the United States, the President-elect, the Vice President, or, if there was no Vice President, the officer in the order of succession to the office of President of the United States, the Vice-President-elect, or any individual who is acting as President under the Constitution and laws of the United States, any Member of Congress (including a Delegate to, or Resident Commissioner in, the Congress) or Member-of-Congress elect, justice or judge of the United States, a chief of state or head of government (or the political equivalent) of a foreign nation, or a foreign official (as such term is defined in section 1116(b)(3)(A) of title 18, United States Code), if the official was on official business at the time of the offense and was in the United States or in a place described in Mil. R. Evid.315(c)(2), 315(c)(3);

(G) The accused then knew that the victim was any of the following persons in the execution of office: a commissioned, warrant, noncommissioned, or petty officer of the armed

services of the United States; a member of any law enforcement or security activity or agency, military or civilian, including correctional custody personnel; or any firefighter;

(H) The murder was committed with intent to obstruct justice;

(I) The murder was preceded by the intentional infliction of substantial physical harm or prolonged, substantial mental or physical pain and suffering to the victim. For purposes of this section, substantial physical harm means fractures or dislocated bones, deep cuts, torn members of the body, serious damage to internal organs, or other serious bodily injuries. The term substantial physical harm does not mean minor injuries, such as a black eye or bloody nose. The term substantial mental or physical pain or suffering is accorded its common meaning and includes torture.

(J) The accused has been found guilty in the same case of another violation of Article 118;

(K) The victim of the murder was under 15 years of age.

(8) That only in the case of a violation of Article 118(a)(4), the accused was the actual perpetrator of the killing or was a principal whose participation in the burglary, rape, rape of a child, sexual assault, sexual assault of a child, aggravated sexual contact, sexual abuse of a child, robbery, or aggravated arson was major and who manifested a reckless indifference for human life.

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).

(9) [Deleted]

(10) That, only in the case of a violation of the law of war, death is authorized under the law of war for the offense;

(11) That, only in the case of a violation of Article 103, 103a, or 103b:

(A) The accused has been convicted of another offense involving espionage, spying, or treason for which either a sentence of death or imprisonment for life was authorized by statute; or

(B) That in committing the offense, the accused knowingly created a grave risk of death to a person other than the individual who was the victim.

For purposes of this rule, national security means the national defense and foreign relations of the United States and specifically includes: a military or defense advantage over any foreign nation or group of nations; a favorable foreign relations position; or a defense posture capable of successfully resisting hostile or destructive action from within or without.

Discussion

Examples of substantial damage of 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.

(d) *Other penalties.* When death is an authorized punishment for an offense, all other punishments authorized under R.C.M. 1003 are also authorized for that offense, including confinement for life, with or without eligibility for parole, and may be adjudged in lieu of the death penalty, subject to limitations specifically prescribed in this Manual. A sentence of death includes a dishonorable discharge or dismissal as appropriate. Confinement is a necessary incident of a sentence of death, but not a part of it.

Discussion

A sentence of death may not be ordered executed until approved by the President. *See* R.C.M. 1207. A sentence to 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).

Analysis

This rule is taken from Rule 1004 of the MCM (2016 edition) with the following amendments.

2017 Amendment: R.C.M. 1004(a)(2) 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).

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 NDAA for FY17.

R.C.M. 1004(c)(9) is deleted. *See Kennedy v. Louisiana*, 554 U.S. 407 (2008).

R.C.M. 1004(d) is deleted and subsection "(e)" is redesignated as subsection "(d)".

Rule 1005. Instructions on sentence

(a) *In general.* The military judge shall give the members appropriate instructions on sentence.

Discussion

Instructions should be tailored to the facts and circumstances of the individual case.

(b) *When given.* Instructions on sentence shall be given after arguments by counsel and before the members close to deliberate on sentence, but the military judge may, upon request of the members, any party, or *sua sponte*, give additional instructions at a later time.

(c) *Requests for instructions.* During presentencing proceedings or at such other time as the military judge may permit, any party may request that the military judge instruct the members on the law as set forth in the request. The military judge may require the requested instruction to be written. Each party shall be given the opportunity to be heard on any proposed instruction on sentence before it is given. The military judge shall inform the parties of the proposed action on such requests before their closing arguments on sentence.

Discussion

Requests for and objections to instructions should be resolved at an Article 39(a) session. *But 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.

(d) *How given.* Instructions on sentence shall be given orally on the record in the presence of all parties and the members. Written copies of the instructions, or unless a party objects, portions of them, may also be given to the members for their use during deliberations.

Discussion

A copy of any written instructions delivered to the members should be marked as an appellate exhibit.

(e) *Required instructions.* Instructions on sentence shall include—

(1) A statement of the maximum authorized punishment that may be adjudged and of the mandatory minimum punishment, if any;

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)). *See also* Discussion to R.C.M. 810(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 additional 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.

(2) A statement of the effect any sentence announced including a punitive discharge and confinement, or confinement in excess of six months, will have on the accused's entitlement to pay and allowances;

(3) A statement of the procedures for deliberation and voting on the sentence set out in R.C.M. 1006;

Discussion

See also R.C.M. 1004 concerning additional instructions required in capital cases.

(4) A statement informing the members that they are solely responsible for selecting an appropriate sentence and may not rely on the possibility of any mitigating action by the convening or higher authority;

Discussion

See also R.C.M. 1002.

(5) A statement that the members should consider all matters in extenuation, mitigation, and aggravation, whether introduced before or after findings, and matters introduced under R.C.M. 1001(b)(1), (2), (3) and (5);

(6) A statement that the members shall consider the sentencing guidance set forth in R.C.M. 1002(f); and

(7) Such other explanations, descriptions, or directions that the military judge determines to be necessary, whether properly requested by a party or determined by the military judge *sua sponte*.

(f) *Failure to object.* Failure to object to an instruction or to omission of an instruction before the members close to deliberate on the sentence constitute forfeiture of the objection. The military judge may require the party objecting to specify in what respect the instructions were improper.

The parties shall be given the opportunity to be heard on any objection outside the presence of the members.

Analysis

This rule is taken from Rule 1005 of the MCM (2016 edition) with the following amendments.

2017 Amendment: The discussion after R.C.M. 1005(e)(5) is deleted and is superseded by the enactment 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).

R.C.M. 1005(e)(6) is new and implements Article 56(c), as amended by Section 5301 of the NDAA FY17.

R.C.M. 1005(e)(7) is new and allows a military judge to provide additional instructions as may be required.

Rule 1006. Deliberations and voting on sentence

(a) *In general.* With respect to charge(s) and specification(s) for which a sentence of death may be determined and in all other cases in which the accused elects sentencing by members under R.C.M. 1002(b), the members shall deliberate and vote after the military judge instructs the members on sentence. Only the members shall be present during deliberations and voting. Superiority in rank shall not be used in any manner to control the independence of members in the exercise of their judgment.

(b) *Deliberations.* Deliberations require a full and free discussion of the sentence to be imposed in the case. Unless otherwise directed by the military judge, members may take with them in deliberations their notes, if any, any exhibits admitted in evidence, and any written instructions. Members may request that the court-martial be reopened and that portions of the record be read to them or additional evidence introduced. The military judge may, in the exercise of discretion, grant such requests.

(c) *Proposal of sentences.* Any member may propose a sentence. Each proposal shall be in writing and shall contain the complete sentence proposed. The junior member shall collect the proposed sentences and submit them to the president.

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 or is without the eligibility for parole. *See* R.C.M.1003(b).

(d) *Voting.*

(1) *Duty of members.* Each member has the duty to vote for a proper sentence for the offenses of which the court-martial found the accused guilty, regardless of the member's vote or opinion as to the guilt of the accused.

(2) *Secret ballot.* Proposed sentences shall be voted on by secret written ballot.

(3) *Procedure.*

(A) *Order.* All members shall vote on each proposed sentence in its entirety beginning with the least severe and continuing, as necessary, with the next least severe, until a sentence is adopted by the concurrence of the number of members required under subsection (d)(4) of this rule. The process of proposing sentences and voting on them may be repeated as necessary until a sentence is adopted.

(B) *Counting votes.* The junior member shall collect the ballots and count the votes. The president shall check the count and inform the other members of the result.

Discussion

A sentence adopted by the required number of members may be reconsidered only in accordance with R.C.M. 1009.

(4) *Number of votes required.*

(A) *Death.* A sentence may include death only if the members unanimously vote for the sentence to include death.

Discussion

See R.C.M. 1004.

(B) *Other.* Any sentence other than death may be determined only if at least three-fourths of the members vote for that sentence.

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(d)(2)(B), at least six would have to concur to impose a sentence requiring a three-fourths vote.

(5) *Mandatory sentence.* When a mandatory minimum is prescribed for an offense under the UCMJ, the members shall vote on a sentence in accordance with this rule.

(6) *Plea agreements.* When the military judge accepts a plea agreement with a sentence limitation, the members shall vote on a sentence in accordance with the sentence limitation.

(7) *Effect of failure to agree.* If the required number of members do not agree on a sentence after a reasonable effort to do so, a mistrial may be declared as to the sentence and the case shall be returned to the convening authority, who may order a rehearing on sentence only or order that a sentence of no punishment be imposed.

(e) *Action after a sentence is reached.* After the members have agreed upon a sentence by the required number of votes in accordance with this rule, the court-martial shall be opened and the president shall inform the military judge that the members have determined a sentence. The military judge may, in the presence of the parties, examine any writing used by the president to state the determination and may assist the members in putting the sentence in proper form. If the members voted unanimously for a sentence of death, the writing shall indicate which aggravating factors under R.C.M. 1004(c) the members unanimously found to exist beyond a reasonable doubt. Neither that writing nor any oral or written clarification or discussion concerning it shall constitute announcement of the sentence.

Discussion

Ordinarily a sentence worksheet should be provided to the members as an aid to putting the sentence in proper form. See Appendix 11 for a format for forms of sentences. If a sentence worksheet has been provided, the military judge should examine it before the president announces 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 indicates 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).

Analysis
This rule is taken from Rule 1006 of the MCM (2016 edition) with the following amendments.
2017 Amendment: R.C.M. 1006(d)(4)(B) is deleted.

R.C.M. 1006(d)(4)(C), redesignated as (d)(4)(B), is amended and implements Article 52 as amended 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).

R.C.M. 1006(d)(6) is new and implements Art 53a as enacted by Section 5237 of the NDAA FY17.

Rule 1007 Announcement of Sentence
(a) *In general*. The sentence shall be announced in the presence of all parties promptly after it has been determined.
(b) *Announcement.*

(1) In the case of sentencing by members, the sentence shall be announced by the military judge in accordance with the members' determination.

(2) In all other cases, the military judge shall announce the sentence and shall specify—

(A) the term of confinement, if any, and the amount of fine, if any, determined for each offense;

(B) for each term of confinement announced under subparagraph (A), whether the term of confinement is to run concurrently or consecutively with any other term or terms of confinement adjudged; and

(C) any other punishments under R.C.M. 1003 as a single, unitary sentence.

Discussion
The date that the sentence is announced by the court-martial is the date a sentence is adjudged. *See* Article 57.

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).

(b) *Erroneous announcement.* If the announced sentence is not the one actually determined by the court-martial, the error may be corrected by a new announcement made before entry of the judgment into the record. This action shall not constitute reconsideration of the sentence. If the court-martial is adjourned before the error is discovered, the military judge may call the court-martial into session to correct the announcement.
(c) *Polling prohibited.* Except as provided in Mil. R. Evid. 606, members may not otherwise be questioned about their deliberations and voting.

Analysis
This rule is taken from Rule 1007 of the MCM (2016 edition) with the following amendments.
2017 Amendment: R.C.M. 1007 is amended and conforms 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 as soon as it is determined when the accused has not elected to be sentenced by members.

Rule 1008. Impeachment of sentence

A sentence which is proper on its face may be impeached only when extraneous prejudicial information was improperly brought to the attention of a member, outside influence was improperly brought to bear upon any member, or unlawful command influence was brought to bear upon any member.

Discussion

See R.C.M. 923 Discussion concerning impeachment of findings.

Analysis

This rule is taken from Rule 1008 of the MCM (2016 edition) without substantive amendment.

Rule 1009. Reconsideration of sentence

(a) *Reconsideration.* Subject to this rule, a sentence may be reconsidered at any time before such sentence is announced in open session of the court.

(b) *Exceptions.*

(1) If the sentence announced in open session was less than the mandatory minimum prescribed for an offense of which the accused has been found guilty, the court that announced the sentence may reconsider such sentence upon reconsideration in accordance with subsection (e) of this rule.

(2) If the sentence announced in open session exceeds the maximum permissible punishment for the offense or the jurisdictional limitation of the court-martial, the sentence may be reconsidered after announcement in accordance with subsection (e) of this rule.

(3) If the sentence announced in open session is not in accordance with a sentence limitation in the plea agreement, if any, the sentence may be reconsidered after announcement in accordance with subsection (e) of this rule.

(c) *Clarification of sentence*. A sentence may be clarified at any time before entry of judgment.

(1) *Sentence adjudged by the military judge*. When a sentence adjudged by the military judge is ambiguous, the military judge shall call a session for clarification as soon as practicable after the ambiguity is discovered.

(2) *Sentence determined by members*. When a sentence determined by the members is ambiguous, the military judge shall bring the matter to the attention of the members if the matter is discovered before the court-martial is adjourned. If the matter is discovered after adjournment, the military judge may call a session for clarification by the members as soon as practicable after the ambiguity is discovered.

(d) *Action by the convening authority*. Prior to entry of judgment, if a convening authority becomes aware that a sentence adjudged by the court-martial is ambiguous, the convening authority shall return the matter to the court-martial for clarification. When a sentence adjudged by the court-martial is apparently illegal, the convening authority shall return the matter to the court-martial for correction.

(e) *Reconsideration procedure*. A military judge may reconsider a sentence only under the circumstances described in subsection (b). Any member of the court-martial may propose that a sentence reached by the members be reconsidered.

(1) *Instructions*. When a sentence has been reached by members and reconsideration has been initiated, the military judge shall instruct the members on the procedure for reconsideration.

(2) *Voting*. The members shall vote by secret written ballot in closed session whether to reconsider a sentence already reached by them.

(3) *Number of votes required*.

(A) *Necessary findings in capital sentencing.* Members may reconsider a unanimous vote under R.C.M. 1004(b)(4)(A) that an aggravating factor was proven beyond a reasonable doubt if at least one member votes to reconsider. Members may reconsider a unanimous vote under R.C.M. 1004(b)(4)(C) that any extenuating and mitigating circumstances are substantially outweighed by any aggravating circumstances admissible under R.C.M. 1001(b)(4), including the factors under R.C.M. 1004(c), if at least one member votes to reconsider. In all other circumstances, a vote under R.C.M. 1004(b)(4)(A) or (C) may be reconsidered only if at least a majority of the members vote for reconsideration.

(B) *Sentence Determinations.*

(i) *With a view toward increasing*. Members may reconsider a sentence with a view toward increasing the sentence only if at least a majority votes for reconsideration.

(ii) *With a view toward decreasing*. Members may reconsider a sentence with a view toward decreasing the sentence only if:

(I) In the case of a sentence which includes death, at least one member votes to reconsider; or

(II) In the case of any other sentence, more than one-fourth of the members vote to reconsider.

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.

(4) *Successful vote*. If a vote to reconsider a sentence succeeds, the procedures in R.C.M. 1006 shall apply.

Analysis

This rule is taken from Rule 1009 of the MCM (2016 edition) with the following amendments. *2017 Amendment*: R.C.M. 1009 is amended and implements 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.

Rule 1010. Notice Concerning Post Trial and Appellate Rights

In each general and special court-martial, prior to adjournment, the military judge shall ensure that the defense counsel has informed the accused orally and in writing of:

(a) The right to submit matters to the convening authority to consider before taking action;

(b) The right to appellate review, and the effect of waiver or withdrawal of such right, or failure to file an appeal, as applicable;

(c) The right to apply for relief from the Judge Advocate General if the case is not reviewed by a Court of Criminal Appeals under Article 66; and

(d) The right to the advice and assistance of counsel in the exercise of the foregoing rights or any decision to waive them.

The written advice to the accused concerning post-trial and appellate rights shall be signed by the accused and the defense counsel and inserted in the record of trial as an appellate exhibit.

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.

Analysis

This rule is taken from Rule 1010 of the MCM (2016 edition) with the following amendments. *2017 Amendment*: R.C.M. 1010 is amended and implements Articles 64-67a, and 69, as amended by Sections 5328, 5329, 5330, 5331, 5332, 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.

Rule 1011. Adjournment

The military judge may adjourn the court-martial at the end of the trial of an accused or proceed to trial of other cases referred to that court-martial. Such an adjournment may be for a definite or indefinite period.

Discussion

A court-martial and its personnel have certain powers and responsibilities following the trial. *See*, for example, R.C.M. 502(d)(4) Discussion (G); 502(d)(5) Discussion (E); 808; 1007; 1009; Chapter XI.

Analysis

This rule is taken from Rule 1011 of the MCM (2016 edition) without substantive amendment.

Rule 1101. Statement of Trial Results.

(a) *Content.* After final adjournment of a general or special court-martial, the military judge shall sign and include in the record a Statement of Trial Results. The Statement of Trial Results shall consist of the following—

(1) *Findings.* For each charge and specification referred to trial—

(A) a summary of each charge and specification;

(B) the plea(s) of the accused; and

(C) the finding or other disposition of each charge and specification.

(2) *Sentence.* The adjudged sentence of the court-martial and the date the sentence was announced by the court-martial. If the accused was convicted of more than one specification and any part of the sentence was determined by a military judge, the Statement of Trial Results shall also specify—

(A) the confinement and fine for each specification, if any;

(B) whether any term of confinement is to run consecutively or concurrently with any other term(s) of confinement;

(C) the amount of credit, if any, applied to the sentence for pretrial confinement or for other reasons;

(D) the total amount of any fine(s) and the total amount of any confinement, after accounting for any credit and any terms of confinement that are to run consecutively or concurrently.

Discussion

The date that the sentence is adjudged is the date the sentence was announced by the court-martial. *See* Article 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.

(3) *Forum.* The type of court-martial and the command by which it was convened.

(4) *Plea agreements.* In a case with a plea agreement, the statement shall specify any limitations on the punishment as set forth in the plea agreement.

(5) *Suspension recommendation.* If the military judge recommends that any portion of the sentence should be suspended, the statement shall specify—

(A) the portion(s) of the sentence to which the recommendation applies;

(B) the minimum duration of the suspension; and

(C) the facts supporting the suspension recommendation.

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.

(6) *Other information.* Any additional information directed by the military judge or required under regulations prescribed by the Secretary concerned.

(b) *Not guilty only by reason of lack of mental responsibility.* If an accused was found not guilty only by reason of lack of mental responsibility of any charge or specification, the military judge shall sign the Statement of Trial Results only after a hearing is conducted under R.C.M. 1105.
(c) *Abatement.* If the military judge abated the proceedings and the court-martial adjourned without a disposition as to at least one specification, the military judge shall include a brief explanation as to the reasons for abatement in the record of trial. If all charges are subsequently withdrawn, dismissed, or otherwise disposed of, the military judge shall sign a Statement of Trial Results in accordance with this rule.

Discussion

The issuance of an explanation of the reasons for abatement does not prevent a later termination of the abatement.

(d) *Distribution.* The trial counsel shall promptly provide a copy of the Statement of Trial Results to the accused's immediate commander, the convening authority or the convening authority's designee, and, if appropriate, the officer in charge of the confinement facility. A copy of the Statement of Trial Results shall be provided to the accused or to the accused's defense counsel. If the statement is served on the defense counsel, defense counsel shall, by expeditious means, provide the accused with a copy. A copy of the Statement of Trial Results shall be provided upon request to any crime victim or victim's counsel in the case, without regard to whether the accused was convicted or acquitted of any offense.

Discussion

See R.C.M. 1104(b) addressing post-trial motions and proceedings to resolve allegations of error in a Statement of Trial Results.

Crime victim has the same definition as victim of an offense under Article 6b. 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.

Analysis

2017 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 is new and 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."

Rule 1102. Execution and effective date of sentences

(a) *In general.* Except as provided in subsection (b), a sentence is executed and takes effect as follows:

(1) *General and special courts-martial.* In the case of a general or special court-martial, a sentence is executed and takes effect when the judgment is entered into the record under R.C.M. 1111.

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.

(2) *Summary courts-martial.* In the case of a summary court-martial, a sentence is executed and takes effect when the convening authority approves the sentence.

(b) *Exceptions.*

(1) *Forfeitures and reductions*. Unless deferred under R.C.M. 1103 or suspended under R.C.M. 1107, that part of an adjudged sentence that includes forfeitures or confinement shall take effect and be executed as follows:

(A) Subject to subparagraph (B), if a sentence includes forfeitures in pay or allowances or reduction in grade, or, if forfeiture or reduction is required by Articles 58a or 58b, the sentence shall take effect the earlier of—

(i) 14 days after the sentence is announced under R.C.M. 1007; or

(ii) in the case of a summary court-martial, the date on which the sentence is approved by the convening authority.

(B) If an accused is not confined and is performing military duties, that portion of the forfeitures that provides for more than two-thirds forfeitures of pay shall not be executed.

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.

(2) *Confinement.*

(A) *In general.* A commander shall deliver the accused into post-trial confinement when the sentence of the court-martial includes death or confinement, unless a sentence of confinement is deferred under R.C.M. 1103.

(B) *Calculation.* Any period of confinement included in the sentence of a court-martial begins to run from the date the sentence is announced by the court-martial. If the accused was earlier ordered into confinement under R.C.M. 305, the accused's sentence shall be credited one day for each day of confinement already served.

(C) *Exclusions in calculating confinement.* The following periods shall be excluded in computing the service of the term of confinement:

(i) Periods during which the sentence to confinement is suspended or deferred;

(ii) Periods during which the accused is in custody of civilian authorities under Article 14 from the time of the delivery to the return to military custody, if the accused was convicted in the civilian court;

(iii) Periods during which the accused is in custody of civilian or foreign authorities after the convening authority, pursuant to Article 57(b)(2), has postponed the service of a sentence to confinement;

(iv) Periods during which the accused has escaped, or is absent without authority, or is absent under a parole that proper authority has later revoked, or is released from confinement through misrepresentation or fraud on the part of the prisoner, or is released from confinement upon the prisoner's petition for a writ under a court order that is later reversed; and

(v) Periods during which another sentence by court-martial to confinement is being served. When a prisoner serving a court-martial sentence to confinement is later convicted by a court-martial of another offense and sentenced to confinement, the later sentence interrupts the running of the earlier sentence. Any unremitted remaining portion of the earlier sentence will be served after the later sentence is fully executed.

(D) *Multiple sentences of confinement.* If a court-martial sentence includes more than one

term of confinement, each term of confinement shall be served consecutively or concurrently as determined by the military judge.

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 an offense 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.

(E) *Nature of the confinement*. The omission of hard labor from any sentence of a court-martial which has adjudged confinement shall not prohibit an appropriate authority from requiring hard labor as part of the punishment.

(F) *Place of confinement*. The place of confinement for persons sentenced to confinement by courts-martial shall be determined by regulations prescribed by the Secretary concerned. Under such regulations as the Secretary concerned may prescribe, a sentence to confinement adjudged by a court-martial or other military tribunal, regardless whether the sentence includes a punitive discharge or dismissal and regardless whether the punitive discharge or dismissal has been executed, may be ordered to be served in any place of confinement under the control of any of the armed forces or in any penal or correctional institution under the control of the United States or which the United States may be allowed to use. Persons so confined in a penal or correctional institution not under the control of one of the armed forces are subject to the same discipline and treatment as persons confined or committed by the courts of the United States or of the State, Territory, District of Columbia, or place in which the institution is situated. No member of the armed forces, or person serving with or accompanying an armed force in the field, may be placed in confinement in immediate association with enemy prisoners, or with individuals who are detained under the law of war and are foreign nationals and not members of the armed forces. The Secretary concerned may prescribe regulations governing the conditions of confinement.

(3) *Dishonorable or a bad-conduct discharge, self-executing.* A bad-conduct or dishonorable discharge shall be executed under regulations prescribed by the Secretary concerned after an appropriate official has certified that the accused's case is final within the meaning of R.C.M. 1209. Upon completion of the certification, the official shall forward the certification to the accused's personnel office for preparation of a final discharge order and certificate.

(4) *Dismissal of a commissioned officer, cadet, or midshipman.* Dismissal of a commissioned officer, cadet, or midshipman shall be executed under regulations prescribed by the Secretary concerned—

(A) after the conviction is final within the meaning of R.C.M. 1209; and

(B) only after the approval by the Secretary concerned or such Under Secretary or Assistant Secretary as the Secretary concerned may designate.

(5) *Sentences extending to death.* A punishment of death shall be carried out in a manner prescribed by the Secretary concerned—

(A) after the conviction is final within the meaning of R.C.M. 1209; and

(B) only after the approval of the President under R.C.M. 1207.

(c) *Other considerations concerning the execution of certain sentences.*

(1) *Death; action when accused lacks mental capacity.* An accused lacking the mental capacity to understand the punishment to be suffered or the reason for imposition of the death

sentence may not be put to death during any period when such incapacity exists. The accused is presumed to possess the mental capacity to understand the punishment to be suffered and the reason for imposition of the death sentence. If a substantial question is raised as to whether the accused lacks capacity, the convening authority then exercising general court-martial jurisdiction over the accused shall order a hearing on the question. A military judge, counsel for the Government, and counsel for the accused shall be detailed. The convening authority shall direct an examination of the accused in accordance with R.C.M. 706, but the examination may be limited to determining whether the accused understands the punishment to be suffered and the reason therefor. The military judge shall consider all evidence presented, including evidence provided by the accused. The accused has the burden of proving such lack of capacity by a preponderance of the evidence. The military judge shall make findings of fact, which will then be forwarded to the convening authority ordering the hearing. If the accused is found to lack capacity, the convening authority shall stay the execution until the accused regains appropriate capacity.

(2) *Restriction; hard labor without confinement*. When restriction and hard labor without confinement are included in the same sentence, they shall, unless one is suspended, be executed concurrently.

Analysis

2017 Amendment: R.C.M. 1102 ("Post-trial Sessions") of the MCM (2016 edition) is deleted.

R.C.M. 1102 is new and 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.

Rule 1102A. [Deleted]

Analysis

2017 Amendment: R.C.M. 1102A ("Post-trial hearing for person found not guilty only by reason of lack of mental responsibility") of the MCM (2016 edition) is deleted and its provisions are incorporated into R.C.M. 1105 without substantial amendment.

Rule 1103. Deferment of confinement, forfeitures and reduction in grade; waiver of Article 58b forfeitures

(a) *In general*

(1) After a sentence is announced, the convening authority may defer a sentence to confinement, forfeitures, or reduction in grade in accordance with this rule. Deferment may be at the request of the accused as provided in subsection (b), or without a request of the accused as provided in subsection (c).

(2) Deferment of a sentence to confinement, forfeitures, or reduction in grade is a postponement of the running of the sentence.

(b) *Deferment requested by an accused.* The convening authority or, if the accused is no longer in the convening authority's jurisdiction, the officer exercising general court-martial jurisdiction over the command to which the accused is assigned, may, upon written application of the accused, at any time after the adjournment of the court-martial and before the entry of judgment, defer the accused's service of a sentence to confinement, forfeitures,

and reduction in grade.

(c) *Deferment without a request from the accused.*

(1) In a case in which a court-martial sentences to confinement an accused referred to in paragraph (2), the convening authority may defer service of the sentence to confinement, without the consent of the accused, until after the accused has been permanently released to the armed forces by a State or foreign country.

(2) Paragraph (1) applies to an accused who, while in custody of a State or foreign country, is temporarily returned by that State or foreign country to the armed forces for trial by court-martial and, after the court-martial, is returned to that State or foreign country under the authority of a mutual agreement or treaty, as the case may be.

(3) As used in this subsection, the term "State" means a State of the United States, the District of Columbia, a territory, and a possession of the United States.

(d) *Action on deferment request.*

(1) The authority acting on the deferment request may, in that authority's discretion, defer service of a sentence to confinement, forfeitures, or reduction in grade.

(2) In a case in which the accused requests deferment, the accused shall have the burden of showing that the interests of the accused and the community in deferral outweigh the community's interests in imposition of the punishment on its effective date. Factors that the authority acting on a deferment request may consider in determining whether to grant the deferment request include, where applicable: the probability of the accused's flight; the probability of the accused's commission of other offenses, intimidation of witnesses, or interference with the administration of justice; the nature of the offenses (including the effect on the victim) of which the accused was convicted; the sentence adjudged; the command's immediate need for the accused; the effect of deferment on good order and discipline in the command; the accused's character, mental condition, family situation, and service record. The decision of the authority acting on the deferment request shall be subject to judicial review only for abuse of discretion. The action of the authority acting on the deferment request shall be in writing. A copy of the action on the deferment request, to include any rescission, shall be included in the original record of trial and a copy shall be provided to the accused and to the military judge.

(e) *Restraint when deferment is granted.* When deferment of confinement is granted, no form of restraint or other limitation on the accused's liberty may be ordered as a substitute form of punishment. An accused may, however, be restricted to specified limits or conditions may be placed on the accused's liberty during the period of deferment for any other proper reason, including a ground for restraint under R.C.M. 304.

(f) *End of deferment.* Deferment of a sentence to confinement, forfeitures, or reduction in grade ends:

(1) In a case where the accused requested deferment under subsection (b)—

(A) When the military judge of a general or special court-martial enters the judgment into the record under R.C.M. 1111; or

(B) When the convening authority of a summary court-martial acts on the sentence of the court-martial;

(2) In a case where the deferment was granted under subsection (c), when the accused has been permanently released to the armed forces by a State or foreign country;

(3) When the deferred confinement, forfeitures, or reduction in grade are suspended;

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.

(4) When the deferment expires by its own terms; or

(5) When the deferment is otherwise rescinded in accordance with subsection (g).

(g) *Rescission of deferment.*

(1) *Who may rescind.* The authority who granted the deferment or, if the accused is no longer within that authority's jurisdiction, the officer exercising general court-martial jurisdiction over the command to which the accused is assigned, may rescind the deferment.

(2) *Action.* Deferment of confinement, forfeitures, or reduction in grade may be rescinded when additional information is presented to a proper authority which, when considered with all other information in the case, that authority finds, in that authority's discretion, is grounds for denial of deferment under subsection (d)(2). The accused and the military judge shall promptly be informed of the basis for the rescission. The accused shall also be informed of the right to submit written matters and to request that the rescission be reconsidered. The accused may be required to serve the sentence to confinement, forfeitures, or reduction in grade pending this action.

(3) *Orders.* Rescission of a deferment before or concurrently with the entry of judgment shall be noted in the judgment that is entered into the record of trial under R.C.M. 1111.

(h) *Waiving forfeitures resulting from a sentence to confinement to provide for dependent support.*

(1) With respect to forfeiture of pay and allowances resulting only by operation of law and not adjudged by the court, the convening authority may waive, for a period not to exceed six months, all or part of the forfeitures for the purpose of providing support to the accused's dependent(s). The convening authority may waive and direct payment of any such forfeitures when they become effective by operation of Article 57(a).

(2) Factors that may be considered by the convening authority in determining the amount of forfeitures, if any, to be waived include, but are not limited to, the length of the accused's confinement, the number and age(s) of the accused's family members, whether the accused requested waiver, any debts owed by the accused, the ability of the accused's family members to find employment, and the availability of transitional compensation for abused dependents permitted under 10 U.S.C. 1059.

(3) For the purposes of this rule, a "dependent" means any person qualifying as a "dependent" under 37 U.S.C. 401.

Analysis

2017 Amendment: R.C.M. 1103 ("Preparation of record of trial") of the MCM (2016 edition) is deleted.

R.C.M. 1103 is new and 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.

Rule 1103A. [Deleted]

Analysis
2017 Amendment: R.C.M. 1103A ("Sealed exhibits and proceedings") of the MCM (2016 edition) as amended by Executive Order XXXXX is deleted and its provisions are incorporated into R.C.M. 1113.

Rule 1104. Post-trial motions and proceedings
(a) *Post-trial Article 39(a) sessions.*

(1) *In general.* Upon motion of either party or *sua sponte*, the military judge may direct a post-trial Article 39(a) session at any time before the entry of judgment under R.C.M. 1111 and, when necessary, after a case has been returned to the military judge by a higher court. The accused's counsel shall be present in accordance with R.C.M. 804 and 805 respectively.

Discussion
A post-trial session with members requires calling the court to order, and is not a post-trial Article 39(a) session.

(2) *Purpose.* The purpose of post-trial Article 39(a) sessions is to inquire into, and, when appropriate, to resolve any matter that arises after trial that substantially affects the legal sufficiency of any findings of guilty or the sentence.

(3) *Scope.* A military judge at a post-trial Article 39(a) session may reconsider any trial ruling that substantially affects the legal sufficiency of any findings of guilty or the sentence. Prior to entering such a finding or findings, the military judge shall give each party an opportunity to be heard on the matter in a post-trial Article 39(a) session. The military judge may *sua sponte*, at any time prior to the entry of judgment, take one or both of the following actions:

(i) enter a finding of not guilty of one or more offenses charged; or

(ii) enter a finding of not guilty of a part of a specification as long as a lesser offense charged is alleged in the remaining portion of the specification.

(b) *Post-trial motions.*

(1) *Matters.* Post-trial motions may be filed by either party or when directed by the military judge to address such matters as—

(A) An allegation of error in the acceptance of a plea of guilty;

(B) A motion to set aside one or more findings because the evidence is legally insufficient;

(C) A motion to correct a computational, technical, or other clear error in the sentence;

(D) An allegation of error in the Statement of Trial Results;

(E) An allegation of error in the post-trial processing of the court-martial; and

(F) An allegation of error in the convening authority's action under R.C.M. 1109 or 1110.

(2) *Timing.*

(A) Except as provided in subparagraphs (B) and (C), post-trial motions shall be filed not later than 14 days after the defense counsel receives notice that the military judge signed the Statement of Trial Results. The military judge may extend the time to submit such matters by not more than an additional 30 days for good cause.

(B) A motion to correct an error in the action of the convening authority shall be filed within five days after the party is notified of the convening authority's action. If any post-trial action by the convening authority is incomplete, irregular, or contains error, the military judge shall—

(i) return the action to the convening authority for correction; or

(ii) with the agreement of all parties, correct the action of the convening authority in the entry of judgment.

(C) A motion to correct a clerical or computational error in a judgment entered by the military judge shall be made within five days after a party is provided a copy of the judgment.

(c) *Matters not subject to post-trial sessions.* A post-trial session may not be directed:

(1) For reconsideration of a finding of not guilty of any specification, or a ruling which amounts to a finding of not guilty;

(2) For reconsideration of a finding of not guilty of any charge, unless the record shows a finding of guilty under a specification laid under that charge, which sufficiently alleges a violation of some article of the code; or

(3) For increasing the severity of the sentence unless the sentence prescribed for the offense is mandatory.

(d) *Procedure.*

(1) *Personnel.* The requirements of R.C.M. 505 and 805 shall apply at post-trial sessions except that, for good cause, a different military judge may be detailed, subject to R.C.M. 502(c) and 902.

(2) *Record.* All post-trial sessions shall be held in open session. The record of the post-trial sessions shall be prepared, certified, and provided in accordance with R.C.M. 1112 and shall be included in the record of the prior proceedings.

Analysis

2017 Amendment: R.C.M. 1104 ("Records of trial: Authentication; service; loss; correction; forwarding") of the MCM (2016 edition) is deleted.

R.C.M. 1104 is new and 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 authorize 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).

Rule 1105. Post-trial hearing for person found not guilty only by reason of lack of mental responsibility

(a) *In general*. The military judge shall conduct a hearing not later than forty days following the finding that an accused is not guilty only by reason of a lack of mental responsibility.

(b) *Psychiatric or psychological examination and report.* Prior to the hearing, the military judge or convening authority shall order a psychiatric or psychological examination of the accused, with the resulting psychiatric or psychological report transmitted to the military judge for use in the post-trial hearing.

(c) *Post-trial hearing.*

(1) The accused shall be represented by defense counsel and shall have the opportunity to testify, present evidence, call witnesses on his or her behalf, and to confront and cross-examine

witnesses who appear at the hearing.

(2) The military judge is not bound by the rules of evidence except with respect to privileges.

(3) An accused found not guilty only by reason of a lack of mental responsibility of an offense involving bodily injury to another, or serious damage to the property of another, or involving a substantial risk of such injury or damage, has the burden of proving by clear and convincing evidence that his or her release would not create a substantial risk of bodily injury to another person or serious damage to property of another due to a present mental disease or defect. With respect to any other offense, the accused has the burden of such proof by a preponderance of the evidence.

(4) If, after the hearing, the military judge finds the accused has satisfied the standard specified in paragraph (3), the military judge shall inform the general court-martial convening authority of this result and the accused shall be released. If, however, the military judge finds after the hearing that the accused has not satisfied the standard specified in paragraph (3), then the military judge shall inform the general court-martial convening authority of this result and that authority may commit the accused to the custody of the Attorney General.

Analysis

2017 Amendment: RCM 1105 ("Matters submitted by the accused") of the MCM (2016 edition) is deleted.

R.C.M. 1105 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.

Rule 1105A. [Deleted]

Analysis

2017 Amendment: R.C.M. 1005A ("Matters submitted by a crime victim") of the MCM (2016 edition) is deleted and its provisions are substantially incorporated into R.C.M. 1106A.

Rule 1106. Matters submitted by the accused

(a) *In general*. After a sentence is announced in a court-martial, the accused may submit matters to the convening authority for consideration in the exercise of the convening authority's powers under R.C.M. 1109 or 1110.

(b) *Matters submitted by the accused.*

(1) Subject to paragraph (2), the accused may submit to the convening authority any matters that may reasonably tend to inform the convening authority's exercise of discretion under R.C.M. 1109 or 1110. The convening authority is only required to consider written submissions. Submissions are not subject to the Military Rules of Evidence.

(2) Submissions under this rule may not include matters that relate to the character of a crime victim unless such matters were admitted as evidence at trial.

Discussion

See Article 6b for a definition of crime victim.

(c) *Access to court-martial record.* Upon request by the defense, the trial counsel shall provide

the accused or counsel for the accused a copy of the recording of all open sessions of the court-martial, and copies of, or access to, the evidence admitted at the court-martial, and the appellate exhibits. Such access shall not include sealed or classified court-martial material or recordings unless authorized by a military judge upon a showing of good cause. A military judge shall issue appropriate protective orders when authorizing such access.

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.

(d) *Time periods.*

(1) *General and special courts-martial.* After a trial by general or special court-martial, the accused may submit matters to the convening authority under this rule within ten days after the sentence is announced.

(2) *Summary courts-martial*. After a trial by summary court-martial, the accused may submit matters under this rule within seven days after the sentence is announced.

(3) *Rebuttal.* In a case where a crime victim has submitted matters under R.C.M. 1106A, the accused shall have five days from receipt of those matters to submit any matters in rebuttal. Such a response shall be limited to addressing matters raised in the crime victim's submissions.

(4) *Extension of time.*

(A) If, within the period described in paragraph (1) or (2), the accused shows that additional time is required for the accused to submit matters, the convening authority may, for good cause, extend the period for not more than 20 days.

(B) For purposes of this rule, good cause for an extension ordinarily does not include the need to obtain matters that reasonably could have been presented at the court-martial.

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 subsection (b) of this rule in addition to matters in rebuttal under subsection (d)(1)(3) of this rule.

(e) *Waiver and forfeiture.*

(1) *Failure to submit matters*. Failure to submit matters within the time prescribed by this rule shall constitute forfeiture of the right to submit such matters.

(2) *Submission of matters*. Submission of any matters under this rule shall be deemed a waiver of the right to submit additional matters unless the right to submit additional matters within the prescribed time limits is expressly reserved in writing.

(3) *Written waiver*. The accused may expressly waive, in writing, the right to submit matters under this rule. Once submitted, such a waiver may not be revoked.

(4) *Absence of accused*. If the accused does not submit matters under this rule as a result of an unauthorized absence, the accused shall be deemed to have waived the right to submit matters under this rule.

Analysis

2017 Amendment: R.C.M. 1106 ("Recommendation of the staff judge advocate or legal officer") of the MCM (2016 edition) is deleted.

R.C.M. 1106 is new and incorporates portions R.C.M. 1105 of the MCM (2016 edition) addressing the post-trial submission of matters to the convening authority by the accused.

Rule 1106A. Matters submitted by crime victim

(a) *In general*. In a case with a crime victim, after a sentence is announced in a court-martial any crime victim of an offense may submit matters to the convening authority for consideration in the exercise of the convening authority's powers under R.C.M. 1109 or 1110.

(b) *Notice to a crime victim.*

(1) *In general.* Subject to such regulations as the Secretary concerned may prescribe, the trial counsel, or in the case of a summary court-martial, the summary court-martial officer, shall make reasonable efforts to inform crime victims, through counsel, if applicable, of their rights under this rule, and shall advise such crime victims on the procedure for making submissions.

(2) *Crime victim defined*. As used in this rule, the term "crime victim" means an individual who has suffered direct physical, emotional, or pecuniary harm as a result of the commission of an offense of which the accused was found guilty, and on which the convening authority may take action under R.C.M. 1109 or 1110, or the individual's representative.

(c) *Matters submitted by a crime victim.*

(1) Subject to paragraph (2), a crime victim may submit to the convening authority any matters that may reasonably tend to inform the convening authority's exercise of discretion under R.C.M. 1109 or 1110. The convening authority is only required to consider written submissions. Submissions are not subject to the Military Rules of Evidence.

(2) *Limitations on submissions.*

(A) Submissions under this rule may not include matters that relate to the character of the accused unless such matters were admitted as evidence at trial.

Discussion

See R.C.M. 1109(d)(3)(C)(i).

(B) The crime victim is entitled to one opportunity to submit matters to the convening authority under this rule.

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).

(3) The convening authority shall ensure any matters submitted by a victim under this subsection be provided to the accused as soon as practicable.

Discussion

See R.C.M. 1106(d)(3).

(d) *Access to court-martial record.* Upon request by a crime victim or victim's counsel, the trial counsel shall provide a copy of the recording of all open sessions of the court-martial, and copies of, or access to, the evidence admitted at the court-martial, and the appellate exhibits. Such access shall not include sealed or classified court-martial material or recordings unless authorized by a military judge upon a showing of good cause. A military judge shall issue appropriate protective orders when authorizing such

access.

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.

(e) *Time periods.*

(1) *General and special courts-martial.* After a trial by general or special court-martial, a crime victim may submit matters to the convening authority under this rule within ten days after the sentence is announced.

(2) *Summary courts-martial*. After a trial by summary court-martial, a crime victim may submit matters under this rule within seven days after the sentence is announced.

(3) *Extension of time.*

(A) If, within the period described in paragraph (1) or (2), the crime victim shows that additional time is required for the crime victim to submit matters, the convening authority may, for good cause, extend the period for not more than 20 days.

(B) For purposes of this rule, good cause for an extension ordinarily does not include the need to obtain matters that reasonably could have been obtained prior to the conclusion of the court-martial.

(f) *Waiver and forfeiture.*

(1) *Failure to submit matters*. Failure to submit matters within the time prescribed by this rule shall forfeit the right to submit such matters.

(2) *Written waiver*. A crime victim may expressly waive, in writing, the right to submit matters under this rule. Once filed, such a waiver may not be revoked.

Analysis

2017 Amendment: R.C.M. 1106A is new and incorporates 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.

Rule 1107. Suspension of execution of sentence; remission

(a) *In general*. Suspension of a sentence grants the accused a probationary period during which the suspended part of a sentence is not executed, and upon the accused's successful completion of which the suspended part of the sentence shall be remitted. Remission cancels the unexecuted part of a sentence to which it applies. The unexecuted part of a sentence is that part of the sentence that has not been carried out.

(b) *Who may suspend and remit.*

(1) *Suspension when acting on sentence.* The convening authority may suspend the execution of a court-martial sentence as authorized under R.C.M. 1109 or 1110.

(2) *Suspension after entry of judgment.* The commander of the accused who has the authority to convene a court-martial of the type that imposed the sentence on the accused may suspend any part of the unexecuted part of any sentence except a sentence of death, dishonorable discharge, bad-conduct discharge, dismissal, or confinement for more than six months.

(3) *Remission of sentence.* The commander of the accused who has the authority to convene a court-martial of the type that imposed the sentence on the accused may remit any unexecuted part of the sentence, except a sentence of death, dishonorable discharge, bad-conduct discharge,

dismissal, or confinement for more than six months.

(4) *Secretarial authority.* The Secretary concerned and, when designated by the Secretary concerned, any Under Secretary, Assistant Secretary, Judge Advocate General, or commanding officer may suspend or remit any part or amount of the unexecuted part of any sentence other than a sentence approved by the President or a sentence of confinement for life without eligibility for parole. The Secretary concerned may, however, suspend or remit the unexecuted part of a sentence of confinement for life without eligibility for parole only after the service of a period of confinement of not less than 20 years.

(c) *Conditions of suspension.* The authority who suspends the execution of the sentence of a court-martial shall:

(1) Specify in writing the conditions of the suspension;

(2) Cause a copy of the conditions of the suspension to be served on the probationer; and

(3) Cause a receipt to be secured from the probationer for service of the conditions of the suspension.

Unless otherwise stated, an action suspending a sentence includes as a condition that the probationer not violate any punitive article of the Uniform Code of Military Justice.

(d) *Limitations on suspension*.

(1) A sentence of death may not be suspended.

(2) A sentence of dishonorable discharge, bad-conduct discharge, dismissal, or confinement for more than six months may be suspended only as provided by subsection (b)(4) and R.C.M. 1109(f).

(3) Suspension shall be for a stated period or until the occurrence of an anticipated future event. The period shall not be unreasonably long. The Secretary concerned may further limit by regulation the period for which the execution of a sentence may be suspended. The convening authority shall provide in the action that, unless the suspension is sooner vacated, the expiration of the period of suspension shall remit the suspended portion of the sentence.

(e) *Termination of suspension by remission.* Expiration of the period provided in the action suspending a sentence or part of a sentence shall remit the suspended sentence portion unless the suspension is sooner vacated. Death or separation which terminates status as a person subject to the UCMJ will result in remission of the suspended portion of the sentence.

Analysis

2017 Amendment: R.C.M. 1107 ("Action by convening authority") of the MCM (2016 edition) is deleted.

R.C.M. 1107 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).

Rule 1108. Vacation of suspension of sentence

(a) *In general.* Suspension of execution of the sentence of a court-martial may be vacated for violation of any condition of the suspension as provided in this rule.

(b) *Timeliness.*

(1) *Violation of conditions.* Vacation shall be based on a violation of any condition of suspension which occurs within the period of suspension.

(2) *Vacation proceedings.* Vacation proceedings under this rule shall be completed within a reasonable time.

(3) *Order vacating the suspension.* The order vacating the suspension shall be issued before the expiration of the period of suspension.

(4) *Interruptions to the period of suspension.* Unauthorized absence of the probationer or the commencement of proceedings under this rule to vacate suspension interrupts and tolls the running of the period of suspension.

(c) *Confinement of probationer pending vacation proceedings.*

(1) *In general.* A probationer under a suspended sentence to confinement may be confined pending action under subsection (e) of this rule, in accordance with the procedures in this subsection.

(2) *Who may order confinement.* Any person who may order pretrial restraint under R.C.M. 304(b) may order confinement of a probationer under a suspended sentence to confinement.

(3) *Basis for confinement.* A probationer under a suspended sentence to confinement may be ordered into confinement upon probable cause to believe the probationer violated any conditions of the suspension.

(4) *Preliminary review of confinement* .Unless vacation proceedings under subsection (d) of this rule are completed within 7 days of imposition of confinement of the probationer (not including any delays requested by probationer), a preliminary review of the confinement shall be conducted by a neutral and detached officer appointed in accordance with regulations of the Secretary concerned.

(A) *Rights of confined probationer*. Before the preliminary review, the probationer shall be notified in writing of:

(i) The time, place, and purpose of the preliminary review, including the alleged violation(s) of the conditions of suspension;

(ii) The right to be present at the preliminary review;

(iii) The right to be represented at the preliminary review by civilian counsel provided by the probationer or, upon request, by military counsel detailed for this purpose; and

(iv) The opportunity to be heard, to present witnesses who are reasonably available and other evidence, and the right to confront and cross-examine adverse witnesses unless the officer conducting the preliminary review determines that this would subject these witnesses to risk or harm. For purposes of this subsection, a witness is not reasonably available if the witness requires reimbursement by the United States for cost incurred in appearing, cannot appear without unduly delaying the proceedings or, if a military witness, cannot be excused from other important duties. Witness testimony may be provided in person, by video teleconference, by telephone, or by similar means of remote testimony.

(B) *Rules of evidence.* Only Mil. R. Evid. 301, 302, 303, 305, 412, and Section V apply to proceedings under this rule, except Mil. R. Evid. 412(b)(1)(C) does not apply. In applying these rules to a preliminary review, the term “military judge,” as used in these rules, shall mean the officer conducting the preliminary review, who shall assume the military judge’s authority to exclude evidence from the hearing, and who shall, in discharging this duty, follow the procedures set forth in these rules.

(C) *Decision.* The officer conducting the preliminary review shall determine whether there is probable cause to believe that the probationer violated the conditions of the probationer’s suspension. If the officer conducting the preliminary review determines that

probable cause is lacking, the officer shall issue a written order directing that the probationer be released from confinement. If the officer determines that there is probable cause to believe that the probationer violated a condition of suspension, the officer shall set forth this determination in a written memorandum that details therein the evidence relied upon and reasons for making the decision. The officer shall forward the original memorandum or release order to the probationer's commander and forward a copy to the probationer and the officer in charge of the confinement facility.

(d) *Vacation proceedings.*

(1) *In general*. The purpose of the vacation hearing is to determine whether there is probable cause to believe that the probationer violated a condition of the probationer's suspension.

(A) *Sentence of general courts-martial and certain special courts-martial.* In the case of vacation proceedings for a suspended sentence of any general court-martial or a suspended sentence of a special court-martial that adjudged either a bad-conduct discharge or confinement for more than six months, the officer having special court-martial jurisdiction over the probationer shall either personally hold the hearing or detail a judge advocate to preside at the hearing. If there is no officer having special court-martial jurisdiction over the probationer who is subordinate to the officer having general court-martial jurisdiction over the probationer, the officer exercising general court-martial jurisdiction over the probationer shall either personally hold a hearing under this subsection or detail a judge advocate to conduct the hearing.

(B) *Special court-martial wherein a bad-conduct discharge or confinement for more than six months was not adjudged.* In the case of vacation proceedings for a sentence from a special court-martial that did not include a bad-conduct discharge or confinement for more than six months, the officer having special court-martial jurisdiction over the probationer shall either personally hold the hearing or detail a judge advocate to conduct the hearing.

(C) *Sentence of summary court-martial.* In the case of vacation proceedings for a suspended sentence of a summary court-martial, the officer having summary court-martial jurisdiction over the probationer shall either personally hold the hearing or detail a commissioned officer to conduct the hearing.

(2) *Notice to probationer.* Before the hearing, the officer conducting the hearing shall cause the probationer to be notified in writing of:

(A) The time, place, and purpose of the hearing;

(B) The right to be present at the hearing;

(C) The alleged violation(s) of the conditions of suspension and the evidence expected to be relied on;

(D) The right to be represented at the hearing by civilian counsel provided by the probationer or, upon request, by military counsel detailed for this purpose; and

(E) The opportunity to be heard, to present witnesses and other evidence, and the right to confront and cross-examine adverse witnesses.

(3) *Procedure.*

(A) *Generally*. The hearing shall begin with the hearing officer informing the probationer of the probationer's rights. The Government will then present evidence. Upon the conclusion of the Government's presentation of evidence, the probationer may present evidence. The probationer shall have full opportunity to present any matters in defense, extenuation, or mitigation. Both the Government and probationer shall be afforded an opportunity to cross-examine adverse witnesses. The hearing officer may also question witnesses called by the parties.

(B) *Rules of evidence.* The Military Rules of Evidence applicable to vacation proceedings are the same as those set forth in subsection (c)(4)(B) of this rule.

(C) *Production of witnesses and other evidence*. The procedure for the production of witnesses and other evidence shall follow that prescribed in R.C.M. 405(h), except that R.C.M. 405(h)(3)(B) shall not apply. The hearing officer shall only consider testimony and other evidence that is relevant to the limited purpose of the hearing.

Discussion

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

(D) *Presentation of testimony*. Witness testimony may be provided in person, by video teleconference, by telephone, or by similar means of remote testimony. All testimony shall be taken under oath, except that the probationer may make an unsworn statement.

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.

(E) *Other evidence*. If relevant to the limited purpose of the hearing, and not cumulative, a hearing officer may consider other evidence, in addition to or in lieu of witness testimony, including statements, tangible evidence, or reproductions thereof, offered by either side, that the hearing officer determines is reliable. This other evidence need not be sworn.

(F) *Protective order for release of privileged information.* If the Government agrees to disclose to the probationer information to which the protections afforded by Mil. R. Evid. 505 or 506 may apply, the convening authority, or other person designated by regulation of the Secretary of the service concerned, may enter an appropriate protective order, in writing, to guard against the compromise of information disclosed to the probationer. The terms of any such protective order may include prohibiting the disclosure of the information except as authorized by the authority.

(G) *Presence of probationer*. The taking of evidence shall not be prevented and the probationer shall be considered to have waived the right to be present whenever the probationer:

(i) After being notified of the time and place of the proceeding is voluntarily absent; or

(ii) After being warned by the hearing officer that disruptive conduct will cause removal from the proceeding, persists in conduct that is such as to justify exclusion from the proceeding.

(H) *Objections*. Any objection alleging failure to comply with these rules shall be made to the convening authority via the hearing officer. The hearing officer shall include a record of all objections in the written recommendations to the convening authority.

(I) *Access by spectators*. The procedures for access by spectators shall follow those prescribed in R.C.M. 405(j)(3).

(J) *Victims' rights*. Any victim of the underlying offense for which the probationer received the suspended sentence, or any victim of the alleged offense that is the subject of the vacation hearing, has the right to reasonable, accurate, and timely notice of the vacation hearing.

(4) *Record and recommendation*. The officer conducting the hearing shall make a summarized record of the hearing. If the hearing is not personally conducted by the officer having the authority to take action under subsection (e) of this rule, the officer who conducted the hearing shall forward the record and that officer's written recommendation concerning vacation to such authority. The record shall include the recommendation, the evidence relied

upon, and the rationale supporting the recommendation.

(5) *Release from confinement*. If the hearing is not personally conducted by the officer having the authority to take action under subsection (e) of this rule and the officer conducting the hearing finds there is not probable cause to believe that the probationer violated any condition of the suspension, the officer shall order the release of the probationer from any confinement ordered under subsection (c) of this rule, and forward the record and recommendation to the officer having the authority to take action under subsection (e) of this rule.

(e) *Action.*

(1) *General courts-martial and certain special courts-martial.* In a case of a suspended sentence from any general court-martial or a suspended sentence from a special court-martial that adjudged either a bad-conduct discharge or confinement for more than six months, unless the officer exercising general court-martial jurisdiction over the probationer personally conducted the hearing, the officer exercising general court-martial jurisdiction over the probationer shall review the record and the recommendation produced by the officer who conducted the hearing on the alleged violation of the conditions of suspension, decide whether the probationer violated a condition of suspension, and, if so, decide whether to vacate the suspended sentence. If the officer exercising general court-martial jurisdiction decides to vacate the suspended sentence, that officer shall prepare a written statement of the evidence relied on and the reasons for vacating the suspended sentence.

(2) *Special courts-martial wherein a bad-conduct discharge and confinement for more than six months was not adjudged.* In a case of a suspended sentence from a special court-martial that did not include a bad-conduct discharge or confinement for more than six months, unless the officer having special court-martial jurisdiction over the probationer personally conducted the hearing, the officer having special court-martial jurisdiction over the probationer shall review the record and the recommendation produced by the officer who conducted the hearing, decide whether the probationer violated a condition of suspension, and, if so, decide whether to vacate the suspended sentence. If the officer exercising special court-martial jurisdiction decides to vacate the suspended sentence, that officer shall prepare a written statement of the evidence relied on and the reasons for vacating the suspended sentence. The authority holding the same or higher court-martial authority as the officer who originally suspended the probationer's sentence may withhold the authority to take action under this paragraph to that officer.

(3) *Vacation of a suspended sentence from a summary court-martial.* In a case of a suspended sentence from a summary court-martial, unless the officer having summary court-martial jurisdiction over the probationer personally conducted the hearing, the officer having summary court-martial jurisdiction over the probationer shall review the record and the recommendation produced by the officer who conducted the hearing, and decide whether the probationer violated a condition of suspension, and, if so, decide whether to vacate the suspended sentence. If the officer exercising summary court-martial jurisdiction decides to vacate the suspended sentence, that officer shall prepare a written statement of the evidence relied on and the reasons for vacating the suspended sentence. The authority holding the same or higher court-martial authority as the officer who originally suspended the probationer's sentence may withhold the authority to take action under this paragraph to that officer.

(4) *Execution.* Any unexecuted part of a suspended sentence ordered vacated under this subsection shall be executed.

Analysis

2017 Amendment: R.C.M. 1108 ("Suspension of execution of sentence; remission") of the MCM (2016 edition) is deleted.

R.C.M. 1108 is new and 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).

Rule 1109. Reduction of Sentence, General and Special Courts-Martial

(a) *In general.* This rule applies to the post-trial actions of the convening authority in any general or special court-martial in which—

(1) The court-martial found the accused guilty of—

(A) An offense for which the maximum authorized sentence to confinement is more than two years, without considering the jurisdictional maximum of the court;

(B) A violation of Article 120(a) or (b);

(C) A violation of Article 120b; or

(D) A violation of such other offense as the Secretary of Defense has specified by regulation; or

(2) The sentence of the court-martial includes—

(A) A bad-conduct discharge, dishonorable discharge, or dismissal;

(B) A term of confinement, or terms of confinement running consecutively, more than six months; or

Discussion

The applicability of subparagraph (a)(2)(B) is determined by assessing the total amount of confinement that is to be served 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, subparagraph (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, subparagraph (a)(2)(B) applies.

(C) Death.

(b) *Limitation of authority on findings.* For any court-martial described under subsection (a), the convening authority may not set aside, disapprove, or take any other action on the findings of the court-martial.

(c) *Limited authority to act on sentence.* For any court-martial described under subsection (a), the convening authority may—

(1) Modify a bad-conduct discharge, dishonorable discharge, or dismissal only as provided in subsections (e) and (f);

(2) Modify a term of confinement of more than six months, or terms of confinement that running consecutively are more than six months, only as provided in subsections (e) and (f);

Discussion

See the discussion following subsection (a)(2)(B).

(3) Reduce or commute a punishment of death only as provided in subsection (e);

(4) Reduce, commute, or suspend, in whole or in part, any punishment adjudged for an offense tried under the law of war other than the punishments specified in paragraphs (1), (2), and (3);

(5) Reduce, commute, or suspend, in whole or in part, the following punishments:

(A) The confinement portion of a sentence if the confinement portion of the sentence is six months or less, to include terms of confinement that running consecutively total six months or less;

Discussion

See the discussion following subsection (a)(2)(B).

(B) A reprimand;

(C) Forfeiture of pay or allowances;

(D) A fine;

(E) Reduction in pay grade;

(F) Restriction to specified limits; and

(G) Hard labor without confinement.

(d) *General Considerations.*

(1) *Who may take action*. If it is impracticable for the convening authority to act under this rule, the convening authority shall, in accordance with such regulations as the Secretary concerned may prescribe, forward the case to an officer exercising general court-martial jurisdiction who may take action under this rule.

(2) *Legal advice*. In determining whether to take action, or to decline taking action under this rule, the convening authority shall consult with the staff judge advocate or legal advisor.

(3) *Consideration of matters.*

(A) *Matters submitted by accused and crime victim.* Before taking or declining to take any action on the sentence under this rule, the convening authority shall consider matters timely submitted under R.C.M. 1106 and 1106A, if any, by the accused and any crime victim.

(B) *Additional matters*. Before taking action the convening authority may consider—

(i) The Statement of Trial Results;

Discussion

See R.C.M. 1104(b) addressing post-trial motions and proceedings to resolve allegations of error in a Statement of Trial Results.

(ii) The evidence introduced at the court-martial, any appellate exhibits, and the recording or transcription of the proceedings, subject to the provisions of R.C.M. 1113 and subparagraph (C);

(iii) The personnel records of the accused; and

(iv) Such other matters as the convening authority deems appropriate.

(C) *Prohibited matters*.

(i) *Accused.* The convening authority may not consider matters adverse to the accused that were not admitted at the court-martial, with knowledge of which the accused is not chargeable, unless the accused is first notified and given an opportunity to rebut.

(ii) *Crime victim*. The convening authority shall not consider any matters that relate to the character of a crime victim unless such matters were presented as evidence at trial and not excluded at trial.

Discussion

See Article 6b for a definition of crime victim.

(3) *Timing.* Except as provided in subsection (e), any action taken by the convening authority under this rule shall be taken prior to entry of judgment. If the convening authority decides to take no action, that decision shall be transmitted promptly to the military judge as provided under subsection (g).

(e) *Reduction of sentence for substantial assistance by accused.*

(1) *In general.* A convening authority may reduce, commute, or suspend the sentence of an accused, in whole or in part, if the accused has provided substantial assistance in the criminal investigation or prosecution of another person.

(2) *Trial counsel.* A convening authority may reduce the sentence of an accused under this subsection only upon the recommendation of the trial counsel who prosecuted the accused. If the person who served as trial counsel is no longer serving in that position, or is not reasonably available, the attorney who is primarily responsible for the investigation or prosecution in which the accused has provided substantial assistance, and who represents the United States, is the trial counsel for the purposes of this subsection. The recommendation of the trial counsel is the decision of the trial counsel alone. No person may direct the trial counsel to make or not make such a recommendation.

(3) *Who may act.*

(A) Before entry of judgment, the convening authority may act on the recommendation of the trial counsel under paragraph (2).

(B) After entry of judgment, the officer exercising general court-martial jurisdiction over the command to which the accused is assigned may act on the recommendation of trial counsel under paragraph (2).

(4) *Scope of authority.* A convening authority authorized to act under paragraph (3) may accept the recommendation of the trial counsel under paragraph (2) of this subsection, and may reduce, commute, or suspend a sentence in whole or in part, including any mandatory minimum sentence.

(5) *Limitations.*

(A) A sentence of death may not be suspended under this subsection.

(B) In the case of a recommendation by the trial counsel under paragraph (2) of this subsection made more than one year after entry of judgment, the officer exercising general court-martial jurisdiction over the command to which the accused is assigned may reduce a sentence only if the substantial assistance of the accused involved—

(i) Information not known to the accused until one year or more after sentencing;

(ii) Information the usefulness of which could not reasonably have been anticipated by the accused until more than one year after sentencing and which was promptly provided to the Government after its usefulness was reasonably apparent to the accused; or

(iii) Information provided by the accused to the Government within one year of sentencing, but which did not become useful to the Government until more than one year after sentencing.

(6) *Evaluating substantial assistance.* In evaluating whether the accused has provided substantial assistance, the trial counsel and convening authority may consider the presentence assistance of the accused.

(7) *Action after entry of judgment.* If the officer exercising general court-martial jurisdiction over the command to which the accused is assigned acts on the sentence of an accused after entry of judgment, the convening authority's action shall be forwarded to the chief trial judge.

The chief trial judge, or a military judge detailed by the chief trial judge, shall modify the judgment of the court-martial to reflect the action by the convening authority. The action by the convening authority and the modified judgment shall be forwarded to the Judge Advocate General and shall be included in the original record of trial. A sentence which is reduced under this rule shall not abridge any right of the accused to appellate review.

(f) *Suspension.*

(1) The convening authority may suspend a sentence of a dishonorable discharge, bad-conduct discharge, dismissal, or confinement in excess of six months, if—

(A) The Statement of Trial Results filed under R.C.M. 1101 includes a recommendation by the military judge that the convening authority suspend the sentence, in whole or in part; and

(B) The military judge includes a statement explaining the basis for the suspension recommendation.

(2) If the convening authority suspends a sentence under this subsection—

(A) The portion of the sentence that is to be suspended may not exceed the portion of the sentence that the military judge recommended be suspended;

(B) The duration of the suspension may not be less than that recommended by the military judge; and

(C) The suspended portion of the sentence may be terminated by remission only as provided in R.C.M. 1107(e).

(3) A sentence that is suspended under this rule shall comply with the procedures prescribed in R.C.M. 1107 (c), (d), and (e).

(g) *Decision; forwarding of decision and related matters.*

(1) *No action.* If the convening authority decides to take no action on the sentence under this rule, the staff judge advocate or legal advisor shall notify the military judge of this decision.

(2) *Action on sentence.* If the convening authority decides to act on the sentence under this rule, such action shall be in writing and shall include a written statement explaining the action. If any part of the sentence is disapproved, the action shall clearly state which part or parts are disapproved. The convening authority's staff judge advocate or legal advisor shall forward the action with the written explanation to the military judge to be attached to the record of trial.

(h) *Service on accused and crime victim.* If the convening authority took any action on the sentence under this rule, a copy of such action shall be served on the accused, crime victim, or on their respective counsel. If the action is served on counsel, counsel shall, by expeditious means, provide the accused or crime victim with a copy. If the judgment is entered expeditiously, service of the judgment will satisfy the requirements of this subsection.

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.

Analysis

2017 Amendment: R.C.M. 1109 ("Vacation of suspension of sentence") of the MCM (2016 edition) is deleted.

R.C.M. 1109 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 the reduction of a sentence in a general or special court-martial.

R.C.M. 1109 incorporates portions of R.C.M. 1107 of the MCM (2016 edition).

Rule 1110. Action by convening authority in certain general and special courts-martial

(a) *In general.* This rule applies to the post-trial actions of the convening authority in any general or special court-martial not specified in R.C.M. 1109(a).

(b) *Action on findings.* In any court-martial subject to this rule, action on findings is not required; however, the convening authority may—

(1) Change a finding of guilty to a charge or specification to a finding of guilty to an offense that is a lesser included offense of the offense stated in the charge or specification; or

(2) Set aside any finding of guilty and—

(A) Dismiss the specification and, if appropriate, the charge; or

(B) Order a rehearing in accordance with the procedures set forth in R.C.M. 810.

A rehearing may not be ordered as to findings of guilty when there is a lack of sufficient evidence in the record to support the findings of guilty of the offense charged or of any lesser included offense. A rehearing may be ordered, however, if the proof of guilt consisted of inadmissible evidence for which there is available an admissible substitute. A rehearing may be ordered as to any lesser offense included in an offense of which the accused was found guilty, provided there is sufficient evidence in the record to support the lesser included offense.

(c) *Action on sentence.*

(1) In any court-martial subject to this rule, action on the sentence is not required; however, the convening authority may disapprove, reduce, commute, or suspend, in whole or in part, the court-martial sentence. If the sentence is disapproved, the convening authority may order a rehearing on the sentence.

(2) In any court-martial subject to this rule, the convening authority, after entry of judgment, may reduce a sentence for substantial assistance in accordance with the procedures under R.C.M. 1109(e).

(d) *Procedures.* The convening authority shall use the same procedures as in subsections (d) and (h) of R.C.M. 1109 for any post-trial action on findings and sentence under this rule.

(e) *Decision; forwarding of decision and related matters.*

(1) *No action.* If the convening authority decides to take no action on the findings or sentence under this rule, the convening authority's staff judge advocate or legal advisor shall notify the military judge of the decision.

(2) *Action on findings.* If the convening authority decides to act on the findings under this rule, the action of the convening authority shall be in writing and shall include a written statement explaining the reasons for the action. If a rehearing is not ordered, the affected charges and specifications shall be dismissed by the convening authority in the action. The convening authority's staff judge advocate or legal advisor shall forward the action with the written explanation to the military judge to be attached to the record of trial.

(3) *Action on sentence.* If the convening authority decides to act on the sentence under this rule, the action of the convening authority on the sentence shall be in writing and shall include a written statement explaining the reasons for the action. If any part of the sentence is disapproved, the action shall clearly state which part or parts are disapproved. The convening authority's staff judge advocate or legal advisor shall forward the action with the written explanation to the military judge to be attached to the record of trial.

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.

Analysis

2017 Amendment: R.C.M. 1110 ("Waiver or withdrawal of appellate review") of the MCM (2016 edition) is deleted.

R.C.M. 1110 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 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 rule

Rule 1111. Entry of judgment

(a) *In general.*

(1) *Scope.* Under regulations prescribed by the Secretary concerned, the military judge of a general or special court-martial shall enter into the record of trial the judgment of the court. If the Chief Trial Judge determines that the military judge is not reasonably available, the Chief Trial Judge may detail another military judge to enter the judgment.

(2) *Purpose.* The judgment reflects the result of the court-martial, as modified by any post-trial actions, rulings, or orders. The entry of judgment terminates the trial proceedings and initiates the appellate process.

(3) *Summary courts-martial.* In a summary court-martial, the findings and sentence of the court-martial, as modified or approved by the convening authority, constitute the judgment of the court-martial. A separate document need not be issued.

(b) *Contents.* The judgment of the court shall be signed and dated by the military judge and shall consist of—

(1) *Findings.* For each charge and specification referred to trial—

(A) a summary of each charge and specification;

(B) the plea of the accused;

(C) the findings or other disposition of each charge and specification accounting for any modifications made by reason of any post-trial action by the convening authority or any post-trial ruling, order, or other determination by the military judge;

(2) *Sentence.* The sentence, accounting for any modifications made by reason of any post-trial action by the convening authority or any post-trial ruling, order, or other determination by the military judge. If the accused was convicted of more than one specification and any part of the sentence was determined by a military judge, the judgment shall also specify—

(A) the confinement and fine for each specification, if any;

(B) whether any term of confinement shall run consecutively or concurrently with any other term(s) of confinement; and

(C) the total amount of any fine(s) and the total duration of confinement to be served, after accounting for the following—

(i) any terms of confinement that are to run consecutively or concurrently;

(ii) the total amount of sentence credit, if any, to be applied to the accused's adjudged sentence to confinement; and

(iii) any modifications to the adjudged sentence made by reason of any post-trial action by the convening authority or any post-trial ruling, order, or other determination by the military judge.

Discussion

The date that the sentence is adjudged is the date the sentence was announced by the court-martial. *See* Article 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.

(3) *Additional information.*

(A) *Deferment.* If the accused requested that any portion of the sentence be deferred, the judgment shall specify the nature of the request, the convening authority's action, the effective date if approved, and, if the deferment ended prior to the entry of judgment, the date the deferment ended.

(B) *Waiver of automatic forfeitures.* If the accused requested that automatic forfeitures be waived by the convening authority under Article 58b, the judgment shall specify the nature of the request, the convening authority's action, and the effective date and length, if approved.

(C) *Suspension.* If the Statement of Trial Results included a recommendation by the military judge that a portion of the sentence be suspended, the judgment shall specify the action of the convening authority on the recommendation.

(D) *Reprimand.* If the sentence included a reprimand, the judgment shall contain the reprimand issued by the convening authority.

(E) *Rehearing.* If the judgment is entered after a rehearing, new trial or other trial, the judgment shall specify any sentence limitation applicable by operation of Article 63.

(F) *Other information.* Any additional information that the Secretary concerned may require by regulation.

(4) *Statement of Trial Results.* The Statement of Trial Results shall be included in the judgment in accordance with regulations prescribed by the Secretary concerned.

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.

(c) *Modification of judgment.* The judgment may be modified as follows—

(1) The military judge who entered a judgment may modify the judgment to correct computational or clerical errors within 14 days after the judgment was initially entered.

(2) The Judge Advocate General, the Court of Criminal Appeals, and the Court of Appeals for the Armed Forces may modify a judgment in the performance of their duties and responsibilities.

(3) If a case is remanded to a military judge, the military judge may modify the judgment consistent with the purposes of the remand.

(4) Any modification to the judgment of a court-martial must be included in the record of trial.

(d) *Rehearings, new trials, and other trial.* In the case of a rehearing, new trial, or other trial, the military judge shall enter a new judgment into the record of trial to reflect the results of the rehearing, new trial, or other trial.

(e) *When judgment is entered.*

(1) *Courts-martial without a finding of guilty.* When a court-martial results in a full acquittal or when a court-martial terminates before findings, the judgment shall be entered as soon as practicable. When a court-martial results in a finding of not guilty only by reason of lack of

mental responsibility of all charges and specifications, the judgment shall be entered as soon as practicable after a hearing is conducted under R.C.M. 1105.

(2) *Courts-martial with a finding of guilty.* If a court-martial includes a finding of guilty to any specification or charge, the judgment shall be entered as soon as practicable after the staff judge advocate or legal advisor notifies the military judge of the convening authority's post-trial action or decision to take no action under R.C.M. 1109 or 1110, as applicable.

(f) *Publication.*

(1) The judgment shall be attached to the record of trial.

(2) A copy of the judgment shall be provided to the accused or to the accused's defense counsel. If the judgment is served on the defense counsel, defense counsel shall, by expeditious means, provide the accused with a copy.

(3) A copy of the judgment shall be provided upon request to any crime victim or victim's counsel in the case, without regard to whether the accused was convicted or acquitted of any offense.

(4) The commander of the accused or the convening authority may publish the judgment of the court-martial to their respective commands.

(5) Under regulations prescribed by the Secretary of Defense, court-martial judgments shall be made available to the public.

Discussion

Crime victim has the same definition as victim of an offense under Article 6b. However, in this provision, a copy of the judgment entered into the record of trial shall be provided to any crime victim without regard to whether the accused was convicted or acquitted of any offense.

Analysis

2017 *Amendment:* R.C.M. 1111 ("Disposition of the record of trial after action") of the MCM (2016 edition) is deleted.

R.C.M. 1111 is new and implements Article 60c, as enacted 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). In some respects, 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.

Rule 1112. Certification of record of trial; general and special courts-martial

(a) *In general.* Each general and special court-martial shall keep a separate record of the proceedings in each case brought before it. The record shall be independent of any other document and shall include a recording of the court-martial. Court-martial proceedings may be recorded by videotape, audiotape, or other technology from which sound images may be reproduced to accurately depict the court-martial.

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. *See* 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.

(b) *Contents of the record of trial.* The record of trial contains the court-martial proceedings, and includes any evidence or exhibits considered by the court-martial in determining the

findings or sentence. The record of trial in every general and special court-martial shall include:

(1) A substantially verbatim recording of the court-martial proceedings except sessions closed for deliberations and voting;

(2) The original charge sheet or a duplicate;

(3) A copy of the convening order and any amending order;

(4) The request, if any, for trial by military judge alone; the accused's election, if any, of members under R.C.M. 903; and, when applicable, any statement by the convening authority required under R.C.M. 503(a)(2);

(5) The election, if any, for sentencing by members in lieu of sentencing by military judge under R.C.M. 1002(b);

(6) Exhibits, or, if permitted by the military judge, copies, photographs, or descriptions of any exhibits that were received in evidence and any appellate exhibits;

(7) The Statement of Trial Results;

(8) Any action by the convening authority under R.C.M. 1109 or 1110; and

(9) The judgment entered into the record by the military judge.

(c) *Certification.* A court reporter shall prepare and certify that the record of trial includes all items required under subsection (b). If the court reporter cannot certify the record of trial because of the court reporter's death, disability, or absence, the military judge shall certify the record of trial.

(1) *Timing of certification*. The record of trial shall be certified as soon as practicable after the judgment has been entered into the record.

(2) *Additional proceedings.* If additional proceedings are held after the court reporter certifies the record, a record of those proceedings shall be included in the record of trial, and a court reporter shall prepare a supplemental certification.

(d) *Loss of record, incomplete record, and correction of record.*

(1) If the certified record of trial is lost or destroyed, a court reporter shall, if practicable, certify another record of trial.

(2) A record of trial is complete if it complies with the requirements of subsection (b). If the record is incomplete or defective, a court reporter or any party may raise the matter to the military judge for appropriate corrective action. A record of trial found to be incomplete or defective before or after certification may be corrected to make it accurate. A superior competent authority may return a record of trial to the military judge for correction under this rule. The military judge shall give notice of the proposed correction to all parties and permit them to examine and respond to the proposed correction. All parties shall be given reasonable access to any court reporter notes or recordings of the proceedings.

(3) The military judge may take corrective action by any of the following means—

(A) reconstructing the portion of the record affected;

(B) dismissing affected specifications;

(C) reducing the sentence of the accused; or

(D) if the error was raised by motion or on appeal by the defense, declaring a mistrial as to the affected specifications.

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 then the proceedings may continue. If either party objects to the summary or reconstruction, then the trial should proceed anew, and the proceedings repeated from the point where

the interruption began.

(e) *Copies of the record of trial*.

(1) *Accused and victim.* Following certification of the record of trial under subparagraph (c), in every general and special court-martial, subject to paragraphs (3) and (4), a court reporter shall, in accordance with regulations issued by the Secretary concerned, provide a copy of the certified record of trial to—

(A) The accused;

(B) The victim of an offense of which the accused was charged if the victim testified during the proceedings; and

(C) Any victim named in a specification of which the accused was charged, upon request, without regard to the findings of the court-martial.

Discussion

See Article 6b for the definition of victim. The record of trial includes only those items listed in subparagraph (b).

(2) *Providing copy impracticable.* If it is impracticable to provide the record of trial to an individual entitled to receive a copy under paragraph (1) because of the unauthorized absence of the individual, or military exigency, or if the individual so requests on the record at the court-martial or in writing, the individual's copy of the record shall be forwarded to the individual's counsel, if any.

(3) *Sealed exhibits; classified information; closed sessions.* Any copy of the record of trial provided to an individual under paragraph (1) shall not contain classified information, information under seal, or recordings of closed sessions of the court-martial, and shall be handled as follows:

(A) *Classified information.*

(i) *Forwarding to convening authority.* If the copy of the record of trial prepared for an individual under this rule contains classified information, the trial counsel, unless directed otherwise by the convening authority, shall forward the individual's copy to the convening authority, before it is provided to the individual.

(ii) *Responsibility of the convening authority.* The convening authority shall:

(I) cause any classified information to be deleted or withdrawn from the individual's copy of the record of trial;

(II) cause a certificate indicating that classified information has been deleted or withdrawn to be attached to the record of trial; and

(III) cause the expurgated copy of the record of trial and the attached certificate regarding classified information to be provided to the individual as provided in paragraphs (1)(A) and (B).

(iii) *Contents of certificate.* The certificate regarding deleted or withdrawn classified information shall indicate:

(I) that the original record of trial may be inspected in the Office of the Judge Advocate General under such regulations as the Secretary concerned may prescribe;

(II) the locations in the record of trial from which matter has been deleted;

(III) the locations in the record of trial which have been entirely deleted; and

(IV) the exhibits which have been withdrawn.

(B) *Sealed exhibits and closed sessions.* The court reporter shall delete or withdraw from an individual's copy of the record of trial—

(i) any matter ordered sealed by the military judge under R.C.M. 1113; and

(ii) any recording or transcript of a session that was ordered closed by the military judge, to include closed sessions held pursuant to Mil. R. Evid. 412, 513, and 514.

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.

(4) *Portions of the record protected by the Privacy Act*. Any copy of the record of trial provided to a victim under paragraph (1) shall not contain any portion of the record the release of which would unlawfully violate the privacy interests of any person other than that victim, to include those privacy interests recognized by 5 U.S.C. § 552a, the Privacy Act of 1974.

(5) *Additional copies*. The convening or higher authority may direct that additional copies of the record of trial of any general or special court-martial be prepared.

(f) *Attachments for appellate review*. In accordance with regulations prescribed by the Secretary concerned, a court reporter shall attach the following matters to the record before the certified record of trial is forwarded to the office of the Judge Advocate General for appellate review:

(1) If not used as exhibits—

(A) The preliminary hearing report under Article 32, if any;

(B) The pretrial advice under Article 34, if any;

(C) If the trial was a rehearing or new or other trial of the case, the record of any former hearings; and

(D) Written special findings, if any, by the military judge;

(2) Exhibits or, with the permission of the military judge, copies, photographs, or descriptions of any exhibits which were marked for and referred to on the record but not received in evidence;

(3) Any matter filed by the accused or victim under R.C.M. 1106 or 1106A, or any written waiver of the right to submit such matters;

(4) Any deferment request and the action on it;

(5) Conditions of suspension, if any, and proof of service on probationer under R.C.M. 1107;

(6) Any waiver or withdrawal of appellate review under R.C.M. 1115;

(7) Records of any proceedings in connection with a vacation of suspension under R.C.M. 1108;

(8) Any transcription of the court-martial proceedings created pursuant to R.C.M. 1114; and

(9) Any redacted materials.

Discussion

The record of trial and attachments may include electronic versions of any matters.

(g) *Security classification.* If the record of trial contains matters that must be classified under applicable security regulations, the trial counsel shall cause a proper security classification to be assigned to the record of trial and on each page thereof on which classified material appears.

Analysis

2017 Amendment: R.C.M. 1112 (“Review by a judge advocate”) of the MCM (2016 edition) is

deleted.

R.C.M. 1112 is new and 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 of records of trial in general and special courts-martial.

R.C.M. 1112 incorporates portions R.C.M. 1103 of the MCM (2016 edition).

Rule 1113. Sealed exhibits and proceedings.

(a) *In general.* If the report of preliminary hearing or record of trial contains exhibits, proceedings, or other materials ordered sealed by the preliminary hearing officer or military judge, counsel for the Government, the court reporter, or trial counsel shall cause such materials to be sealed so as to prevent unauthorized examination or disclosure. Counsel for the Government, the court reporter, or trial counsel shall ensure that such materials are properly marked, including an annotation that the material was sealed by order of the preliminary hearing officer or military judge, and inserted at the appropriate place in the record of trial. Copies of the report of preliminary hearing or record of trial shall contain appropriate annotations that materials were sealed by order of the preliminary hearing officer or military judge and have been inserted in the report of preliminary hearing or record of trial. This rule shall be implemented in a manner consistent with Executive Order 13526, concerning classified national security information.

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 (b)(5) and (6) of this rule.

(b) *Examination and disclosure of sealed materials.* Except as provided in this rule, sealed materials may not be examined or disclosed.

(1) *Prior to referral.* Prior to referral of charges, the following individuals may examine and disclose sealed materials only if necessary for proper fulfillment of their responsibilities under the UCMJ, this Manual, governing directives, instructions, regulations, applicable rules for practice and procedure, or rules of professional conduct: the judge advocate advising the convening authority who directed the Article 32 preliminary hearing; the convening authority who directed the Article 32 preliminary hearing; the staff judge advocate to the general court-martial convening authority; a military judge detailed to an Article 30a proceeding; and the general court-martial convening authority.

(2) *Referral through certification.* After referral of charges and prior to certification of the record under R.C.M. 1112(c), sealed materials may not be examined or disclosed in the absence of an order from the military judge based upon good cause.

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.

(3) *Reviewing and appellate authorities; appellate counsel.*

(A) *Examination by reviewing and appellate authorities.* Reviewing and appellate authorities may examine sealed matters when those authorities determine that examination is reasonably necessary to a proper fulfillment of their responsibilities under the UCMJ, this

Manual, governing directives, instructions, regulations, applicable rules for practice and procedure, or rules of professional conduct.

(B) *Examination by appellate counsel*. Appellate counsel may examine sealed materials subject to the following procedures.

(i) *Sealed materials released to trial counsel or defense counsel.* Materials presented or reviewed at trial and sealed, as well as materials reviewed *in camera,* released to trial counsel or defense counsel, and sealed, may be examined by appellate counsel upon a colorable showing to the reviewing or appellate authority that examination is reasonably necessary to a proper fulfillment of their responsibilities under the UCMJ, this Manual, governing directives, instructions, regulations, applicable rules for practice and procedure, or rules of professional conduct.

(ii) *Sealed materials reviewed in camera but not released to trial counsel or defense counsel.* Materials reviewed *in camera* by a military judge, not released to trial counsel or defense counsel, and sealed may be examined by reviewing or appellate authorities. After examination of said materials, the reviewing or appellate authority may permit examination by appellate counsel for good cause.

Discussion

For disclosure procedures, see subparagraph (b)(3)(C) of this rule.

(C) *Disclosure*. Appellate counsel shall not disclose sealed materials in the absence of:

(i) Prior authorization of the Judge Advocate General in the case of review under R.C.M. 1201; or

(ii) Prior authorization of the appellate court before which a case is pending review under R.C.M. 1203 and 1204.

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.

(D) For purposes of this rule, reviewing and appellate authorities are limited to:

(i) Judge advocates reviewing records pursuant to R.C.M. 1307;

(ii) Officers and attorneys in the office of the Judge Advocate General reviewing records pursuant to R.C.M. 1201 and 1210;

(iii) Appellate judges of the Courts of Criminal Appeals and their professional staffs;

(iv) The judges of the United States Court of Appeals for the Armed Forces and their professional staffs;

(v) The Justices of the United States Supreme Court and their professional staffs; and

(vi) Any other court of competent jurisdiction.

(4) *Examination of sealed materials.* For purposes of this rule, "examination" includes reading, inspecting, and viewing.

(5) *Disclosure of sealed materials*. For purposes of this rule, "disclosure" includes photocopying, photographing, disseminating, releasing, manipulating, or communicating the contents of sealed materials in any way.

(E) Notwithstanding any other provision of this rule, in those cases in which review is sought or pending before the United States Supreme Court, authorization to disclose sealed materials or information shall be obtained under that Court's rules of practice and procedure.

Analysis
2017 Amendment: R.C.M. 1113 ("Execution of sentences") of the MCM (2016 edition) is deleted.

R.C.M. 1113 is new and incorporates R.C.M. 1103A of the MCM (2016 edition) as amended by Executive Order XXXXX. R.C.M. 1113(b) conforms to changes in R.C.M. 1112(c) regarding certification of records of trial.

Rule 1114. Transcription of proceedings
(a) *Transcription of complete record.* A certified verbatim transcript of the record of trial shall be prepared—

(1) When the judgment entered into the record includes a sentence of death, dismissal of a commissioned officer, cadet, or midshipman, a dishonorable or bad-conduct discharge, or confinement for more than six months; or

(2) As otherwise required by court rule, court order, or under regulations prescribed by the Secretary concerned.

Discussion
See R.C.M. 1116(b) regarding transcription of the record when a case is forwarded to appellate defense counsel.

(b) *Transcription of portions of record.* A certified verbatim transcript of relevant portions of the record of trial shall be prepared—

(1) Upon application of a party as approved by the military judge, any court, or the Judge Advocate General; or

(2) As otherwise required under regulations prescribed by the Secretary concerned.

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.

(c) *Cost.* Any certified transcript required by this rule shall be prepared without cost to the accused.
(d) *Inclusion in the record of trial.* If a certified transcript is made under this rule, it shall be attached to the record of trial.
(e) *Authority.* The Secretary concerned shall prescribe by regulation the procedure for preparing and certifying a transcript under this rule.

Analysis
2017 Amendment: R.C.M. 1114 ("Promulgating orders") of MCM (2016 edition) is deleted.

R.C.M. 1114 is new and 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.

Rule 1115. Waiver or withdrawal of appellate review
(a) *In general.* After any general court-martial, except one in which the judgment entered into the record includes a sentence of death, and after any special court-martial in which the judgment

entered into the record includes a bad-conduct discharge or confinement for more than six months, the accused may waive or withdraw the right to appellate review by a Court of Criminal Appeals. The accused may sign a waiver of the right to appeal at any time after entry of judgment and may withdraw an appeal at any time before such review is completed.

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 or 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(i).

(b) *Right to counsel.*

(1) *In general.* The accused shall have the right to consult with qualified counsel before submitting a waiver or withdrawal of appellate review.

(2) *Waiver.*

(A) *Counsel who represented the accused at the court-martial.* The accused shall have the right to consult with any civilian, individual military, or detailed counsel who represented the accused at the court-martial concerning whether to waive appellate review unless such counsel has been excused under R.C.M. 505(d)(2)(B).

(B) *Associate counsel.* If counsel who represented the accused at the court-martial has not been excused but is not immediately available to consult with the accused because of physical separation or other reasons, associate defense counsel shall be detailed to the accused upon request by the accused. Such counsel shall communicate with the counsel who represented the accused at the court-martial, and shall advise the accused concerning whether to waive appellate review.

(C) *Substitute counsel.* If counsel who represented the accused at the court-martial has been excused under R.C.M. 505(d)(2)(B), substitute defense counsel shall be detailed to advise the accused concerning waiver of appellate rights.

(3) *Withdrawal.*

(A) *Appellate defense counsel.* If the accused is represented by appellate defense counsel, the accused shall have the right to consult with such counsel concerning whether to withdraw an appeal.

(B) *Associate defense counsel.* If the accused is represented by appellate defense counsel, and such counsel is not immediately available to consult with the accused because of physical separation or other reasons, associate defense counsel shall be detailed to the accused, upon request by the accused. Such counsel shall communicate with appellate defense counsel and shall advise the accused whether to withdraw an appeal.

(C) *No counsel.* If appellate defense counsel has not been assigned to the accused, defense counsel shall be detailed for the accused. Such counsel shall advise the accused concerning whether to withdraw an appeal.

(4) *Civilian counsel.* Whether or not the accused was represented by civilian counsel at the court-martial, the accused may consult with civilian counsel, at no expense to the United States,

concerning whether to waive or withdraw appellate review.

(5) *Record of trial.* Any defense counsel with whom the accused consults under this rule shall be given reasonable opportunity to examine the record of trial and any attachments.

Discussion

See R.C.M. 1112(f) for required attachments to the record of trial.

(6) *Right to consult.* The right to consult with counsel, as used in this rule, does not require communication in the presence of one another.

(c) *Compulsion, coercion, inducement prohibited.* No person may compel, coerce, or induce an accused by force, promises of clemency, or otherwise to waive or withdraw appellate review.

(d) *Form of waiver or withdrawal.* A waiver or withdrawal of appellate review shall:

(1) Be written;

(2) State that the accused and defense counsel have discussed the accused's rights to appellate review and the effect of waiver or withdrawal of appellate review and that the accused understands these matters;

(3) State that the waiver or withdrawal is submitted voluntarily; and

(4) Be signed by the accused and by defense counsel.

Discussion

See Appendix 19 (DD Form 2330) or Appendix 20 (DD Form 2331) for samples of forms.

(e) *To whom submitted.*

(1) *Waiver.* A waiver of appellate review shall be filed with the convening authority or the Judge Advocate General. The waiver shall be attached to the record of trial.

(2) *Withdrawal.* A withdrawal of appellate review may be filed with the authority exercising general court-martial jurisdiction over the accused, who shall promptly forward it to the Judge Advocate General, or directly with the Judge Advocate General. The withdrawal shall be attached to the record of trial.

(f) *Effect of waiver or withdrawal; substantial compliance required.*

(1) *In general.* A valid waiver or withdrawal of appellate review under this rule shall bar review by the Court of Criminal Appeals. Once submitted, a waiver or withdrawal in compliance with this rule may not be revoked.

(2) *Waiver.* If the accused files a waiver of appellate review in accordance with this rule, the record of trial and attachments shall be forwarded for review by a judge advocate under R.C.M. 1201.

(3) *Withdrawal.* Action on a withdrawal of appellate review shall be carried out in accordance with procedures established by the Judge Advocate General, or if the case is pending before a Court of Criminal Appeals, in accordance with the rules of such court. If the appeal is withdrawn, the record of trial and attachments shall be forwarded for review in accordance with R.C.M. 1201(f).

(4) *Substantial compliance required.* A purported waiver or withdrawal of an appeal which does not substantially comply with this rule shall have no effect.

Analysis

R.C.M. 1115 is new and is taken from Rule 1110 of the MCM (2016 edition) with the following amendments.

2017 Amendment: R.C.M. 1115 is amended and 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.

Rule 1116. Transmittal of records of trial for general and special courts-martial

(a) *Cases forwarded to the Judge Advocate General*. In all general and special courts-martial in which the judgment includes a finding of guilty, the certified record of trial and attachments required under R.C.M. 1112(f) shall be sent directly to the Judge Advocate General concerned. Forwarding an electronic copy of the certified record of trial and attachments satisfies the requirements under this rule. The records of trial in general and special courts-martial without a finding of guilty shall be disposed of in accordance with the regulations of the Secretary concerned.

(b) *Transmittal of records for cases eligible for appellate review by a Court of Criminal Appeals.*

(1) *Automatic review*. Except when the accused has waived or withdrawn the right to appellate review, if the court-martial judgment includes a sentence of death, dismissal of a commissioned officer, cadet, or midshipman, a dishonorable or bad-conduct discharge, or confinement for 2 years or more, the Judge Advocate General shall forward the certified record of trial and attachments required under R.C.M. 1112(f) to the Court of Criminal Appeals for automatic review under Article 66(b)(3).

Discussion

See R.C.M. 1203(b).

(A) A copy of the record of trial and attachments shall be forwarded to appellate defense counsel in accordance with rules prescribed by the Secretary concerned. If the record forwarded does not include a written transcript of the proceedings, the Government shall provide appellate defense counsel with appropriate equipment for playback of the recording and with either—

(i) the means to transform the recording into a text format through voice recognition software or similar means; or

(ii) a transcription of the record in either printed or digital format.

(B) Upon written request of the accused, a copy of the record and attachments shall be forwarded to a civilian counsel provided by the accused.

(C) Copies of the record provided under subparagraph (1)(A) of this rule shall not include sealed exhibits, recordings or transcriptions of closed sessions, or classified matters.

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.

(2) *Cases eligible for direct appeal by the accused.* Except when the accused has waived or withdrawn the right to appeal under Article 61, if a general and special court-martial is not subject to automatic review under Article 66(b)(3) but is eligible for review under Article 66(b)(1), the Judge Advocate General shall provide notice to the accused of the right to file an appeal either by depositing the notice in the United States mails for delivery by first class certified mail to the accused at an address provided by the accused, or, if the accused has not provided an address, to the latest address listed for the accused in the official service record of the accused. Proof of service shall be attached to the record of trial.

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.

(A) The Judge Advocate General shall forward a copy of the record of trial and attachments required under R.C.M. 1112(f) to an appellate defense counsel who shall be detailed to review the case, and upon request of the accused, to represent the accused before the Court of Criminal Appeals.

(B) The record of trial and attachments required under R.C.M. 1112(f) shall be forwarded in accordance with the procedures set forth in subparagraphs (1)(A)–(C) of this rule.

(c) *Review of cases not eligible for appellate review by a Court of Criminal Appeals.* General and special courts-martial not eligible for appellate review under Article 66(b)(1) or (3) shall be reviewed under Article 65(d)(2).

Discussion

See R.C.M. 1201(a)(1); and R.C.M. 1203(b) and (c).

(d) *Review when appellate review by a Court of Criminal Appeals is waived, withdrawn, or not filed.* In a general or special court-martial in which the accused waives the right to appellate review or withdraws an appeal under Article 61, or fails to file a timely appeal in a case eligible for review by the Court of Criminal Appeals under Article 66(b)(1) the case shall be reviewed under Article 65(d)(3).

Discussion

See R.C.M. 1115; R.C.M. 1201(a)(2); and R.C.M. 1203(c).

Analysis

2017 Amendment: R.C.M. 1116 is new 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), regarding the transmittal of records of trial in general and special courts-martial to the Judge Advocate General.

Rule 1117. Appeal of Sentence by the United States

(a) *In general*. With the approval of the Judge Advocate General concerned, the Government may appeal a sentence announced under R.C.M. 1007 to the Court of Criminal Appeals on the grounds that –

(1) the sentence violates the law; or

(2) the sentence is plainly unreasonable.

(b) *Timing*.

(1) An appeal under this rule must be filed within 60 days after the date on which the judgment of the court-martial is entered into the record under R.C.M. 1111.

(2) Under rules prescribed by the Secretary concerned, the Judge Advocate General shall ensure that any request for approval is submitted in sufficient time to obtain and consider submissions under subparagraph (c)(4) of this rule.

(c) *Approval process*.

(1) A request from the Government to the Judge Advocate General for approval of an appeal under this rule shall include a statement of reasons in support of an appeal under subparagraph (a)(1) or (a)(2), as applicable, based upon the information contained in the record before the sentencing authority at the time the sentence was announced under R.C.M. 1007.

(2) A statement of reasons in support of an appeal under subparagraph (a)(1) shall identify the specific provisions of law at issue and the facts in the record demonstrating a violation of the law in the announced sentence under R.C.M. 1007.

(3) A statement of reasons in support of an appeal under subparagraph (a)(2) shall identify the facts in the record that demonstrate by clear and convincing evidence that the sentence announced under R.C.M. 1007 was plainly unreasonable because no reasonable sentencing authority would adjudge such a sentence in view of the record before the sentencing authority at the time the sentence was announced under R.C.M. 1007.

(4) Prior to acting on a request from the Government, the Judge Advocate General shall transmit the request to the military judge who presided over the presentencing proceeding for purposes of providing the military judge, the parties, and any person who is a crime victim as defined by R.C.M. 1001(c)(2)(A) at the time of sentencing with an opportunity to make a submission addressing the statement of reasons in the Government's request.

(A) The military judge shall establish the time for the parties and victims to provide such a submission to the military judge, and for the military judge to forward all submissions to the Judge Advocate General, subject to any deadline for such submissions established by the Judge Advocate General under regulations prescribed by the Secretary concerned. Such regulations shall ensure that the parties and the military judge have not less than 7 days to prepare, review, and transmit such submissions.

(B) Submissions under this paragraph shall not include facts beyond the record established at the time the sentence was announced under R.C.M. 1007.

(5) The decision of the Judge Advocate General as to whether to approve a request shall be based on the information developed under this rule.

(6) If an appeal is approved by the Judge Advocate General and submitted to the Court of Criminal Appeals under this rule, the following shall be included with the appeal: the statement of approval, the Government's request and statement of reasons under subparagraph (c)(2) or (3), and any submissions under subparagraph (c)(4).

(d) *Contents of the record of trial*. Unless the record has been forwarded to the Court of Criminal Appeals for review under R.C.M. 1116(b), the record of trial for an appeal under this rule shall consist of—

(1) any portion of the record in the case that is designated as pertinent by either of the parties;

(2) the information submitted during the presentencing proceeding; and

(3) any information required by rule or order of the Court of Criminal Appeals.

Analysis

2017 Amendment. R.C.M. 1117 is new and implements Article 56(d), as enacted 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).

Rule 1201. Review by the Judge Advocate General

(a) *Review of certain general and special courts-martial.* Except as provided in subsection (b), an attorney designated by the Judge Advocate General shall review:

(1) Each general and special court-martial case that is not eligible for appellate review by a Court of Criminal Appeals under Article 66(b)(1) or (3); and

Discussion

See R.C.M. 1203(b) and (c).

(2) Each general or special court-martial eligible for appellate review by a Court of Criminal Appeals in which the Court of Criminal Appeals does not review the case because:

(A) In a case under Article 66(b)(3), other than one in which the sentence includes death, the accused withdraws direct appeal or waives the right to appellate review.

Discussion

See R.C.M. 1203(b).

(B) In a case under Article 66(b)(1), the accused does not file a timely appeal, or files a timely appeal and then withdraws it.

Discussion

An attorney designated by the Judge Advocate General conducts this initial review pursuant to Article 65(d).
See R.C.M. 1203(c).
See R.C.M. 1307 for judge advocate review of summary courts-martial.

(b) *Exception.* If the accused was found not guilty or not guilty only by reason of lack of mental responsibility of all offenses, or if the convening authority set aside all findings of guilty, no review under this rule is required.

(c) *By whom.*

(1) A review conducted under this rule may be conducted by an attorney within the Office of the Judge Advocate General or another attorney designated by the Judge Advocate General under regulations prescribed by the Secretary concerned.

(2) No person may review a case under this rule if that person has acted in the same case as an accuser, preliminary hearing officer, member of the court-martial, military judge, or counsel, or has otherwise acted on behalf of the prosecution or defense.

(d) *Form and content for review of cases not eligible for appellate review at the Court of Criminal Appeals.* The review referred to in subparagraph (a)(1) shall include a written conclusion as to each of the following:

(1) Whether the court had jurisdiction over the accused and the offense;

(2) Whether each charge and specification stated an offense;

(3) Whether the sentence was within the limits prescribed as a matter of law; and

(4) When applicable, a response to each allegation of error made in writing by the accused.

(e) *Form and content for review of cases in which the accused has waived or withdrawn appellate review or failed to file an appeal.* The review referred to in subparagraph (a)(2) shall include a written conclusion as to each of the following:

(1) Whether the court had jurisdiction over the accused and the offense;

(2) Whether each charge and specification stated an offense; and

(3) Whether the sentence was within the limits prescribed as a matter of law.

(f) *Remedies.*

(1) If the attorney conducting the review under subsection (a) believes corrective action is required, the attorney shall forward the matter to the Judge Advocate General, who may modify or set aside the findings or sentence, in whole or in part.

(2) In setting aside the findings or sentence, the Judge Advocate General may order a rehearing, except that a rehearing may not be ordered where the evidence was legally insufficient at the trial to support the findings.

(3) If the Judge Advocate General sets aside findings and sentence and does not order a rehearing, the Judge Advocate General shall dismiss the charges.

(4) If the Judge Advocate General sets aside findings and orders a rehearing and the convening authority determines that a rehearing would be impractical, the convening authority shall dismiss the charges.

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.

(g) *Notification.* After a case is reviewed under subsection (a), the accused shall be notified of the results of the review and any action taken by the Judge Advocate General or convening authority by means of depositing a copy of the review and any modified judgment in the United States mails for delivery 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. Proof of service shall be attached to the record of trial.

(h) *Application for relief to the Judge Advocate General after final review.*

(1) *In general.* Notwithstanding R.C.M. 1209, the Judge Advocate General may, upon application of the accused or a person with authority to act for the accused, modify or set aside the findings or sentence, in whole or in part, of—

(A) A summary court-martial previously reviewed under R.C.M. 1307; or

(B) A general or special court-martial previously reviewed under subparagraph (a)(1) or (2).

(2) *Timing.* In order to qualify for review under this subsection, an accused must submit an application for review not later than one year after—

(A) In the case of a summary court-martial, the date of completion of review under R.C.M. 1307; or

(B) In the case of a general or special court-martial reviewed under subpargraph (a)(1) or (a)(2), the later of—

(i) the date on which the accused is notified of the decision of the Judge Advocate General under subsection (g); or

(ii) the date on which a copy of the decision of the Judge Advocate General is deposited in the United States mails under subsection (g).

(3) *Extension.* The Judge Advocate General may, for good cause shown, extend the period for submission of an application under subparagraph (h)(2) for a time period not to exceed two additional years.

(4) *Scope.*

(A) In a case previously reviewed under R.C.M. 1307 or subparagraph (a)(1), the Judge Advocate General may act on the grounds of newly discovered evidence, fraud on the court, lack of jurisdiction over the accused or the offense, error prejudicial to the substantial rights of the accused, or the appropriateness of the sentence.

(B) In a case previously reviewed under subparagraph (a)(2), the Judge Advocate General's review is limited to the issue of whether the waiver, withdrawal, or failure to file an appeal was invalid under the law.

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.

(5) *Procedure*. Each Judge Advocate General shall provide procedures for considering all cases properly submitted under this rule and may prescribe the manner by which an application for relief under this rule may be made and, if submitted by a person other than the accused, may require that the applicant show authority to act on behalf of the accused.

(i) *Remission and suspension*. The Judge Advocate General may, when so authorized by the Secretary concerned under Article 74, at any time remit or suspend the unexecuted part of any sentence, other than a sentence approved by the President.

(j) *Mandatory review of summary courts-martial forwarded under R.C.M. 1307.* The Judge Advocate General shall review summary courts-martial if the record of trial and the action thereon are forwarded under R.C.M. 1307(g). On such review, the Judge Advocate General may vacate or modify, in whole or in part, the findings or sentence, or both, of the court-martial on the ground of newly discovered evidence, fraud on the court-martial, lack of jurisdiction over the accused or the offense, error prejudicial to the substantial rights of the accused, or the appropriateness of the sentence.

(k) *Cases referred or submitted to the Court of Criminal Appeals.*

(1) *In general.* Action taken by the Judge Advocate General under subsections (h) or (j) may be reviewed by the Court of Criminal Appeals under Article 69(d) as follows:

(A) The Judge Advocate General may forward a case to the Court of Criminal Appeals. If the case is forwarded to a Court of Criminal Appeals, the accused shall be informed and shall have the rights to appellate defense counsel afforded under R.C.M. 1202(b)(2).

(B) The accused may submit an application for review to the Court of Criminal Appeals. The Court of Criminal Appeals may grant such an application only if the application demonstrates a substantial basis for concluding that the Judge Advocate General's action under this rule constituted prejudicial error, and the application is filed not later than the earlier of—

(i) 60 days after the date on which the accused is notified of the decision of the Judge Advocate General; or

(ii) 60 days after the date on which a copy of the decision of the Judge Advocate General is deposited in the United States mails for delivery 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. Proof of service shall be attached to the record of trial.

Discussion

See R.C.M. 1203.

(2) The submission of an application for review under subparagraph (k)(1)(B) does not constitute a proceeding before the Court of Criminal Appeals for purposes of representation by appellate defense counsel under Article 70(c)(1).

(3) In any case reviewed by a Court of Criminal Appeals under this subsection, the Court may take action only with respect to matters of law.

Analysis

This rule is taken from Rule 1201 of the MCM (2016 edition) with the following amendments. *2017 Amendment*: R.C.M. 1201 is substantially amended and 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.

Rule 1202. Appellate counsel

(a) *In general.* The Judge Advocate General concerned shall detail one or more commissioned officers as appellate Government counsel and one or more commissioned officers as appellate defense counsel who are qualified under Article 27(b)(1).

(b) *Duties.*

(1) *Appellate Government counsel.* Appellate Government counsel shall represent the United States before the Court of Criminal Appeals or the United States Court of Appeals for the Armed Forces when directed to do so by the Judge Advocate General concerned. Appellate Government counsel may represent the United States before the United States Supreme Court when requested to do so by the Attorney General.

(2) *Appellate defense counsel.*

(A) In every general and special court-martial eligible for review by a Court of Criminal Appeals under Article 66(b)(1), an appellate defense counsel shall be detailed to review the case, unless the accused has waived the right to appeal under Article 61 or submits a written statement declining representation. Upon request, the detailed appellate defense counsel shall represent the accused in accordance with subparagraph (B).

Discussion

See R.C.M. 1203(c) and R.C.M. 1115.

(B) Appellate defense counsel shall represent the accused before the Court of Criminal

Appeals, the Court of Appeals for the Armed Forces, or the Supreme Court when the accused is a party in the case before such court and:

(i) The accused requests to be represented by appellate defense counsel;

Discussion

See Article 65(b) and Article 61.

(ii) The United States is represented by counsel; or

(iii) The Judge Advocate General has sent the case to the United States Court of Appeals for the Armed Forces. Appellate defense counsel is authorized to communicate directly with the accused. The accused is a party in the case when named as a party in pleadings before the court or, even if not so named, when the military judge is named as respondent in a petition by the Government for extraordinary relief from a ruling in favor of the accused at trial.

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. 1116. 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.

(c) *Counsel in capital cases.* To the greatest extent practicable, in any case in which the death penalty is adjudged, at least one appellate defense counsel shall, as determined by the Judge Advocate General, be learned in the law applicable to capital cases. Such counsel may, if necessary, be a civilian, and, if so, may be compensated in accordance with regulations prescribed by the Secretary of Defense.

Discussion

See R.C.M. 502(d)(2)(C) concerning the qualifications for capital counsel.

Analysis

This rule is taken from Rule 1202 of the MCM (2016 edition) with the following amendments. *2017 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), addressing the requirement to detail appellate defense counsel to review cases eligible for direct appeal.

R.C.M. 1202(c) is new and implements Article 70, as amended by Section 5334 of the NDAA FY17, addressing the requirements regarding counsel learned in the law applicable to capital cases.

Rule 1203. Review by a Court of Criminal Appeals

(a) *In general.* Each Judge Advocate General shall establish a Court of Criminal Appeals composed of appellate military judges who shall serve for a tour of not less than three years, subject to such provision for reassignment as may be prescribed in regulations issued by the Secretary concerned.

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.

(b) *Cases reviewed by a Court of Criminal Appeals—Automatic Review.* A Court of Criminal Appeals shall review cases forwarded to it by the Judge Advocate General under Article 65(b)(1).

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 or bad-conduct discharge, or confinement for 2 years or more. *See* Article 65(b)(1); 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.

(c) *Cases eligible for review by a Court of Criminal Appeals—Appeal by the accused.* A Court of Criminal Appeals shall review a timely appeal from the judgment of the court-martial in accordance with the standards set forth in Article 66(b)(1) and the rules prescribed under Article 66(h).

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.

(d) *Timeliness*. In order for an appeal under subsection (b) to be timely, it must be filed in accordance with Article 66(c) and the rules prescribed under Article 66(h).

(e) *Action on cases reviewed by a Court of Criminal Appeals.*

(1) *Forwarding by the Judge Advocate General to the Court of Appeals for the Armed Forces.* The Judge Advocate General may forward the decision of the Court of Criminal Appeals to the Court of Appeals for the Armed Forces for review with respect to any matter of law. In such a case, the Judge Advocate General shall cause a copy of the decision of the Court of Criminal Appeals and the order forwarding the case to be served on the accused and on appellate defense counsel. While a review of a forwarded case is pending, the Secretary concerned may defer further service of a sentence to confinement that has been ordered executed in such a case.

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. *See e.g., United States v. Miller*, 47 M.J. 352 (C.A.A.F. 1997) (requiring a hearing on continued confinement be conducted if the Judge Advocate General decides to certify a case involving a decision favorable to the accused); *United States v. Kreutzer*, 70 M.J. 444 (C.A.A.F. 2012).

(2) *Action when sentence is set aside.* In a case reviewed by it under this rule in which the Court of Criminal Appeals has set aside the sentence and which is not forwarded to the Court of Appeals for the Armed Forces under subparagraph (e)(1), the Judge Advocate General shall instruct an appropriate authority to modify the judgment in accordance with the decision of the Court of Criminal Appeals. If the Court of Criminal Appeals has ordered a rehearing on sentence, the record shall be sent to an appropriate convening authority. If that convening authority finds a rehearing impracticable that convening authority may dismiss the charges.

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.

(3) *Action when sentence is affirmed in whole or part.*

(A) *Sentence requiring approval by the President.* If the Court of Criminal Appeals affirms any sentence which includes death, the Judge Advocate General shall transmit the record of trial and the decision of the Court of Criminal Appeals directly to the Court of Appeals for the Armed Forces when any period for reconsideration provided by the rules of the Courts of Criminal Appeals has expired.

(B) *Other cases.* If the Court of Criminal Appeals affirms any sentence other than one which includes death, the Judge Advocate General shall cause a copy of the decision of the Court of Criminal Appeals to be served on the accused in accordance with subsection (f).

(4) *Remission or suspension.* If the Judge Advocate General believes that a sentence as affirmed by the Court of Criminal Appeals, other than one which includes death, should be remitted or suspended in whole or part, the Judge Advocate General may, before taking action under subparagraphs (e)(1) or (3), transmit the record of trial and the decision of the Court of Criminal Appeals to the Secretary concerned with a recommendation for action under Article 74 or may take such action as may be authorized by the Secretary concerned under Article 74(a).

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.

(5) *Action when accused lacks mental capacity.* In a review conducted under subsection (b) or (c), the Court of Criminal Appeals may not affirm the proceedings while the accused lacks mental capacity to understand and to conduct or cooperate intelligently in the appellate proceedings. In the absence of substantial evidence to the contrary, the accused is presumed to have the capacity to understand and to conduct or cooperate intelligently in the appellate proceedings. If a substantial question is raised as to the requisite mental capacity of the accused, the Court of Criminal Appeals may direct an examination of the accused in accordance with R.C.M. 706, but the examination may be limited to determining the accused's present capacity to understand and cooperate in the appellate proceedings. The Court may further order a remand under R.C.M. 810(f) as may be necessary. If the record is thereafter returned to the Court of Criminal Appeals, the Court of Criminal Appeals may affirm part or all of the findings or sentence unless it is established, by a preponderance of the evidence—including matters outside the record of trial—that the accused does not have the requisite mental capacity. If the accused does not have the requisite mental capacity, the Court of Criminal Appeals shall stay the proceedings until the accused regains appropriate capacity, or take other appropriate action. Nothing in this subsection shall prohibit the Court of Criminal Appeals from making a determination in favor of the accused which will result in the setting aside of a conviction.

(f) *Notification to accused.*

(1) *Notification of decision.* The accused shall be notified of the decision of the Court of Criminal Appeals in accordance with regulations of the Secretary concerned.

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.

(2) *Notification of right to petition the Court of Appeals for the Armed Forces for review.* If the accused has the right to petition the Court of Appeals for the Armed Forces for review, the accused shall be provided with a copy of the decision of the Court of Criminal Appeals bearing an endorsement notifying the accused of this right. The endorsement shall inform the accused that such a petition:

(A) May be filed only within 60 days from the time the accused was in fact notified of the decision of the Court of Criminal Appeals or the mailed copy of the decision was postmarked, whichever is earlier; and

(B) May be forwarded through the officer immediately exercising general court-martial jurisdiction over the accused and through the appropriate Judge Advocate General or filed directly with the Court of Appeals for the Armed Forces.

Discussion

See Article 67(c); *see also* R.C.M. 1204(b).

(3) *Receipt by the accused—disposition.* When the accused has the right to petition the Court of Appeals for the Armed Forces for review, the receipt of the accused for the copy of the decision of the Court of Criminal Appeals, a certificate of service on the accused, or the postal

receipt for delivery of certified mail shall be transmitted in duplicate by expeditious means to the appropriate Judge Advocate General. If the accused is personally served, the receipt or certificate of service shall show the date of service. The Judge Advocate General shall forward one copy of the receipt, certificate, or postal receipt to the clerk of the Court of Appeals for the Armed Forces when required by the court.

(g) *Cases not reviewed by the Court of Appeals for the Armed Forces.* If the decision of the Court of Criminal Appeals is not subject to review by the Court of Appeals for the Armed Forces, or if the Judge Advocate General has not forwarded the case to the Court of Appeals for the Armed Forces and the accused has not filed or the Court of Appeals for the Armed Forces has denied a petition for review, then either:

(1) The Judge Advocate General shall, if the sentence affirmed by the Court of Criminal Appeals includes a dismissal, transmit the record, the decision of the Court of Criminal Appeals, and the Judge Advocate General's recommendation to the Secretary concerned for action under R.C.M. 1206; or

(2) If the sentence affirmed by the Court of Criminal Appeals does not include a dismissal, the unexecuted portion of the sentence affirmed by the Court of Criminal Appeals shall be executed in accordance with R.C.M. 1102.

Discussion

See R.C.M. 1102, 1206, and Article 74(a) concerning the authority of the Secretary and others to take action.

(h) *Scope.* Except as otherwise expressly provided in this rule, this rule does not apply to appeals by the Government under R.C.M. 908.

(i) *Article 6b(e) petition for writ of mandamus*. The rules prescribed by the Judge Advocates General under Article 66(h) shall establish the means by which the petitions for writs of mandamus described in Article 6b(e) are forwarded to the Courts of Criminal Appeals.

Analysis

This rule is taken from Rule 1203 of the MCM (2016 edition) with the following amendments.

2017 Amendment: R.C.M. 1203 is amended and 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.

Rule 1204. Review by the Court of Appeals for the Armed Forces

(a) *Cases reviewed by the Court of Appeals for the Armed Forces.* Under such rules as it may prescribe, the Court of Appeals for the Armed Forces shall review the record in all cases:

(1) in which the sentence, as affirmed by a Court of Criminal Appeals, extends to death;

(2) reviewed by a Court of Criminal Appeals which the Judge Advocate General, after appropriate notification to the other Judge Advocate Generals and the Staff Judge Advocate to the Commandant of the Marine Corps, orders sent to the Court of Appeals for the Armed Forces for review; and

(3) reviewed by a Court of Criminal Appeals in which, upon petition of the accused and on good cause shown, the Court of Appeals for the Armed Forces has granted a review.

Discussion

See Article 67(a)(2) on the notification requirement when the Judge Advocate General orders a case sent to the Court under subparagraph (a)(2) of this rule. 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.

(b) *Petition by the accused for review by the Court of Appeals for the Armed Forces.*

(1) *Counsel.* When the accused is notified of the right to forward a petition for review by the Court of Appeals for the Armed Forces, if requested by the accused, associate counsel qualified under R.C.M. 502(d)(2) shall be detailed to advise and assist the accused in connection with preparing a petition for further appellate review.

Discussion

See R.C.M. 1202 for duties of appellate defense counsel.

(2) *Forwarding petition.* The accused shall file any petition for review by the Court of Appeals for the Armed Forces under subparagraph (a)(3) of this rule directly with the Court of Appeals for the Armed Forces.

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.

(c) *Action on decision by the Court of Appeals for the Armed Forces.*

(1) *In general.* After it has acted on a case, the Court of Appeals for the Armed Forces may direct the Judge Advocate General to return the record to the Court of Criminal Appeals for further proceedings in accordance with the decision of the court. Otherwise, unless the decision is subject to review by the Supreme Court, or there is to be further action by the President or the Secretary concerned, the Judge Advocate General shall instruct the appropriate authority to take action in accordance with that decision. If the Court has ordered a rehearing, but the convening authority to whom the record is transmitted finds a rehearing impracticable, the convening authority may dismiss the charges.

Discussion

See R.C.M. 1111 concerning modification of the judgment in the case. *See also* R.C.M. 1206 and Article 74(a).

(2) *Sentence requiring approval of the President.*

(A) If the Court of Appeals for the Armed Forces has affirmed a sentence that must be approved by the President before it may be executed, the Judge Advocate General shall transmit the record of trial, the decision of the Court of Criminal Appeals, the decision of the Court of Appeals for the Armed Forces, and the recommendation of the Judge Advocate General to the Secretary concerned.

(B) If the Secretary concerned is the Secretary of a military department, the Secretary concerned shall forward the material received under subparagraph (A) to the Secretary of Defense, together with the recommendation of the Secretary concerned. The Secretary of Defense shall forward the material, with the recommendation of the Secretary concerned and the recommendation of the Secretary of Defense, to the President for the action of the President.

(C) If the Secretary concerned is the Secretary of Homeland Security, the Secretary concerned shall forward the material received under subparagraph (A) to the President, together with the recommendation of the Secretary concerned, for action of the President.

Discussion

See Article 57(a)(3) and R.C.M. 1207.

(3) *Sentence requiring approval of the Secretary concerned.* If the Court of Appeals for the Armed Forces has affirmed a sentence which requires approval of the Secretary concerned before it may be executed, the Judge Advocate General shall follow the procedure in R.C.M. 1203(e)(3).

Discussion

See Article 57(a)(4) and R.C.M. 1206.

(4) *Decisions subject to review by the Supreme Court.* If the decision of the Court of Appeals for the Armed Forces is subject to review by the Supreme Court, the Judge Advocate General shall take no action under paragraphs (c)(1), (2), or (3) of this rule until: (A) the time for filing a petition for a writ of certiorari with the Supreme Court has expired; or (B) the Supreme Court has denied any petitions for writ of certiorari filed in the case. After (A) or (B) has occurred, the Judge Advocate General shall take action under paragraphs (c)(1), (2), or (3). If the Supreme Court grants a writ of certiorari, the Judge Advocate General shall take action under R.C.M. 1205(b).

Analysis

This rule is taken from Rule 1204 of the MCM (2016 edition) with the following amendments.
2017 Amendment: The Discussion to R.C.M. 1204(a) 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 notice 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.

Rule 1205. Review by the Supreme Court

(a) *Cases subject to review by the Supreme Court.* Under 28 U.S.C. § 1259 and Article 67a, decisions of the Court of Appeals for the Armed Forces may be reviewed by the Supreme Court by writ of certiorari in the following cases:

(1) Cases reviewed by the Court of Appeals for the Armed Forces under Article 67(a)(1);

(2) Cases certified to the Court of Appeals for the Armed Forces by the Judge Advocate General under Article 67(a)(2);

(3) Cases in which the Court of Appeals for the Armed Forces granted a petition for review under Article 67(a)(3); and

(4) Cases other than those described in paragraphs (a)(1), (2), and (3) of this rule in which the Court of Appeals for the Armed Forces granted relief.

The Supreme Court may not review by writ of certiorari any action of the Court of Appeals for the Armed Forces in refusing to grant a petition for review.

(b) *Action by the Supreme Court.* After the Supreme Court has taken action, other than denial of

a petition for writ of certiorari, in any case, the Judge Advocate General shall, unless the case is returned to the Court of Appeals for the Armed Forces for further proceedings, forward the case to the President or the Secretary concerned in accordance with R.C.M. 1204(c)(2) or (3) when appropriate, or take action in accordance with the decision.

Analysis
This rule is taken from Rule 1205 of the MCM (2016 edition) with the following amendments. *2017 Amendment*: R.C.M. 1205(a) is amended by striking the reference to "67(h)" and replacing it with "67a." Technical corrections are made to references to Article 67(a)(1), (2), and (3).

Rule 1206. Powers and responsibilities of the Secretary
(a) *Sentences requiring approval by the Secretary.* No part of a sentence extending to dismissal of a commissioned officer, cadet, or midshipman may be executed until approved by the Secretary concerned or such Under Secretary or Assistant Secretary as may be designated by the Secretary.

Discussion

See Article 57(a)(4).

(b) *Remission and suspension.*

(1) *In general.* The Secretary concerned and, when designated by the Secretary concerned, any Under Secretary, Assistant Secretary, Judge Advocate General, or commander may remit or suspend any part or amount of the unexecuted part of any sentence, including all uncollected forfeitures, other than a sentence approved by the President.

(2) *Substitution of discharge.* The Secretary concerned may, for good cause, substitute an administrative discharge for a discharge or dismissal executed in accordance with the sentence of a court-martial.

(3) *Sentence commuted by the President.* When the President has commuted a death sentence to a lesser punishment, the Secretary concerned may remit or suspend any remaining part or amount of the unexecuted portion of the sentence of a person convicted by a military tribunal under the Secretary's jurisdiction.

Analysis
This rule is taken from Rule 1206 of the MCM (2016 edition) with the following amendments. *2017 Amendment*: The Discussion to R.C.M. 1206(a) is amended by striking the reference to "71(b)" and replacing it with "57(a)(4)."

Rule 1207. Sentences requiring approval by the President
No part of a court-martial sentence extending to death may be executed until approved by the President.

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.

Analysis
This rule is taken from Rule 1207 of the MCM (2016 edition) with the following amendments.

2017 Amendment: The Discussion to R.C.M. 1207 is amended by striking the reference to "71(a)" and replacing it with "57(a)(3)."

Rule 1208. Restoration

(a) *New trial.* All rights, privileges, and property affected by an executed portion of a court-martial sentence—except an executed dismissal or discharge—which has not again been adjudged upon a new trial or which, after the new trial, has not been sustained upon the action of any reviewing authority, shall be restored. So much of the findings and so much of the sentence adjudged at the earlier trial shall be set aside as may be required by the findings and sentence at the new trial. Ordinarily, action taken under this subsection shall be reflected in the new judgment entered in the case.

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.

(b) *Other cases.* In cases other than those in subsection (a), all rights, privileges, and property affected by an executed part of a court-martial sentence that has been set aside or disapproved by any competent authority shall be restored unless a new trial, other trial, or rehearing is ordered and such executed part is included in a sentence imposed at the new trial, other trial, or rehearing. Ordinarily, any restoration shall be reflected in the new judgment entered in the case. In accordance with regulations established by the Secretary concerned, for the period after the date on which an executed part of a court-martial sentence is set aside, an accused who is pending a rehearing, new trial, or other trial shall receive the pay and allowances due at the restored grade.

Discussion

See R.C.M. 1111 concerning entry of a new judgment in the case.

Analysis

This rule is taken from Rule 1208 of the MCM (2016 edition) with the following amendments.
2017 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.

The Discussion to R.C.M. 1208(b) is amended by inserting a reference to R.C.M. 1111 concerning entry of a new judgment in the case.

Rule 1209. Finality of courts-martial

(a) *When a conviction is final.*

(1) *General and special courts-martial.* A conviction in a general or special court-martial is final when—

(A) Review is completed under R.C.M. 1201(a) (Article 65);

(B) Review is completed by a Court of Criminal Appeals and—

(i) The accused does not file a timely petition for review by the Court of Appeals for

the Armed Forces and the case is not otherwise under review by that court;

(ii) A petition for review is denied or otherwise rejected by the Court of Appeals for the Armed Forces; or

(iii) Review is completed in accordance with the judgment of the Court of Appeals for the Armed Forces and—

(I) A petition for a writ of certiorari is not filed within the time limits prescribed by the Supreme Court;

(II) A petition for writ of certiorari is denied or otherwise rejected by the Supreme Court; or

(III) Review is otherwise completed in accordance with the judgment of the Supreme Court.

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.

(2) *Summary courts-martial.* A conviction in a summary court-martial is final when a judge advocate completes review under R.C.M. 1307(d) and no further action is required under R.C.M. 1307(e).

Discussion

Although a summary court-martial conviction is final under paragraph (a)(2) of this rule, an accused may petition for post-final review pursuant to R.C.M. 1307(h). *See also* R.C.M. 1201(j).

(b) *Effect of finality.* The appellate review of records of trial provided by the UCMJ, the proceedings, findings, and sentences of courts-martial as approved, reviewed, or affirmed as required by the UCMJ, and all dismissals and discharges carried into execution under sentences by courts-martial following approval, review, or affirmation as required by the UCMJ, are final and conclusive. The judgment of a court-martial and orders publishing the proceedings of courts-martial and all action taken pursuant to those proceedings are binding upon all departments, courts, agencies, and officers of the United States, subject only to action upon a petition for a new trial under Article 73, to action under Article 69, to action by the Secretary concerned as provided in Article 74, and the authority of the President.

Analysis

This rule is taken from Rule 1209 of the MCM (2016 edition) with the following amendments. *2017 Amendment*: R.C.M. 1209 is amended and implements Articles 65 and 69, as amended by Sections 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.

Rule 1210. New trial

(a) *In general.* At any time within three years after the date of entry of judgment, the accused may petition the Judge Advocate General for a new trial on the ground of newly discovered evidence or fraud on the court-martial. A petition may not be submitted after the death of the accused. A petition for a new trial of the facts may not be submitted on the basis of newly

discovered evidence when the petitioner was found guilty of the relevant offense pursuant to a guilty plea.

(b) *Who may petition.* A petition for a new trial may be submitted by the accused personally, or by accused's counsel, regardless whether the accused has been separated from the Service.

(c) *Form of petition.* A petition for a new trial shall be written and shall be signed under oath or affirmation by the accused, by a person possessing the power of attorney of the accused for that purpose, or by a person with the authorization of an appropriate court to sign the petition as the representative of the accused. The petition shall contain the following information, or an explanation why such matters are not included:

(1) The name, service number, and current address of the accused;

(2) The date and location of the trial;

(3) The type of court-martial and the title or position of the convening authority;

(4) The request for the new trial;

(5) The sentence or a description thereof as reflected in the judgment of the case, with any later reduction thereof by clemency or otherwise;

(6) A brief description of any finding or sentence believed to be unjust;

(7) A full statement of the newly discovered evidence or fraud on the court-martial which is relied upon for the remedy sought;

(8) Affidavits pertinent to the matters in paragraph (c)(7) of this rule; and

(9) The affidavit of each person whom the accused expects to present as a witness in the event of a new trial. Each such affidavit should set forth briefly the relevant facts within the personal knowledge of the witness.

(d) *Effect of petition.* The submission of a petition for a new trial does not stay the execution of a sentence.

(e) *Who may act on petition.* If the accused's case is pending before a Court of Criminal Appeals or the Court of Appeals for the Armed Forces, the Judge Advocate General shall refer the petition to the appropriate court for action. Otherwise, the Judge Advocate General of the armed force which reviewed the previous trial shall act on the petition, except that petitions submitted by persons who, at the time of trial and sentence from which the petitioner seeks relief, were members of the Coast Guard, and who were members of the Coast Guard at the time the petition is submitted, shall be acted on in the Department in which the Coast Guard is serving at the time the petition is so submitted.

(f) *Grounds for new trial.*

(1) *In general.* A new trial may be granted only on grounds of newly discovered evidence or fraud on the court-martial.

(2) *Newly discovered evidence.* A new trial shall not be granted on the grounds of newly discovered evidence unless the petition shows that:

(A) The evidence was discovered after the trial;

(B) The evidence is not such that it would have been discovered by the petitioner at the time of trial in the exercise of due diligence; and

(C) The newly discovered evidence, if considered by a court-martial in the light of all other pertinent evidence, would probably produce a substantially more favorable result for the accused.

(3) *Fraud on court-martial.* No fraud on the court-martial warrants a new trial unless it had a substantial contributing effect on a finding of guilty or the sentence adjudged.

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).

(g) *Action on the petition.*

(1) *In general.* The authority considering the petition may cause such additional investigation to be made and such additional information to be secured as that authority believes appropriate. Upon written request, and in its discretion, the authority considering the petition may permit oral argument on the matter.

(2) *Courts of Criminal Appeals; Court of Appeals for the Armed Forces.* The Courts of Criminal Appeals and the Court of Appeals for the Armed Forces shall act on a petition for a new trial in accordance with their respective rules.

(3) *The Judge Advocates General.* When a petition is considered by the Judge Advocate General, any hearing may be before the Judge Advocate General or before an officer or officers designated by the Judge Advocate General. If the Judge Advocate General believes meritorious grounds for relief under Article 74 have been established but that a new trial is not appropriate, the Judge Advocate General may act under Article 74 if authorized to do so, or transmit the petition and related papers to the Secretary concerned with a recommendation. The Judge Advocate General may also, in cases which have been finally reviewed but have not been reviewed by a Court of Criminal Appeals, act under Article 69.

Discussion

See also R.C.M. 1201(h).

(h) *Action when new trial is granted.*

(1) *Forwarding to convening authority.* When a petition for a new trial is granted, the Judge Advocate General shall select and forward the case to a convening authority for disposition.

(2) *Charges at new trial.* At a new trial, the accused may not be tried for any offense of which the accused was found not guilty or upon which the accused was not tried at the earlier court-martial.

(3) *Action by convening authority.* The convening authority's action on the record of a new trial is the same as in other courts-martial.

(4) *Disposition of record.* The disposition of the record of a new trial is the same as for other courts-martial.

(5) *Judgment.* After a new trial, a new judgment shall be entered in accordance with R.C.M. 1111.

Discussion

See Article 75 and R.C.M. 1208.

(6) *Action by persons charged with execution of the sentence.* Persons charged with the administrative duty of executing a sentence adjudged upon a new trial shall credit the accused with any executed portion or amount of the original sentence included in the new sentence in computing the term or amount of punishment actually to be executed pursuant to the sentence.

Analysis
This rule is taken from Rule 12010 of the MCM (2016 edition) with the following amendments.
2017 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.

Rule 1301. Summary courts-martial
(a) *Composition*. A summary court-martial is composed of one commissioned officer on active duty. Unless otherwise prescribed by the Secretary concerned a summary court-martial shall be of the same armed force as the accused. Summary courts-martial shall be conducted in accordance with the regulations of the military Service to which the accused belongs. Whenever practicable, a summary court-martial should be an officer whose grade is not below lieutenant of the Navy or Coast Guard or captain of the Army, Air Force, or Marine Corps. When only one commissioned officer is present with a command or detachment, that officer shall be the summary court-martial of that command or detachment. When more than one commissioned officer is present with a command or detachment, the convening authority may not be the summary court-martial of that command or detachment.
(b) *Function.* The function of the summary court-martial is to promptly adjudicate minor offenses under a simple disciplinary proceeding. A finding of guilt by the summary court-martial does not constitute a criminal conviction as it is not a criminal forum. However, a summary court-martial shall constitute a trial for purposes of determining former jeopardy under Article 44. The summary court-martial shall thoroughly and impartially inquire into both sides of the matter and shall ensure that the interests of both the Government and the accused are safeguarded and that justice is done. A summary court-martial may seek advice from a judge advocate or legal officer on questions of law, but the summary court-martial may not seek advice from any person on factual conclusions that should be drawn from evidence or the sentence that should be imposed, as the summary court-martial has the independent duty to make these determinations.

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 conviction.

(c) *Jurisdiction.*
[Note: R.C.M. 1301(c) applies to offenses committed on or after 24 June 2014.]
(1) Subject to Chapter II, summary courts-martial have the power to try persons subject to the UCMJ, except commissioned officers, warrant officers, cadets, aviation cadets, and midshipmen, for any non-capital offense made punishable by the UCMJ.

Discussion
See R.C.M. 103(3) for a definition of capital offenses.

(2) Notwithstanding subsection (c)(1), summary courts-martial do not have jurisdiction over offenses under Articles 120(a), 120(b), 120b(a), 120b(b), and attempts thereof under Article 80. Such offenses shall not be referred to a summary court-martial.

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.

(d) *Punishments.*

(1) *Limitations—amount.* Subject to R.C.M. 1003, summary courts-martial may impose any punishment not forbidden by the UCMJ except death, dismissal, dishonorable or bad-conduct discharge, confinement for more than 1 month, hard labor without confinement for more than 45 days, restriction to specified limits for more than 2 months, or forfeiture of more than two-thirds of 1 month's pay.

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 paragraph (d)(2) of this rule for additional limits on enlisted persons serving in pay grades 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 combination of certain types of punishment.

(2) *Limitations—pay grade.* In the case of enlisted members above the fourth enlisted pay grade, summary courts-martial may not adjudge confinement, hard labor without confinement, or reduction except to the next pay grade.

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.

(e) *Counsel*. The accused at a summary court-martial does not have the right to counsel. If the accused has counsel qualified under R.C.M. 502(d)(2), that counsel may be permitted to represent the accused at the summary court-martial if such appearance will not unreasonably delay the proceedings and if military exigencies do not preclude it.

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.

(f) *Power to obtain witnesses and evidence.* A summary court-martial may obtain evidence pursuant to R.C.M. 703.

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).

(g) *Secretarial limitations*. The Secretary concerned may prescribe procedural or other rules for summary courts-martial not inconsistent with this Manual or the UCMJ.

Analysis

This rule is taken from Rule 1301 of the MCM (2016 edition) with the following amendments.

2017 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) is amended and aligns with changes to Articles 120 and 125, which prohibited the trial of certain offenses at a summary court-martial and also eliminated the offense of forcible sodomy under Article 125 because that offense has been fully incorporated into Article 120.

Rule 1302. Convening a summary court-martial

(a) *Who may convene summary courts-martial.* Unless limited by competent authority summary courts-martial may be convened by:

(1) Any person who may convene a general or special court-martial;

(2) The commander of a detached company or other detachment of the Army;

(3) The commander of a detached squadron or other detachment of the Air Force;

(4) The commander or officer in charge of any other command when empowered by the Secretary concerned; or

(5) A superior competent authority to any of the above.

(b) *When convening authority is accuser*. If the convening authority or the summary court-martial is the accuser, it is discretionary with the convening authority whether to forward the charges to a superior authority with a recommendation to convene the summary court-martial. If the convening authority or the summary court-martial is the accuser, the jurisdiction of the summary court-martial is not affected.

(c) *Procedure.* After the requirements of Chapters III and IV of this Part have been satisfied, summary courts-martial shall be convened in accordance with R.C.M. 504(d)(2). The convening order may be by notation signed by the convening authority on the charge sheet. Charges shall be referred to summary courts-martial in accordance with R.C.M. 601.

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

Analysis

This rule is taken from Rule 1302 of the MCM (2016 edition) without substantive amendment.

Rule 1303. Right to object to trial by summary court-martial

No person who objects thereto before arraignment may be tried by summary court-martial even if that person also refused punishment under Article 15 and demanded trial by court-martial for the same offenses.

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.

Analysis

This rule is taken from Rule 1303 of the MCM (2016 edition) without substantive amendment.

Rule 1304. Trial procedure

(a) *Pretrial duties*.

(1) *Examination of file*. The summary court-martial shall carefully examine the charge sheet, allied papers, and immediately available personnel records of the accused before trial.

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.

(2) *Report of irregularity*. The summary court-martial shall report to the convening authority any substantial irregularity in the charge sheet, allied papers, or personnel records.

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, since 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 paragraph (a)(3) of this rule concerning minor errors.

(3) *Correction and amendment*. The summary court-martial may, subject to R.C.M. 603, correct errors on the charge sheet and amend charges and specifications. Any such corrections or amendments shall be initialed.

(4) *Rights of victims at summary courts-martial*. Pursuant to Article 6b, a victim at summary court-martial is entitled to the following rights:

(A) To be reasonably protected from the accused;

(B) To reasonable, accurate, and timely notice of the summary court-martial;

(C) To not be excluded from the summary court-martial unless the summary court-martial officer, after receiving clear and convincing evidence, determines that testimony by the victim of an offense under this chapter would be materially altered if the victim heard other testimony at the summary court-martial;

(D) To be reasonably heard during sentencing in accordance with R.C.M. 1001(c); and

(E) The reasonable right to confer with the representative of the command and counsel for the government, if any.

(b) *Summary court-martial procedure*.

Discussion

A sample guide is at Appendix 9. The summary court-martial should review and become familiar with the guide before proceeding.

(1) *Preliminary proceeding*. After complying with R.C.M. 1304(a), the summary court-martial shall hold a preliminary proceeding during which the accused shall be given a copy of the charge sheet and informed of the following:

(A) The general nature of the charges;

(B) The fact that the charges have been referred to a summary court-martial for trial and the date of referral;

(C) The identity of the convening authority;

(D) The name(s) of the accuser(s);

(E) The names of the witnesses who could be called to testify and any documents or physical evidence which the summary court-martial expects to introduce into evidence;

(F) The accused's right to inspect the allied papers and immediately available personnel records;

(G) That during the trial the summary court-martial will not consider any matters, including statements previously made by the accused to the officer detailed as summary court-martial unless admitted in accordance with the Military Rules of Evidence;

(H) The accused's right to plead not guilty or guilty;

(I) The accused's right to cross-examine witnesses and have the summary court-martial cross-examine witnesses on behalf of the accused;

(J) The accused's right to call witnesses and produce evidence with the assistance of the summary court-martial as necessary;

(K) The accused's right to testify on the merits, or to remain silent with the assurance that no adverse inference will be drawn by the summary court-martial from such silence;

(L) If any findings of guilty are announced, the accused's rights to remain silent, to make an unsworn statement, oral or written or both, and to testify, and to introduce evidence in extenuation or mitigation;

(M) The maximum sentence which the summary court-martial may adjudge if the accused is found guilty of the offense or offenses alleged; and

(N) The accused's right to object to trial by summary court-martial.

(2) *Trial proceeding*.

(A) *Objection to trial*. The summary court-martial shall give the accused a reasonable period of time to decide whether to object to trial by summary court-martial. The summary court-martial shall thereafter record the response. If the accused objects to trial by summary court-martial, the summary court-martial shall return the charge sheet, allied papers, and personnel records to the convening authority. If the accused fails to object to trial by summary court-martial, trial shall proceed.

(B) *Arraignment*. After complying with R.C.M. 1304(b)(1) and (2)(A), the summary court-martial shall read and show the charges and specifications to the accused and, if necessary, explain them. The accused may waive the reading of the charges. The summary court-martial shall then ask the accused to plead to each specification and charge.

(C) *Motions*. Before receiving pleas the summary court-martial shall allow the accused to make motions to dismiss or for other relief. The summary court-martial shall take action on

behalf of the accused, if requested by the accused, or if it appears necessary in the interests of justice.

(D) *Pleas*.

(i) *Not guilty pleas.* When a not guilty plea is entered, the summary court-martial shall proceed to trial.

(ii) *Guilty pleas.* If the accused pleads guilty to any offense, the summary court-martial shall comply with R.C.M. 910.

(iii) *Rejected guilty pleas.* If the summary court-martial is in doubt that the accused's pleas of guilty are voluntarily and understandingly made, or if at any time during the trial any matter inconsistent with pleas of guilty arises, which inconsistency cannot be resolved, the summary court-martial shall enter not guilty pleas as to the affected charges and specifications.

(iv) *No plea.* If the accused refuses to plead, the summary court-martial shall enter not guilty pleas.

(v) *Changed pleas.* The accused may change any plea at any time before findings are announced. The accused may change pleas from guilty to not guilty after findings are announced only for good cause.

(E) *Presentation of evidence*.

(i) The Military Rules of Evidence (Part III) apply to summary courts-martial.

(ii) The summary court-martial shall arrange for the attendance of necessary witnesses for the prosecution and defense, including those requested by the accused.

Discussion

See R.C.M. 703. Ordinarily witnesses should be excluded from the courtroom until called to testify. *See* Mil. R. Evid. 615.

(iii) Witnesses for the prosecution shall be called first and examined under oath. The accused shall be permitted to cross-examine these witnesses. The summary court-martial shall aid the accused in cross-examination if such assistance is requested or appears necessary in the interests of justice. The witnesses for the accused shall then be called and similarly examined under oath.

(iv) The summary court-martial shall obtain evidence which tends to disprove the accused's guilt or establishes extenuating circumstances.

Discussion

See R.C.M. 703 and 1001.

(F) *Findings and sentence*.

(i) The summary court-martial shall apply the principles in R.C.M. 918 in determining the findings. The summary court-martial shall announce the findings to the accused in open session.

(ii) The summary court-martial shall follow the procedures in R.C.M. 1001 and 1002 and apply the principles in the remainder of Chapter X in determining a sentence, except as follows:

(I) If an accused is found guilty of more than one offense, a summary court-martial shall determine the appropriate confinement and fine, if any, for all offenses of which the accused was found guilty. The summary court-martial shall not determine or announce separate terms of confinement or fines for each offense; and

(II) The summary court-martial shall announce the sentence to the accused in open session.

(iii) If the sentence includes confinement, the summary court-martial shall advise the accused of the right to apply to the convening authority for deferment of the service of the confinement.

(iv) If the accused is found guilty, the summary court-martial shall advise the accused of the rights under R.C.M. 1306(a) and (h) and R.C.M. 1307(h) after the sentence is announced.

(v) The summary court-martial shall, as soon as practicable, inform the convening authority of the findings, sentence, recommendations, if any, for suspension of the sentence, and any deferment request.

(vi) If the sentence includes confinement, the summary court-martial shall cause the delivery of the accused to the accused's commanding officer or the commanding officer's designee.

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.

Analysis

This rule is taken from Rule 1304 of the MCM (2016 edition) with the following amendments. *2017 Amendment*: R.C.M. 1304(a)(4) is new and addresses the rights of a victim under Article 6b at summary courts-martial.

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.

Rule 1305. Record of trial

(a) *In general.* The record of trial of a summary court-martial shall be prepared as prescribed in subsection (b) of this rule. The convening or higher authority may prescribe additional requirements for the record of trial.

Discussion

See Appendix 15 for a sample of a Record of Trial by Summary Court-Martial (DD Form 2329).

Any matters submitted under R.C.M. 1306(a) should be appended to the record of trial

(b) *Contents*. The summary court-martial shall prepare a written record of trial, which shall include:

(1) The pleas, findings, and sentence, and if the accused was represented by counsel at the summary court-martial, a notation to that effect;

(2) The fact that the accused was advised of the matters set forth in R.C.M. 1304(b)(1);

(3) If the summary court-martial is the convening authority, a notation to that effect.

(c) *Certification.* The summary court-martial shall certify the record by signing the record of trial. An electronic record of trial may be certified with the electronic signature of the summary court-martial.

Discussion

Certification means attesting that the record accurately reports the proceedings. *See* R.C.M. 1112(c).

(d) *Forwarding copies of the record.*

(1) *Accused's copy.*

(A) *Service.* The summary court-martial shall cause a copy of the record of trial to be served on the accused as soon as it is certified. Service of a certified electronic copy of the record of trial with a means to review the record of trial satisfies the requirement of service under this rule.

(B) *Receipt.* The summary court-martial shall cause the accused's receipt for the copy of the record of trial to be obtained and attached to the original record of trial or shall attach to the original record of trial a certificate that the accused was served a copy of the record. If the record of trial was not served on the accused personally, the summary court-martial shall attach a statement explaining how and when such service was accomplished. If the accused was represented by counsel, such counsel may be served with the record of trial.

(C) *Classified information.* If classified information is included in the record of trial of a summary court-martial, R.C.M. 1112(e)(3)(A) shall apply.

(2) *Forwarding to the convening authority.* The original and one copy of the record of trial shall be forwarded to the convening authority after compliance with paragraph (d)(1) of this rule.

(3) *Further disposition.* After compliance with R.C.M. 1306(b) and (h) and R.C.M. 1307(h), if applicable, the record of trial shall be disposed of under regulations prescribed by the Secretary concerned.

(e) *Loss of record; defective record; correction of record.*

(1) *Loss of record*. If the certified record of trial is lost or destroyed, the summary court-martial shall, if practicable, cause another record of trial to be prepared for certification. The new record of trial shall become the record of trial in the case if the requirements of this rule are met.

(2) *Defective record.* A record of trial found to be defective after certification may be returned to the summary court-martial to be corrected. The summary court-martial shall give notice of the proposed correction to the parties and permit them to examine and respond to the proposed correction before issuing a certificate of correction. The parties shall be given reasonable access to any recording of the proceedings.

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.

(3) C*ertificate of correction; service on the accused*. The certificate of correction shall be certified as provided in subsection (c) of this rule and a copy served on the accused as provided in paragraph (d)(1) of this rule. The certificate of correction and the accused's receipt for the certificate of correction shall be attached to each copy of the record of trial required to be prepared under this rule.

Analysis

This rule is taken from Rule 1305 of the MCM (2016 edition) with the following amendments.

2017 Amendment: R.C.M. 1305(c) is amended and allows for the certification of the record of trial in a summary court-martial.

R.C.M. 1305(d) is amended and conforms with changes to Article 54 to provide procedures for the correction of a record of trial in a summary court-martial.

Rule 1306. Post-trial procedure, summary court-martial

(a) *Matters submitted.* After a sentence is adjudged by a summary court-martial, the accused and any crime victim may submit matters to the convening authority in accordance with R.C.M. 1106 and R.C.M. 1106A.

(b) *Convening authority's action.*

(1) *In general.* The convening authority shall take action on the sentence of a summary court-martial and, in the discretion of the convening authority, the findings of a summary court-martial, in accordance with the procedures and requirements of R.C.M. 1109(d).

(2) *Action on findings.* Action on the findings is not required. With respect to findings, the convening authority may:

(A) change a finding of guilty to a charge or specification to a finding of guilty to an offense that is a lesser included offense of the offense stated in the charge or specification; or

(B) set aside any finding of guilty and:

(i) dismiss the specification and, if appropriate, the charge; or

(ii) direct a rehearing in accordance with R.C.M. 810 and subsection (e).

(3) *Action on sentence.* The convening authority shall take action on the sentence. The convening authority may disapprove, commute, or suspend, in whole or in part, any portion of an adjudged sentence. The convening authority shall approve the sentence that is warranted by the circumstances of the offense and appropriate for the accused.

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)(5)–(6).

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.

(4) *When proceedings resulted in finding of not guilty*. The convening authority shall not take action disapproving a finding of not guilty, a finding of not guilty only by reason of lack of mental responsibility, or a ruling amounting to a finding of not guilty. When an accused is found not guilty only by reason of lack of mental responsibility, the convening authority, however, shall commit the accused to a suitable facility pending a hearing and disposition in accordance with R.C.M. 1105.

(5) *Action when accused lacks mental capacity*. The convening authority may not approve a sentence while the accused lacks mental capacity to understand and to conduct or cooperate intelligently in the post-trial proceedings. If, before the convening authority takes action, a substantial question is raised as to the requisite mental capacity of the accused, the convening authority shall either—

(A) direct an examination of the accused in accordance with R.C.M. 706 to determine the

accused's present capacity to understand and cooperate in the post-trial proceedings; or

(B) disapprove the findings and sentence.

Discussion

See R.C.M. 909 regarding presumptions and standards governing issues of mental competence.

(c) *Ordering rehearing or other trial.* The convening authority may, in the convening authority's discretion, order a rehearing. A rehearing may be ordered as to some or all offenses of which findings of guilty were entered and the sentence, or as to sentence only. A rehearing may not be ordered as to findings of guilty when there is a lack of sufficient evidence in the record to support the findings of guilty of the offense charged or of any lesser included offense. A rehearing may be ordered, however, if the proof of guilt consisted of inadmissible evidence for which there is available an admissible substitute. A rehearing may be ordered as to any lesser offense included in an offense of which the accused was found guilty, provided there is sufficient evidence in the record to support the lesser included offense.

Discussion

See R.C.M. 810 regarding procedures for rehearings and limitations on sentence at rehearings.

(d) *Contents of action and related matters.*

(1) *In general*. The convening authority shall state in writing and insert in the record of trial the convening authority's decision as to the sentence, whether any findings of guilty are disapproved, whether any charges or specifications are changed or dismissed and an explanation for such action, and any orders as to further disposition. The action shall be signed by the convening authority. The convening authority's authority to sign shall appear below the signature. The convening authority may recall and modify any action taken by that convening authority at any time before it has been published, or, if the action is favorable to the accused, at any time prior to forwarding the record for review or before the accused has been officially notified.

(2) *Sentence.* The action shall state whether the sentence adjudged by the court-martial is approved. If only part of the sentence is approved, the action shall state which parts are approved. A rehearing may not be directed if any sentence is approved.

(3) S*uspension*. The action shall indicate, when appropriate, whether an approved sentence is to be executed or whether the execution of all or any part of the sentence is to be suspended. No reasons need be stated.

(4) *Deferment of service of sentence to confinement*. Whenever the service of the sentence to confinement is deferred by the convening authority under R.C.M. 1103 before or concurrently with the initial action in the case, the action shall include the date on which the deferment became effective. The reason for the deferment need not be stated in the action.

(e) *Incomplete, ambiguous, or erroneous action*. When the action of the convening authority or of a higher authority is incomplete, ambiguous, or contains error, the authority who took the incomplete, ambiguous, or erroneous action may be instructed by an authority acting under Article 64, 66, 67, 67a, or 69 to withdraw the original action and substitute a corrected action.

(f) *Service*. A copy of the convening authority's action shall be served on the accused or on defense counsel and, upon the victim's request, the victim. If the action is served on defense counsel, defense counsel shall, by expeditious means, provide the accused with a copy.

(g) *Subsequent action*. Any action taken on a summary court-martial after the initial action by the convening authority shall be in writing, signed by the authority taking the action, and

promulgated in appropriate orders.
(h) *Review by a judge advocate*. A judge advocate shall review each summary court-martial in which there is a finding of guilty pursuant to R.C.M. 1307.

Analysis
2017 Amendment: This rule is taken from Rule 1306 of the MCM (2016 edition) with the following amendments.

R.C.M. 1306 is amended and consolidates the post-trial process for summary courts-martial into one rule and removes 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 appellate procedures in summary courts-martial required by the changes to Articles 64 and 69.

Rule 1307. Review of summary courts-martial by a judge advocate
(a) *In general.* Except as provided in subsection (b) of this rule, under regulations of the Secretary concerned, a judge advocate shall review each summary court-martial in which there is a finding of guilty.
(b) *Exception.* If the accused is found not guilty or not guilty only by reason of lack of mental responsibility of all offenses or if the convening authority disapproved all findings of guilty, no review under this rule is required.
(c) *Disqualification.* No person may review a case under this rule if that person has acted in the same case as an accuser, preliminary hearing officer, summary court-martial officer, or counsel, or has otherwise acted on behalf of the prosecution or defense.
(d) *Form and content of review*. The judge advocate's review shall be in writing and shall contain the following:

(1) Conclusions as to whether—

(A) the court-martial had jurisdiction over the accused and each offense as to which there is a finding of guilty that has not been disapproved;

(B) each specification as to which there is a finding of guilty that has not been disapproved stated an offense; and

(C) the sentence was legal.

(2) A response to each allegation of error made in writing by the accused. Such allegations may be filed under R.C.M. 1106 or directly with the judge advocate who reviews the case; and

(3) If the case is sent for action to the officer exercising general court-martial jurisdiction under subsection (e) of this rule, a recommendation as to the appropriate action to be taken and an opinion as to whether corrective action is required as a matter of law.

A copy of the judge advocate's review under this rule shall be attached to the record of trial. A copy of the review shall also be forwarded to the accused.
(e) *Forwarding to officer exercising general court-martial jurisdiction*. In cases reviewed under this rule, the record of trial shall be sent for action to the officer exercising general court-martial convening authority over the accused at the time the court-martial was held (or to that officer's successor) when:

(1) The judge advocate who reviewed the case recommends corrective action; or

(2) Such action is otherwise required by regulations of the Secretary concerned.

(f) *Action by officer exercising general court-martial jurisdiction.*

(1) *Action*. The officer exercising general court-martial jurisdiction who receives a record under subsection (e) of this rule may—

(A) Disapprove or approve the findings or sentence in whole or in part;

(B) Remit, commute, or suspend the sentence in whole or in part;

(C) Except where the evidence was insufficient at the trial to support the findings, order a rehearing on the findings, on the sentence, or on both; or

(D) Dismiss the charges.

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) concerning the entry of judgment in summary courts-martial. *See also* Appendix 16 (Forms for actions) and Appendix 17 (Forms for court-martial orders).

(2) *Rehearing*. If the officer exercising general court-martial jurisdiction orders a rehearing, but the convening authority finds a rehearing impracticable, the convening authority shall dismiss the charges.

(3) *Notification*. After the officer exercising general court-martial jurisdiction has taken action, the accused shall be notified of the action and the accused shall be provided with a copy of the action.

(g) *Records forwarded to the Judge Advocate General*. If the judge advocate who reviews the case under this rule states that corrective action is required as a matter of law, and the officer exercising general court-martial jurisdiction does not take action that is at least as favorable to the accused as that recommended by the judge advocate, the record of trial and the action thereon shall be forwarded to the Judge Advocate General for review under R.C.M. 1201(j).

(h) *Application for post-final review by the Judge Advocate General*. Not later than one year after completion of the judge advocate's review of the case under this rule, the accused may apply for review by the Judge Advocate General under R.C.M. 1201(h) on the grounds of newly discovered evidence, fraud on the court-martial, lack of jurisdiction over the accused or offense, error prejudicial to the substantial rights of the accused, or the appropriateness of the sentence.

(i) *Review by a Court of Criminal Appeals.* After the Judge Advocate General reviews a summary court-martial under R.C.M. 1201(h) or (j), the case may be sent to the Court of Criminal Appeals by order of the Judge Advocate General, or the accused may submit an application for review to the Court of Criminal Appeals in accordance with R.C.M. 1201(k).

(j) *Other records*. Records reviewed under this rule that are not forwarded under subsection (g) shall be disposed of as prescribed by the Secretary concerned.

Analysis

2017 Amendment: R.C.M. 1307 is new and 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 provides for review of the record of trial of a summary court-martial by a judge advocate and permits an accused to apply for appellate review for correction of legal error.