

**HAWAII JUDICIAL CIRCUIT  
NAVY-MARINE CORPS TRIAL JUDICIARY**



**RULES OF PRACTICE**

**Revised: 1 January 2013**

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## **Preamble**

The Hawaii Circuit Rules of Practice (at times referred to as the HCRs) supplement the Uniform Rules of Practice before the Navy-Marine Corps Courts-Martial (*see* NAVMARTRIJUDACTINST 5813.4 (series)) and govern all courts-martial convened in the Hawaii Judicial Circuit. These HCRs are promulgated by the Circuit Military Judge for the Hawaii Judicial Circuit under Rule for Courts-Martial 108 and 801(b) and pursuant to the authority delegated in the Uniform Rules. They are designed to promote a common understanding of the procedure for the practice of military criminal law in courts-martial within the Hawaii Judicial Circuit. These rules are effective 31 August 2012. All previously published rules are hereby cancelled.

## **Rule 1: Applicability**

**Rule 1.1:** These Uniform rules apply to the trial of all general and special courts-martial in which the accused is a member of the naval service. Counsel, as officers of the court, court reporters, clerks of court, and bailiffs are required to follow these and any local rules.

**HCR 1.1:** These HCRs apply to all Navy-Marine Corps courts-martial tried under the cognizance of the Circuit Military Judge of the Hawaii Judicial Circuit.

**Rule 1.2:** All parties to the court-martial must comply with these Uniform Rules. In the case of noncompliance with these rules or local rules, or orders of the court, the military judge may, as appropriate, issue an admonishment on the record, issue appropriate court orders, issue a report to a military counsel's commanding officer or officer-in-charge, or forward information about the matter to a civilian or military counsel's bar. In addition, the court may forward a complaint for processing in accordance with R.C.M. 109, proceed with action for contempt under R.C.M. 809 and Article 48 of the Uniform Code of Military Justice, or fashion any other appropriate remedy.

**HCR 1.2:** All counsel practicing before a court in this circuit will familiarize themselves with both the Uniform Rules of Practice before the Navy-Marine Corps Courts-Martial and these HCRs. Counsel must certify to the court at their first appearance that they have read and will comply with both sets of rules.

## **Rule 2: Purpose**

**Rule 2:** These Uniform Rules are intended to facilitate the orderly administration of military justice.

**HCR 2.1:** These HCRs are intended to facilitate the orderly and just disposition of courts-martial and to provide for more efficient application of judicial and legal resources throughout the circuit.

## **Rule 3: Construction**

**Rule 3.1:** These Uniform Rules will be construed to ensure simplicity, fairness, and efficiency in the timely disposition of courts-martial.

**HCR 3.1:** a. Throughout these HCRs the following definitions will apply:

(1) "Filing" of a pleading, notice, or document with the court means that a true and complete copy of the pleading, notice, or document in question is delivered to the detailed military judge and clerk of court. Counsel are cautioned that a detailed military judge in any given court-martial may not be stationed where a court-martial was convened or the *situs* of trial. Detailed counsel and detailed military judges may be separated by substantial time and distance. Counsel should plan and coordinate accordingly. Counsel are responsible for ensuring that the detailed military judge receives filings in a timely manner via an approved means as described within these *Circuit Rules*.

(2) "Service" upon opposing counsel means that a true and complete copy of a filed pleading or document is delivered to opposing counsel.

(3) "Notice" is established when the transmitting attorney establishes that the receiving attorney has, in fact, received the pleading, document, or information transmitted. For the purpose of this definition, "receiving attorney" means the lead counsel in the case, whether military or civilian. If the lead counsel is unavailable, however, notice is deemed to be established by the receipt of the pleading, document, or information by any counsel detailed to the case or assigned as individual military counsel.

(4) "Timeliness" of filing, service and notice vis-à-vis time zones shall be determined by the detailed military judge as required and when appropriate in any particular case.

b. Original documents. All original documents should be retained and physically entered into the record of trial at the next session of the court-martial in question. Counsel are solely responsible for ensuring the cognizant Clerk of Court or detailed court reporter is served with all original documents.

c. Method of filing, service, and notice:

- (1) Physical service: Proof of physical delivery to the judge or attorney in question will establish filing, service, and/or notice as appropriate.
- (2) Electronic transmissions: In lieu of physical delivery, each filing or matter to be served may be transmitted electronically to the military judge or counsel concerned. Proof that an electronic document was received and opened by the receiving military judge or receiving counsel will constitute proof of filing or service of the document in question, and will constitute proof of notice as to that document, except as to any portion of the pleading or document that was not transmitted electronically. Electronic transmission and receipt will constitute filing and service, and can be substituted for physical service to the extent that the electronic filing or matter to be served corresponds to the original of the filing or matter to be served. Originals will be entered into the record of trial at the next session of the court-martial.
- (3) Fax transmissions: Fax transmissions cannot be assumed to be delivered to the judge or counsel in question. In order to satisfy filing, service, and/or notice requirements for faxed documents, the transmitting attorney must verify by voice or other means that the addressee did in fact receive the faxed document.

**Rule 3.2:** If any rule herein conflicts with case law, statute, the Manual for Courts-Martial, any constitutional provision, or any service regulation, then that rule must be read in accordance with the law.

**HCR 3.2:** Failure to comply with these HCRs does not provide any rights or remedies to the accused and the rules will be applied and interpreted in that light.

**HCR 3.3:** Consistent with law and ethical standards, the detailed military judge may modify or suspend any of these HCRs when required by the facts of a case or in the interests of justice.

**Rule 4: Referred Charges**

**Rule 4.1:** After the referral of charges, the trial counsel will provide the responsible judicial circuit with a copy of those charges, along with the appropriate convening order, as soon as possible.

**HCR 4.1.a:** After referral of charges, trial counsel will provide the Clerk of Court with a copy of those charges, along with the applicable convening order, as soon as possible, but not later than seven calendar days after referral.

**HCR 4.1.b:** Defense counsel will examine the personal data on the charge sheet, determine its accuracy, and notify the trial counsel and the military judge of any necessary corrections, additions, or deletions as soon after service of the charges as possible.

**HCR 4.1.c:** All authorized changes to the charge sheet must be initialed and dated by the trial counsel or other representative of the convening authority. See R.C.M. 603.

**Rule 4.2:** Trial counsel must immediately notify the Clerk of Court and the assigned military judge if referred charges have been withdrawn.

**HCR 4.2:** Trial counsel and defense counsel shall make every effort to inform the detailed military judge of plea bargain specifics (i.e., only Part I of the Pretrial Agreement) at the earliest time practical following conclusion of negotiations and acceptance by counsel, the accused and the convening authority.

**HCR 4.3:** Trial counsel will notify the detailed military judge and defense counsel at least three days before trial of any charges or specifications on which evidence will not be presented.

**HCR 4.4:** The Circuit Military Judge, Hawaii Judicial Circuit is responsible for detailing all military judges to all Navy-Marine Corps courts-martial within the Hawaii Judicial Circuit except for those cases that fall within the purview of the Chief Judge, Navy-Marine Corps Trial Judiciary. Cases involving National Security, as defined in the Manual of the Judge Advocate General, JAGINST 5800.7D (series) shall be detailed by the Chief Trial Judge in accordance with NAVMARTRIJUDICINST 5500.2 (series). Government counsel or trial counsel will ensure that the Circuit Military Judge is immediately advised of the existence of all such cases. Notice shall include the name of the accused, the convening authority, and the allegations. Cases likely to generate press interest or are otherwise potentially high visibility cases shall also be brought to the Circuit Military Judge's attention as soon as practicable following referral.

#### **Rule 5: Civilian Counsel**

**Rule 5.1:** If an accused retains civilian counsel, detailed defense counsel must furnish civilian counsel with a copy of all pertinent rules of court. Prior to appearing in Court, civilian counsel must cause to be served on the clerk of court a written notice of appearance. This notice will be in the form of a pleading and must contain the following: name of the accused, counsel's name, office address, telephone numbers, and jurisdiction(s) where the counsel is presently admitted to practice. The filing of any pleading relative to a case that contains the signature of counsel constitutes notice of appearance of such counsel.

**HCR 5.1:** If an accused retains civilian counsel, detailed defense counsel must furnish civilian counsel with a copy of these HCRs as well as the Uniform Rules. Civilian counsel will cause to be served on the clerk of court a written notice of appearance, attachment 1. Detailed defense counsel will promptly provide a copy of the notice of appearance to the trial counsel and court reporter prior to the first session of court. The notice must be in the form of a pleading and must contain the following: Name of the accused, counsel's name, office address, telephone/fax numbers, and electronic mail address; and jurisdiction(s) where the counsel is presently admitted to practice and in good standing. Additionally, the notice must acknowledge familiarity with these rules. Attachment 1 is a sample of a proper notice of appearance.

**Rule 5.2:** Detailed defense counsel must inform the civilian counsel of the rules of Professional Conduct of Attorneys Practicing Under The Cognizance and Supervision of the Judge Advocate General (JAGINST 5803.3 series).

**Rule 5.3:** Once civilian counsel notifies the clerk of court or the military judge of representation of the accused on the referred charges he or she may not withdraw from such representation, without the permission of the military judge.

### **Rule 6: Hawaii Circuit Docketing Procedures**

**Rule 6.1:** The circuit judge of each judicial circuit will establish and promulgate docketing procedures for cases within their circuit. These procedures must contain features that ensure positive control over the docketing and processing of courts-martial.

**HCR 6.1:** Every week, each Military Justice Officer, Senior Trial Counsel, or other designated person is required to submit a Docketing Memorandum to the Clerk of Court, *in writing, no later than 1200 on Wednesday*. If not received by 1200 on Wednesday, the requested cases may be left off that week's revised docket. The Docketing Memorandum may be submitted via facsimile or electronic mail. The Circuit Military Judge may designate an alternate date and time for submission to accommodate weeks during which holidays are observed. The Docketing Memorandum must be in the format provided in attachment 2, and will list all cases which are to be included on the published docket. *If no cases are to be docketed, a negative submission is required*. The Hawaii Judicial Circuit Docket is a single document for all scheduled cases; however, cases which are docketed for anytime after the upcoming week are considered to be on the long-range docket. The short-range docket (upcoming week) will ordinarily indicate for each case the starting time, courtroom (JBPHH/MCBH), and the initials of the detailed military judge.

**HCR 6.2:** The Docketing Memorandum consists of four parts. Part One addresses cases to be docketed for the upcoming week, Part Two addresses cases to be docketed on the long-range docket, Part Three addresses any requested additions to the docket, and Part Four addresses any



requested deletions to the docket and any logistical concerns (for example, if counsel are requesting a specific time of day due to witness availability).

**HCR 6.3:** Part One of the Docketing Memorandum must include all cases that are to have any sessions during the upcoming week. This includes cases which are being brought before the circuit for the first time, cases in which either counsel is requesting a session, and cases in which a session has been judicially scheduled by a military judge at a previous session.

**HCR 6.4:** Part Two of the Docketing Memorandum must include all cases that should be included on the long-range docket. Normally, Part Two reflects cases that have previously been docketed pursuant to previous court order, or through the use of a motion for docketing or pretrial information report.

**HCR 6.5:** Part Three of the Docketing Memorandum must include any requested additions to the docket. All requested additions to the docket must be justified, and ordinarily require supporting documentation. A motion for continuance, a copy of part one of a signed PTA, and a certificate of withdrawal are all examples of appropriate supporting documentation.

**HCR 6.6:** Part Four of the Docketing Memorandum must include any requested deletions to the docket. All requested deletions to the docket must be justified, and ordinarily require supporting documentation. A motion for continuance, a copy of part one of a signed PTA, and/or a certificate of withdrawal are all examples of appropriate supporting documentation.

**HCR 6.7.a:** Only cases with referred charges will be entered on the docket. In order to enter a case on the docket for the upcoming week, trial counsel will submit, via the Military Justice Officer or Senior Trial Counsel a completed Motion for Docketing (MFD), attachment 3 or a completed Pretrial Information Report (PTIR), attachment 4.

**HCR 6.7.b:** The PTIR serves to prepare the military judge for each session of court. In the initial PTIR, trial counsel must include copies of any military orders or directives alleged to have been violated, and copies of any federal or state statutes alleged to have been violated and applicable sections of the statutes pertaining to the maximum punishments. Prior to trial on the merits or guilty pleas, trial and defense counsel must each include proposed elements for any federal or state statutes alleged to have been violated, together with all applicable definitions.

**HCR 6.8:** Counsel should also include in Part 2 of the PTIR any special circumstances or requests that are specific to the next session of court, including start time, witness availability, significant logistical issues, and a justification if the trial deadlines exceed 60 days from the arraignment date.

**HCR 6.9:** Trial counsel and defense counsel both must sign the PTIR. However, its submission should not be delayed for the lack of a signature. Accordingly, provided counsel have communicated with one another regarding the contents of the PTIR, one counsel may sign for the other with an explanation for the missing signature in Part 2. This will serve to verify to the court that the non-signing counsel is aware of the contents and has authorized the other to sign on his or her behalf.

**HCR 6.10:** If a previously scheduled session of court no longer appears to be necessary, a PTIR is still required. The reason for requesting to cancel the session should be explained in part 2 of the PTIR. As an example, if an Article 39(a) session was scheduled to litigate motions, and no motions have been filed, counsel still must submit a PTIR for that session, but may indicate in the PTIR that neither party desires a session. Unless all charges have been withdrawn in writing, only the military judge has the authority to cancel or move any session of court.

**HCR 6.11.a:** In order to docket a case for anytime other than the upcoming week (or within 7 days), counsel must submit an MFD. A PTIR is not required at that time, but must be submitted the week prior to the first scheduled session.

**HCR 6.11.b:** A proposed pretrial order, attachment 5, is REQUIRED to be filled out and attached to every MFD. Notice of any substantive changes to the contents of attachment 5 must be affirmatively given to the opposing party and the court.

**HCR 6.12:** The accused, via Defense counsel, must enter forum and pleas on the date established by the court. Such entry must be either orally on the record, or in writing by use of attachment 6. If in writing, they will be entered on the record at the next session of court.

**HCR 6.13:** Counsel shall submit pretrial documentation addressing preliminary matters (commonly referred to by the applicable page number of the Navy-Marine Corps Trial Judiciary Trial Guide) in accordance with the court-established deadlines. Notice of pleas and forum shall be submitted in accordance with attachment 6. Counsel who fails to submit such documents in a timely manner may, in the discretion of the military judge, forfeit the opportunity to conduct general voir dire of the members.

**HCR 6.14:** Each week, the Circuit Military Judge publishes the docket pursuant to the OJAG standard operating procedures. The Clerk of Court will be the circuit's primary point of contact for all docketing issues. The Clerk of Court is the administrative assistant to the Circuit Military Judge, Hawaii Judicial Circuit. The Clerk of Court is responsible for all administrative functions associated with the circuit and will be treated with the respect due the court when handling such matters, regardless of his/her rank.

**HCR 6.15:** The Circuit Military Judge or Clerk will normally publish the docket by the close of business on the day following the due date of the Docketing Memorandum, which will normally be on Thursday of each week. The docket is published through OJAG and distributed by the Clerk of Court to the field. Each Military Justice Officer, Senior Trial Counsel, Senior Defense Counsel, or other officer receiving the docket is responsible to ensure that the docket is distributed to all parties concerned with the scheduling of cases, including the court reporters. *It is the responsibility of each counsel to be aware of each week's published docket.*

**HCR 6.16:** Trial deadlines established at an Article 39(a) arraignment session, or by the use of a Motion for Docketing, are not optional. Counsel will adhere to the deadlines and may be called upon to address, on the record, any failure to abide by them.

**HCR 6.17:** If a case is withdrawn, documentation of such withdrawal must be submitted to the court. Proper documentation includes a withdrawal letter signed by the convening authority, a certification of withdrawal such as that in attachment 7, or a copy of the charge sheet reflecting the withdrawal action. Cases will not be removed from the docket, and counsel will be expected to appear as scheduled, until such written notification of withdrawal is received by the court.

**Rule 7 PII:**

**Rule 7.1:** Use of Personally Identifying Information (PII) must be eliminated or minimized to the maximum extent possible in all pleadings and in all court documents.

**Rule 7.2:** PII must be redacted in all documents, pleadings, discovery, etc. that are electronically transmitted. Unless encrypted, medical and psychiatric records must never be electronically transferred.

**Rule 7.3:** PII and the names of all alleged victim(s), must be minimized to the maximum extent possible in all pleadings. With the exception of the charge sheet, and during court proceedings, all alleged victim(s), will only be identified by their initials, and rank if a service-member.

**HCR 7:** The first and last initials in capital letters will be used when identifying victims in pleadings. Where initials are duplicative the middle initial will be used for both parties.

**Rule 8: Conferences & Ex Parte Communications With The Military Judge**

**Rule 8.1:** Conferences between the military judge and trial and defense counsel are authorized by R.C.M. 802. The presence of the accused is neither required nor prohibited. Such conferences will not be used to litigate or decide contested issues. The military judge must summarize all R.C.M. 802 conferences for the record at the next 39(a) session of court.

**HCR 8:** In contested cases, counsel may seek, and the military judge will normally schedule, a trial management R.C.M. 802 conference approximately one week prior to trial on the merits.

**Rule 8.2:** *Ex parte* communications with a military judge concerning a case that is pending before that military judge are prohibited, except for routine administrative matters or as provided by law.

**Rule 8.3:** Routine administrative matters include, but are not

limited to, docketing and logistic matters (e.g. pleas, forum, and number of, or difficulty with, witnesses that affect the time, location, and length of court sessions).

**Rule 8.4:** Military judges may, at their discretion, conduct critiques or offer suggestions regarding counsels' performance in courts-martial to improve the administration of justice. At the discretion of the military judge, these sessions may be conducted *ex parte*, or jointly.

### **Rule 9: Discovery**

**Rule 9.1:** Counsel will promptly comply with military law regarding discovery. Counsel must not make a frivolous discovery request or fail to make a diligent effort to comply with a legal and proper discovery request by an opposing party.

**HCR 9.1:** Discovery issues must be resolved expeditiously. Counsel will acknowledge and respond to discovery requests in a timely fashion, normally within five working days. When counsel are not able to respond fully to a discovery request within five working days, counsel will acknowledge the request and discover what is available and give notice of when remaining material is expected to become available. To prevent discovery issues from unnecessarily delaying trial, the military judge, at arraignment, may require both counsel to state on the record their compliance with discovery requirements.

**Rule 9.2:** Notwithstanding "open discovery" in the military, discovery requests should be as specific as possible to avoid misunderstanding and to assist in quickly obtaining the desired information.

**HCR 9.2:** Gamesmanship in the discovery process will not be tolerated. Discovery requests should be answered promptly in writing. All counsel are expected to adhere to the spirit of military discovery practice and shall promptly turn over all discoverable materials, including the identity of witnesses. In the normal case, the Court will not set discovery deadlines, but will instead rely upon the parties to either work together or bring unresolved discovery issues to the Court's attention as soon as they are ripe.

**HCR 9.3:** Upon notice to opposing counsel, a party may request an *in camera* review of potentially discoverable material from the Court at any time.

### **Rule 10: Motions**

**Rule 10.1:** As early as possible, counsel will advise the military judge and opposing counsel of the general

nature of any motions, along with applicable citations.

**Rule 10.2:** When necessary and not otherwise prohibited by the military judge, motions and other documents may be filed with the court and served on opposing counsel by facsimile (fax) or electronic transmission. Transmitting counsel will ensure that such documents are actually received. Moreover, whenever a facsimile or electronic mail transmission is used to communicate with the court or with opposing counsel, the original document or copy, as appropriate, will be maintained by the originator and provided to the court reporter for inclusion in the record of trial.

**Rule 10.3.A: Motions**

- 10.3.A.1:** Each motion must include or be accompanied by a statement of the specific points of law and authority that support the motion, including, where appropriate, a concise statement of facts, which party bears the burden of production and persuasion, and whether oral argument is requested.
- 10.3.A.2:** Within 7 days of the date of service or at such other time as the Court may direct, the opposing counsel must serve and file a memorandum of points and authorities in opposition to the motion. If such a response is not filed within the prescribed time, the Court may treat the motion as conceded.
- 10.3.A.3:** Each motion that requires an order must be accompanied by a proposed order.
- 10.3.A.4:** Within 5 days after service of the motion in Opposition, or at such other time as the Court may Direct, the moving party may serve and file a response.

**HCR 10.1:** Motions must be submitted in accordance with the trial deadlines established by the military judge at the arraignment or as set out in an approved motion for docketing. If no such deadlines have been previously established in a case, counsel will submit motions 10 days prior, and responses 7 days prior, to the pretrial Article 39(a) session. All motions and responses must be filed in the format contained in attachment 8 and contain the following information:

- (1) A statement of the nature of the motion;

- (2) A summary of the facts supporting the motion;
- (3) A brief discussion of the points of law supporting the motion, including citation of authority as well as argument and conclusions;
- (4) A statement of any evidence to be offered in support of the motion, (e.g., a description or copy of real evidence including photographs, names of witnesses, summaries of expected testimony, etc), a statement of which party bears the burden of production and persuasion, and a request, if any, for the production of a witness for an Article 39(a) motion session;
- (5) A statement of the relief requested, including drafts of any proposed orders; and
- (6) A statement whether oral argument is desired.

**HCR 10.2:** Answers to motions will comply with the same requirements as motions, except they will be filed with the detailed military judge as soon as possible or as directed by pretrial order.

**HCR 10.3:** Counsel will prepare proposed findings of fact and conclusions of law to accompany each motion, unless otherwise directed by court order. Proposed findings of fact and conclusions of law must be submitted and timely filed with each motion and response, thereto.

**Rule 10.4:** When essential findings are required on a motion, the military judge must enter those findings on the record contemporaneously with the ruling.

**HCR 10.4:** If the motion involves only a dispute between the parties as to the law or an ultimate question of fact, and does not involve the underlying facts, counsel should endeavor to enter into, and prepare, prior to trial, stipulations of fact or of testimony covering those matters.

**Rule 10.5:** If the military judge rules adversely to the government on a significant matter, and the government is contemplating an appeal, the military judge must state on the record the time of the ruling, the time the 72-hour period will run, and how and where the government may provide the military judge with written notice of appeal.

**HCR 10.5:** If cases will be cited in the course of argument before the detailed military judge, a list of cases, not already cited in counsel's brief, will be delivered to the military judge and opposing counsel prior to argument.

**Rule 10.6:** Unless good cause is shown, no motions will be considered on the day of trial.

**HCR 10.6:** It is the responsibility of counsel to ensure prompt delivery of all motions and/or responses as well as all supporting documents by the appropriate filing date and to confirm receipt by the judiciary.

### **Rule 11: Continuances**

**Rule 11.1:** Continuance requests must be made by written motion outside of court or, if presented during an Article 39(a) session, they may be oral. The motion must state the specific reason for the request and the earliest possible trial date. Counsel must be prepared to fully justify each continuance request.

**Rule 11.2:** All motions to continue must include the number of previous continuances and who sought the continuances, whether opposing counsel consents, the trial date, and dates counsel and witnesses are available for trial. The proposed order must contain language for both granting and denying the motion, a box to check if the motion is granted or denied, and a place for the new trial date. If the motion is made after the last Article 39a session before trial, the motion will not be granted except under extraordinary circumstances where there is no alternative means of preventing a substantial injustice.

**HCR 11.1a:** In cases where a Reserve Military Judge has been detailed, all continuance requests will be submitted to both the Circuit Military Judge and the detailed Reserve Military Judge. Absent specific delegation to the Reserve Military Judge the Circuit Military Judge will rule on the continuance requests.

**HCR 11.1b:** Counsel do not set trial dates. The detailed military judge has sole responsibility to set or change trial dates. *See* Rule 6. If a continuance is requested and both counsel agree to the requested delay, the detailed military judge may grant the request without an Article 39(a) session or R.C.M. 802 conference in his or her sole discretion.

**Rule 11.3:** If the accused is in pretrial confinement, defense motions for continuances and concurrences in government motions for continuances must be signed by the accused and defense counsel.

### **Rule 12: Situs**

**Rule 12:** Subject to R.C.M. 504(d)(1), the military judge shall designate the situs of the trial.

### **Rule 13: Courtroom Security**

**Rule 13.1:** The presiding military judge may prescribe rules in any case to establish courtroom security as necessary.

**HCR 13.1:** Local courtroom security in the Hawaii Circuit is generally governed by separate instructions applicable in each of the geographic regions/installations covered by the circuit.

**Rule 13.2:** The government is responsible for ensuring that the courtroom facility is in compliance with all applicable orders and directives governing courtroom safety requirements. Notwithstanding such orders and directives, counsel must inform the military judge whenever they believe extra precautions and/or security measures should be implemented.

**HCR 13.2:** In any case where the detailed military judge determines a security problem exists, or where a high security risk or potential risk is present, the trial counsel will ensure a courtroom security officer is appointed and a courtroom security plan is developed. The detailed military judge may delay the trial until satisfied that the court-martial may proceed in a safe manner.

**Rule 13.3:** The circuit judge will annually review the security plan with the courtroom facilities within the circuit with the government representative responsible for courtroom security at each installation.

**Rule 13.4:** The wearing or carrying of weapons in the courtroom is prohibited, except when authorized by the detailed military judge.

**HCR 13.3:** If firearms are to be marked as exhibits, trial counsel will personally ensure that the firearms have been cleared before they are brought in the courtroom and cannot be fired.

### **Rule 14: Uniforms**

**Rule 14.1:** The military judge will designate the proper



uniform and civilian attire to be worn by all persons required to be present. However, when court is convened in a courtroom facility or non-operational setting, all parties, counsel, and the court will appear in the Uniform of the Day. Utility uniforms will not be designated as courtroom uniforms unless the court is convened at sea or in an operational setting.

**HCR 14.1.a:** The uniform for all sessions of court will be determined by the military judge. *See* R.C.M. 801. The prescribed uniform is service “C” for Marines and Summer Whites for Navy (or Service equivalent). Marines may be required to wear Service “A” at the military judge’s discretion. Navy personnel, at the military judge’s discretion may wear the khaki uniform or service uniform. In all cases, when determining which uniform will be worn, the military judge will give careful consideration to the seriousness with which the proceedings are viewed, customs and traditions of the naval service, as well as the potential for publicity. Utility uniforms may be authorized for specific sessions at the discretion of the military judge presiding.

**HCR 14.1.b:** Male civilian counsel will wear conservative coat and tie, shirt, and slacks. Female civilian counsel will wear appropriate conservative business clothing.

**Rule 14.2:** The accused must 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 must render such assistance as may be necessary to ensure proper uniform. When the accused is in pretrial confinement, the Government is responsible for ensuring the accused is in the appropriate uniform. Confinement uniforms are not appropriate courtroom attire.

**Rule 14.3:** Physical restraints will not be imposed on the accused or any witness during open sessions of the court-martial unless prescribed by the military judge. No accused or witness in open court will wear any tag or symbol that identifies them as being in custody.

### **Rule 15: Spectators**

**Rule 15.1:** The military judge is responsible for the control of court-martial spectators and the courtroom security in general. The military judge may issue such orders as deemed just, to ensure a fair trial.

**Rule 15.2:** Spectators are encouraged to attend any sessions of the court-martial, unless otherwise determined by the military judge. See R.C.M. 806.

**HCR 15.2:** Spectators may enter or leave the courtroom while the court-martial is in session, provided that their activity is not disruptive to the proceedings.

**Rule 15.3:** Counsel will ensure that the military judge is advised if there is a likelihood that any spectator is to be called as a witness.

**Rule 15.4:** Spectators are forbidden to demonstrate agreement or disagreement, either verbally or by non-verbal conduct (e.g. shaking or nodding of head), with testimony or other trial procedures. Spectators who violate this rule may be excluded from the courtroom or, in aggravated cases, held in contempt. Counsel are responsible for advising their clients, their witnesses, and friends of the accused and counsel, of the decorum required in the courtroom.

**HCR 15.4:** Counsel will refrain from conferring with spectators or other non-participants across the bar while the court is in session.

### **Rule 16: Punctuality and Consideration For Members' Time**

**Rule 16:** Punctuality in all court matters is required of all parties and reflects preparation and professionalism. When a party is unavoidably late, or proceedings will be delayed, the judge will be notified immediately and provided an explanation.

Note: It is better to be 15 minutes early than one minute late.

**HCR 16.1:** Trial counsel will notify the accused's command of the place, date, and time of trial, that the presence of the accused is required, and that appropriate transportation to the situs of the trial should be arranged. Generally, trial counsel is responsible for ensuring the timely presence of an accused who is in pretrial confinement or other restraint. However, after the accused arrives at the place of trial, defense counsel is responsible for the timely presence of an accused at all required court sessions. Defense counsel is also responsible for the timely presence of an accused that is not in pretrial restraint.

**HCR 16.2:** When a case is to be tried before a court with members, trial counsel must ensure that the members are notified of the time, place, and uniform for the trial. Reporting times for court members will be scheduled to minimize waiting time for members. Members may be placed on standby or "on call" as deemed necessary by the detailed military judge.

**HCR 16.3:** Trial counsel in every trial before members will submit a proposed findings worksheet where any plea of "not guilty" has been entered. If there is more than one charge or specification, if lesser-included offenses are in issue, or if findings by exceptions and substitutions can reasonably be made, the worksheet will be tailored to reflect each alternative finding. If defense counsel disagrees with the worksheet proposed by trial counsel, defense counsel may submit a proposed worksheet.

**HCR 16.4:** Trial counsel in every trial before members will submit a proposed sentencing worksheet when a finding of "guilty" has been reached. If defense counsel disagrees with the worksheet proposed by trial counsel, defense counsel may submit a proposed worksheet.

### **Rule 17: Bailiff**

**Rule 17:** If practicable, a bailiff will be present at every court-martial. Trial counsel must ensure bailiffs are provided a copy of attachment (1) and are thoroughly briefed on their duties.

**HCR 17.1:** A bailiff will be present at every trial with members or as directed by the military judge. Trial counsel will ensure the bailiff is provided a copy of attachment 9 and is thoroughly briefed as to the bailiff's responsibilities.

**HCR 17.2:** The bailiff will not be a witness. The bailiff will not be the unit escort or guard for the accused. If the detailed military judge excuses the presence of a bailiff, the trial counsel will perform the bailiff's duties.

### **Rule 18: Guards**

**Rule 18:** When appropriate, a guard or guards will be detailed to ensure proper custody of the accused and to assist the court in preserving order and decorum.

**HCR 18.1:** All issues concerning Guards or Courtroom Security will be resolved by the detailed military judge on a case-by-case basis.

**HCR 18.2:** Counsel will immediately notify the detailed military judge of any matters that may affect courtroom security. If matters arise during the course of a trial, counsel will immediately ask for a recess and advise the military judge.

### **Rule 19: Court Reporters**

**Rule 19.1:** Trial counsel must ensure that the court reporter has been sworn.

**Rule 19.2:** Each time the court convenes or reconvenes, the reporter will note in the record the presence or absence of the parties and the time at which the

court convenes or reconvenes. The court reporter must note the time at which recesses are taken and the time of adjournment.

**Rule 19.3:** Court reporters must ensure that the name and rank of all military parties to the trial and the name and address of civilian counsel are properly noted in the record of trial.

**Rule 19.4:** Court reporters will maintain a complete list of all exhibits marked and those admitted.

**HCR 19:** The trial counsel is responsible for keeping the court reporters apprised of the status of all docketed cases, to include, but not limited to: all anticipated delays; continuances; withdrawal of charges; changes of courtrooms and/or location; changes in the anticipated pleas and forum; and the need for court reporter support in unscheduled hearings.

#### **Rule 20: Entry and Departure of Military Judge**

**Rule 20:** All persons in the courtroom, except the court reporter, without regard to rank or grade, must rise when the military judge enters or leaves the courtroom.

#### **Rule 21: Entry and Departure of Members**

**Rule 21:** All persons, other than the military judge and court reporter, must rise when the members enter and leave the courtroom.

#### **Rule 22: Voir Dire**

**Rule 22.1:** In accordance with R.C.M. 912(d), the military judge determines the procedure for conducting voir dire. Voir dire examination shall be limited to matters relevant to determining whether to remove a member for cause and to determine the member's fairness and impartiality. The military judge shall ensure that the privacy of the prospective members is reasonably protected. All group voir dire questions must be submitted in writing to the judge prior to trial.

**HCR 22.1.a:** The military judge determines the procedure for conducting voir dire. See R.C.M. 912(d). All questions to be asked *en banc* will be submitted for approval in writing on the date designated by the military judge, or in the absence of such date, at least 5 days prior to assembly or at the direction of the military judge presiding. Copies of proposed voir dire questions must

be served on opposing counsel. Upon specific request, the military judge may permit counsel to ask additional questions.

**HCR 22.1.b:** The military judge will ordinarily conduct the initial voir dire of the members. Counsel may then be permitted to ask previously approved questions that have not been asked during the initial voir dire by the military judge. All questions must be relevant to determining the qualifications of the members to sit on the court-martial. Where necessary, and in the discretion of the military judge, counsel may be permitted to question the members individually. However *see* HCR 6.13 for possible sanctions for not submitting proposed voir dire questions to the court in accordance with trial deadlines.

**HCR 22.1.c:** During voir dire, counsel will not: (1) argue the case; (2) question members concerning anticipated instructions or theories of law, or members' understanding of various legal principles yet to be explained to them; (3) ask members what kind of findings or sentence they might return under a hypothetical set of facts; (4) engage in efforts to establish rapport with members; or (5) seek a pre-commitment from a member to a factual or legal proposition that is in issue.

**Rule 22.2:** The member's questionnaires shall be phrased and organized so as to facilitate an accurate screening and shall request only that information essential for: (1) determining whether a person meets the Article 25 criteria for eligibility and (2) providing basic background information ordinarily sought during voir dire examination.

**HCR 22.2:** The trial counsel is responsible for ensuring that all court members complete the Hawaii Judicial Circuit Court-Martial Members Questionnaire, attachment 10, on the date designated by the military judge, or in the absence of such date, by assembly. A member may desire to retain the original and provide a copy for court use, and then update the copy as necessary for subsequent trials.

**Rule 22.3:** Before voir dire, counsel will provide the military judge with a joint list of the full name and unit or city and state of residence of all witnesses. The list must include witnesses whose testimony will be presented by stipulation.

**HCR 22.3:** All challenges, whether peremptory or for cause, must be addressed to the military judge at an Article 39(a) session.

### **Rule 23: Prohibited Items in Courtroom**

**Rule 23.1:** Eating, chewing gum, or using tobacco products are not permitted in the courtroom. Weapons and objects that may be used as weapons, including potential

exhibits, are not permitted in the courtroom without specific authorization of the military judge.

**HCR 23.1:** Use of tobacco products and eating are not permitted in the courtroom. Leave of court is required to permit drinking in the courtroom of any beverage other than water. All beverages must be consumed from covered containers.

**Rule 23.2:** Unless specifically authorized by the military judge, and except for the equipment required by the court reporter, NO ELECTRONIC DEVICES CAPABLE OF video and/or audio recording (e.g. LAP TOPS/CELL PHONES/TABLETS/ etc..) are permitted in the courtroom.

**Rule 23.3:** Cellular or mobile telephones are not permitted in the courtroom unless otherwise permitted by the military judge.

#### **Rule 24: Counsel Decorum**

**Rule 24.1:** Counsels' decorum in the courtroom must be conducive to a dignified judicial atmosphere.

**HCR 24.1:** Counsel will refrain from undue familiarity between themselves or in relationship to the members, military judge, or witnesses while court is in session and when in the presence of the accused.

**Rule 24.2:** Counsel will stand when addressing the bench or members and when examining a witness, unless otherwise authorized by the military judge.

**HCR 24.2:** Counsel will direct all argument and responsive statements to the military judge or members, as applicable, and will avoid colloquy or argument towards the other party, except for perfunctory matters of courtesy.

**Rule 24.3:** Unless specifically authorized by the military judge, only one counsel per side may question a witness, address the court on a motion or issue, or make opening statements or closing arguments.

**HCR 24.3:** During sessions of the court, no counsel will leave the courtroom without permission of the military judge.

#### **Rule 25: Counsel Conduct**

**Rule 25.1:** Counsel must not, during trial, state or allude to

any matter that counsel has no reasonable basis to believe is relevant to the case or that is not supported by admissible evidence.

**Rule 25.2:** Counsel must not, during trial, assert any personal knowledge of the facts in issue, except if testifying as a witness.

**HCR 25.2:** Counsel will not, during trial, assert any personal opinion as to the justness of a cause, the credibility of a witness, or the guilt or innocence of an accused; but counsel may argue, based on analysis of the evidence, for any position or conclusion supported by the evidence and any allowable inferences.

**Rule 25.3:** Counsel, in presenting a matter to the court-martial, must disclose legal authority in the controlling jurisdiction known to counsel to be directly contrary to their position and which is not disclosed by opposing counsel.

**HCR 25.3.a:** When one counsel is addressing the court or examining a witness, the opposing counsel shall remain seated at the counsel table, unless standing to make an objection.

**HCR 25.3.b:** Each time the court convenes or reconvenes, the trial counsel will ensure that the military judge is advised of all changes to, or absences of, any parties.

**HCR 25.3.c:** Counsel will follow along in the trial guide to ensure that the military judge makes no unintentional omissions. Should counsel believe that a military judge has made such an omission, he or she must bring it to the judge's attention immediately upon its discovery.

### **Rule 26: Witnesses**

**Rule 26.1:** Trial counsel must swear each witness called to testify and will ensure that the military witness' name, grade, and military organization, or civilian witness' name and city and state of residence are announced in court.

**HCR 26.1:** Live, in-person testimony from witnesses is expected (in the absence of a stipulation of expected testimony) during all phases of the trial. In the event either counsel desires to use an alternative to live, in-person testimony (e.g., telephonic testimony or video teleconferencing), counsel must request permission to do so in advance of the session and note the request on the PTIR. This rule applies equally to testimony on the merits and testimony on sentencing. Nothing in this HCR will be construed to limit or alter the military judge's discretion or responsibilities under M.R.E. 611.

**Rule 26.2:** Counsel must ensure that their witnesses understand

the physical arrangements of the courtroom, where they should go, and how they must conduct themselves.

**HCR 26.2.a:** Witnesses will be instructed by counsel that they must not chew gum or tobacco, wear dark glasses, or use slang expressions or profanity (except as may be required in the presentation of the facts). Witnesses must be told not to engage court members or the military judge in casual conversation.

**HCR 26.2.b:** Military witnesses do not salute the military judge, president of the court, or the members.

**HCR 26.2.c:** Unsworn statements will not be made from the witness stand. They will be made from the counsel table or at another location authorized by the military judge.

**Rule 26.3:** Counsel must ensure that their witnesses will be immediately available when called to testify.

**HCR 26.3.a:** Counsel will ensure that their respective witnesses will be immediately available when called to testify. This includes informing the witness of the time, location, and uniform for court, as well as making any arrangements necessary to allow a civilian witness to come aboard the base. The fact that the government has agreed to, or has been ordered to, produce a witness on behalf of the defense, does not relieve the defense counsel of these requirements for defense witnesses. Counsel will coordinate with each other and the military judge to reduce, whenever practicable, the amount of time a witness is required to wait prior to testifying; however, availability is always more important than convenience.

**HCR 26.3.b:** Witnesses ordinarily will not be present in court during trial. Counsel are responsible for ensuring their witnesses are aware of and comply with this rule. The detailed military judge may permit a witness to remain in the courtroom after the witness has testified, or otherwise, upon a showing of good cause. This rule is not to be construed as limiting M.R.E. 615.

**Rule 26.4:** Counsel will question witnesses from a reasonable distance. Before approaching the witness, counsel must obtain permission of the military judge. Counsel should not position themselves so as to block the view of the military judge, members, or counsel.

**HCR 26.4.a:** Witnesses will not be crowded, shouted at, ridiculed, humiliated, or otherwise abused.

**HCR 26.4.b:** To the greatest extent practicable, trial counsel will ensure that separate waiting areas for government and defense witnesses are provided.

**HCR 26.4.c:** No later than five business days prior to trial, counsel who intend on using



an interpreter will notify the detailed military judge and opposing counsel of the interpreter's identity and provide a brief summary of his/her qualifications. Any anticipated objection to the proposed interpreter will be provided to the detailed military judge as soon as possible but no later than two business days prior to the date of trial.

**HCR 26.4.d:** Counsel will provide their witnesses with information and assistance concerning the availability of services such as transportation, parking, childcare, lodging, and courtroom translators or interpreters.

### **Rule 27: Objections**

**Rule 27:** Counsel must succinctly state the nature and basis of an objection. After the military judge rules on an objection, counsel may only make comment or further argument with permission from the military judge.

**HCR 27.1:** Counsel shall not present argument on an objection without the permission of the military judge. Argument on objections shall be direct and succinct. Citation of specific authority is desirable.

**HCR 27.2:** An objection or argument for the purpose of making a speech, recapitulating testimony, or attempting to guide a witness is prohibited.

### **Rule 28: Stipulations**

**Rule 28.1:** If a motion, or any other issue, involves only a dispute between the parties as to the law or any ultimate question of fact, and does not involve the underlying facts, counsel will consider entering into stipulations of fact or of testimony covering those matters.

**Rule 28.2:** Stipulations must be in writing, and will be prepared prior to trial. Oral stipulations, when permitted by the military judge, must be read into the record and agreed to by counsel and the accused.

**Rule 28.3:** Stipulations may be made for the limited purpose of obtaining a ruling on a motion or other pleading.

**Rule 28.4:** Written stipulations of fact will be marked as a trial exhibit and, in a members trial, read to the members. Stipulations of fact may be taken into the deliberation room by the members. Written stipulations of expected testimony must be marked as appellate exhibits and, in a members trial, read to

the members. Stipulations of testimony may not be taken into the deliberation room.

### **Rule 29: Offers of Proof**

**Rule 29.1:** When offers of proof are expected to be presented on motions or objections, counsel should inform opposing counsel and attempt to reach agreement on the content of the offer of proof before presentation.

**Rule 29.2:** Absent a stipulation, an offer of proof is not evidence upon which a finding of fact may be based.

### **Rule 30: Judicial Notice**

**Rule 30:** Counsel will advise the military judge and opposing counsel, as soon as possible and preferably before trial, of any intended requests for judicial notice.

**HCR 30:** Prior to trial, the trial counsel will have marked as appellate exhibits readable copies of all directives, regulations and state or federal statutes alleged to have been violated. Trial counsel will also provide advance copies to the defense counsel and to the military judge. *See HCR 6.1.c.*

### **Rule 31: Exhibits**

**Rule 31.1:** Prosecution exhibits will be identified by Arabic numerals. Defense exhibits will be identified by capital letters. Appellate exhibits will be identified by Roman numerals.

**HCR 31.1.a:** In formulating questions to witnesses concerning an exhibit, counsel will refer to the exhibit by its exhibit number or letter.

**HCR 31.1.b:** Exhibits will be marked by the court reporter, not the counsel, in the anticipated order of presentation before the trial is scheduled to commence or during recesses.

**HCR 31.1.c:** The proponent of documentary or photographic evidence will arrange to have a copy of the original exhibit on the date of trial for each member of the court as well as a copy for the military judge.

**Rule 31.2:** If an exhibit is not compatible for inclusion in the

record of trial, counsel will prepare an appropriate substitute for inclusion in the record.

**Rule 31.3:** All audio recordings and video recordings that contain audio portions must be transcribed before trial, by the party offering such a recording, unless authorized by the military judge. If a portion is inaudible, the transcript shall so state. A copy of the transcript will be served on opposing counsel before trial in sufficient time to allow for ascertaining the accuracy of the transcript. The recording or a copy thereof will be made available to opposing counsel upon request. The transcript and recording shall be marked as exhibits.

**Rule 31.4:** For those circuits in which electronic media, or so-called "smart courtroom" technology, is installed, additional rules or protocols may be necessary for the handling and presentation of exhibits. Attachment 11 contains a proposed set of rules that may be used or modified to accomplish the circuit's needs.

**HCR 31.2.a:** Use of electronic media is encouraged. However, counsel must obtain the express, prior approval of the military judge before using any form of electronic media in any session of court. Counsel using electronic media are directed to Uniform Rule 31.4 and attachment 11 of these rules.

**HCR 31.2.b:** Any exhibits (including computer generated exhibits or any other exhibits or demonstrative aids prepared prior to trial) or evidence intended for use during argument or opening statement, must first be shown to opposing counsel and then be approved for use by the military judge. Counsel are advised to diligently practice the use of such exhibits, particularly computer generated exhibits, prior to any session of court. Further, counsel must ensure computer-generated exhibits are properly duplicated by hard-copy print-outs for inclusion in the record of trial.

**HCR 31.2.c:** Counsel intending on using demonstrative aids, such as charts, diagrams, videotapes, audiotapes or any other technological presentations during their opening arguments, closing arguments or cases-in-chief must provide notice to the detailed military judge and opposing counsel no less than two days prior to trial.

### **Rule 32: VTC REQUIREMENTS**

**Rule 32.1:** Consistent with the Rules for Courts-Martial and applicable DoN instructions, Video Teleconferencing (VTC) may be used to conduct Article 39(a) sessions for arraignments, motions practice and any other

administrative sessions.

**HCR 32.1.a:** Requests for remote testimony over the objection of the opposing party will be made as soon as the potential need for remote testimony is discovered.

**HCR 32.1.b:** When the military judge has authorized VTC testimony over the objection of one of the parties, the safeguards set forth in HCR 32.2 and 32.3 will be employed. The detailed military judge may deviate from these procedures based upon the exigencies of the situation.

**Rule 32.2:** The Government will ensure that all sites meet the necessary security requirements.

**HCR 32.2:** Two-way audio and visual transmissions shall be provided and color transmission should be used. The VTC locations must have telephonic connectivity and access to a fax machine or other means of receiving documents/written material. A VTC technician or knowledgeable support personnel will be available at both locations. The court reporter will transcribe the VTC witness's testimony in the same manner as a normal witness.

**Rule 32.3:** VTC sessions are open to the public at the site designated by the presiding military judge consistent with the 6<sup>th</sup> Amendment, R.C.M. 504(d)(1) and R.C.M. 804.

**HCR 32.3:** If counsel for both sides are not present at the site where the witness is testifying, witness will identify on the record those present at the remote location and note if any spectators are present. The witness will ensure that they are seated far enough away from any spectators so that the spectators cannot communicate with the VTC witness. During the VTC witness's testimony, the witness will ensure that there is no non-verbal communications between themselves and any spectators. They will also testify that they have no access to papers, exhibits, or the like while testifying unless authorized by the military judge. The detailed military judge may deviate from these procedures based upon the exigencies of the situation.

### **Rule 33: Findings and Instructions**

**Rule 33:** Trial and defense counsel will make appropriate recommendations as to specific instructions for the military judge to provide to the members. Requests for special instructions, modifications to standard instructions, or a summarization of the evidence, must be submitted in writing and in a timely manner to the military judge and opposing counsel.

### **Rule 34: Record of Trial**

**Rule 34.1:** A complete and accurate record of the proceedings is required to protect the rights of all parties. During the course of the trial, counsel must ensure

that uncommon names, places, and things are spelled out on the record, that witnesses respond verbally, and that descriptions of size, distance, and location are clear.

- Rule 34.2:** At the conclusion of the trial, defense counsel will indicate whether civilian counsel or military counsel will examine the record, who will respond to the staff judge advocate's recommendations, and who will represent the accused in post-trial matters. The accused must include such decisions in the written acknowledgement of appellate rights.
- Rule 34.3:** Whenever practicable, trial counsel must read and make corrections to the record of trial. Corrections by trial counsel should be initialed and dated before it is submitted to the military judge for authentication.
- Rule 34.4:** The trial counsel must ensure that the record of trial is prepared in a timely and accurate manner. Pursuant to R.C.M. 1103(i)(1)(B), the trial counsel must permit the defense to review the record except when unreasonable delay will result, before it is submitted to the judge for authentication.

#### **Rule 35: Document Size**

- Rule 35.1:** All electronic filings must be signed and filed in Adobe PDF format. All documents and pleading filed with the court will be on white 8.5 inch by 11 inch white paper.
- Rule 35.2:** All motions will be filed in the form attached as attachment (6) to these rules.
- Rule 35.3:** All pleadings filed must have one inch margins and use Courier New or Times New Roman 12 point font.

**HCR 35:** The substantive portions of all documents should be double spaced. Headings and signature blocks for example may be single spaced.

#### **Rule 36: Terms of Court**

**HCR 36:** With the availability of VTC, sites located off-base have immediate access to the judiciary and each case can be immediately arraigned and docketed and motions heard in accordance with the trial deadlines set by the military judge. Terms of Court (ToC) may be used

as a management tool for sites located outside of the National Capital Region. Counsel should be vigilant in identifying potential windows where the casework warrants a ToC. ToC are intended to assist counsel and the Hawaii Circuit docketing judge for case planning in areas where military judges are not regularly present. Utilizing ToC will likely fluctuate between set terms and flexible terms as necessary based on Circuit/area caseload and the interests of justice. Counsel should attempt to utilize both VTC and ToC. At a minimum, counsel in these locations must continually assess pending cases and remain in contact with the court about events that might affect judicial support requirements. See attachment 12.

**Attachments:**

- (1) Civilian Counsel Notice of Appearance
- (2) Docketing Memorandum
- (3) Motion for Docketing/Continuance
- (4) PTIR
- (5) Pretrial Order
- (6) Notice of Pleas and Forum
- (7) Certification of Withdrawal
- (8) Motion Format
- (9) Bailiff's Handbook
- (10) Member's Questionnaire
- (11) Technology Supplement
- (12) Chief Trial Judge's Terms of Court guidance

**HAWAII JUDICIAL CIRCUIT  
NAVY-MARINE CORPS TRIAL JUDICIARY  
(GENERAL) (SPECIAL) COURT-MARTIAL**

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**UNITED STATES**

**v.**

**ACCUSED**

**CIVILIAN DEFENSE  
COUNSEL NOTICE OF  
APPEARANCE**

**Date:**

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1. Pursuant to Rule 5.1 of the Uniform Rules of Practice Before Navy-Marine Corps Courts-Martial (Uniform Rules) and the Hawaii Judicial Circuit Rules of Practice (Circuit Rules), I, {ATTORNEY'S FULL NAME}, hereby provide notice to the Circuit Military Judge of my appearance on behalf of {CLIENT'S RANK, FULL NAME}. My office address, phone numbers, and e-mail address are: ADDRESS, PHONE NUMBER (office and fax) & E-MAIL ADDRESS. I am an active member in good standing licensed to practice in the following jurisdictions: {LIST BAR ADMISSIONS}.
2. I understand that practice in the Hawaii Judicial Circuit requires me to be familiar with the Uniform and Circuit rules. Additionally, I am aware of the standards of professional conduct required of counsel practicing in Navy-Marine Corps courts-martial as contained in JAG Instruction 5803.1C. I certify that I am not now, nor have I ever been, de-certified or suspended from practice in Navy-Marine Corps courts-martial by the Judge Advocate General of the Navy.

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COUNSEL NAME  
Attorney At Law

\*\*\*\*\*

**Certificate of Service**

I hereby attest that a copy of the foregoing notice of appearance was served on the court and opposing counsel personally / electronically / and/or by facsimile on \_\_\_\_\_, 20xx.

\_\_\_\_\_  
Counsel Name





**UNITED STATES MARINE CORPS**  
 LEGAL SERVICES SUPPORT TEAM KANEOHE BAY  
 MARINE CORPS BASE HAWAII  
 KANEOHE BAY, HAWAII 96863

5800  
 B0521  
 1 Aug 12

From: Senior Trial Counsel, RLSO MIDLANT Det Groton  
 To: Docketing Judge  
 Via: Clerk of Court

Subj: DOCKETING MEMORANDUM FOR THE WEEK OF 6 - 10 AUGUST 2012

**1. DOCKET REQUEST FOR 6 - 10 AUGUST 2012**

NAME	TIME	MJ/TC/DC	UNIT	CHARGES	PURPOSE	CTRM	DUR
<b>Monday, 6 August 2012</b>							
Smith	0800	ABC/DE/FG	NSB	80,81,134	MOT	Groton	3 HRS
<b>Tuesday, 7 August 2012</b>							
Johnson	0900	ABC/DE/FG	NSB	91,92,121	ARRN-VTC	Groton	15 MIN
<b>Wednesday, 8 August 2012</b>							
<b>Thursday, 9 August 2012</b>							
<b>Friday, 10 August 2012</b>							

**2. The long range docket accurately reflects the following cases:**

U.S. v. Smith: Wednesday 22 - 24 August, Trial.  
 U.S. v. Johnson: Monday 27 August, Motions.

**3. The following cases need to be added to the docket.**

U.S. v. Sailor: Wednesday 15 August, Motions.  
 U.S. v. Corpsman: Friday 31 August, Motions.  
 U.S. v. Marine: Monday 24 September, Motions.

**4. The following cases need to be removed from the docket.**

U.S. v. Smith: Tuesday 4 September, Motions.  
 U.S. v. Smith: Monday 10 - 13 September, Trial.

I. M. COUNSEL  
 Captain,  
 U.S. Marine Corps

Copy to:  
 SDC  
 File

**HAWAII JUDICIAL CIRCUIT  
NAVY-MARINE CORPS TRIAL JUDICIARY  
(GENERAL) (SPECIAL) COURT-MARTIAL**

<p><b>UNITED STATES</b></p> <p style="text-align: center;">v.</p> <p><b>ACCUSED</b></p>	<p><b>GENERAL/SPECIAL COURT-MARTIAL</b></p> <p style="text-align: center;"><b>MOTION FOR DOCKETING</b></p> <p style="text-align: center;"><b>Date:</b></p>
---	--

From: \_\_\_\_\_, Trial Counsel  
To: \_\_\_\_\_, Defense Counsel

1. The government requests \_\_\_\_\_ for arraignment/trial in the above captioned case to be tried at \_\_\_\_\_.

2. THE ATTACHED PRETRIAL ORDER (PTO) IS PROPOSED [notice must be given if any change is made to the standard PTO included as Attachment 8 to the local rules].

Dated: \_\_\_\_\_ TRIAL COUNSEL

From: \_\_\_\_\_, Defense Counsel  
To: \_\_\_\_\_, Trial Counsel

1.          The above arr/trial date and proposed PTO is acceptable.  
             The above arr/trial date and proposed PTO is not acceptable, and the date of \_\_\_\_\_/ATTACHED PTO is proposed. [notice must be given if any change is made to the standard PTO included as Attachment 8 to the local rules].  
           (if approved by the military judge, delay is normally excludable under R.C.M. 707 absent a showing to the contrary).

2.     Anticipated Forum:      Members;            Military Judge Alone.  
 3.     Anticipated Motions: \_\_\_\_\_  
 4.     Anticipated Pleas: \_\_\_\_\_  
 5.     Additional Comments: \_\_\_\_\_

Dated: \_\_\_\_\_ DEFENSE COUNSEL

From: \_\_\_\_\_, Trial Counsel  
To:     Circuit/Docketing Military Judge or detailed military judge as appropriate

1.          The arr/trial date of \_\_\_\_\_ AND PTO is **mutually agreeable** to the trial and defense counsel.  
             The trial and defense counsel were not able to reach a mutually agreeable date and PTO – both the government’s as well as the defense’s proposed PTOs are attached.

Dated: \_\_\_\_\_ TRIAL COUNSEL

**\*Counsel are advised that if they do not receive a court signed copy of the PTO soon after submitting this MFD, that they have an affirmative duty to acquire a copy of the PTO for this case.\***

**HAWAII JUDICIAL CIRCUIT  
NAVY-MARINE CORPS TRIAL JUDICIARY  
(GENERAL) (SPECIAL) COURT-MARTIAL**

PRETRIAL INFORMATION REPORT

From: \_\_\_\_\_, (Trial)(Defense) Counsel

To: \_\_\_\_\_, Clerk of Court

Via: \_\_\_\_\_, (Defense)(Trial) Counsel

Subj: (GCM) (SPCM) ICO U.S. v. \_\_\_\_\_

Ref: (a) Uniform Rules of Practice Before Navy-Marine Corps Courts-Martial

- Encl: (1) Copy of Charge Sheet      \_\_\_ enclosed \_\_\_ not enclosed  
(2) Copy of Convening Order      \_\_\_ enclosed \_\_\_ not enclosed  
(3) Pretrial Agreement (Part one)      \_\_\_ enclosed \_\_\_ not enclosed  
(4) Page 43 matters      \_\_\_ enclosed \_\_\_ not enclosed  
(5) Anticipated Pleas/Forum      \_\_\_ enclosed \_\_\_ not enclosed  
(6) Motion for Docketing      \_\_\_ enclosed \_\_\_ not enclosed  
(7) Stipulation of Fact      \_\_\_ enclosed \_\_\_ not enclosed  
(8) Applicable Orders/Regulations      \_\_\_ enclosed \_\_\_ not enclosed  
(9) Prop elements (if Assimil.)      \_\_\_ enclosed \_\_\_ not enclosed

1. Pursuant to Rules 6 and 7 of reference (a), the following information is provided:

- a. Date charges preferred: \_\_\_\_\_; Day 120: \_\_\_\_\_.  
calculated from date of pretrial confinement
- b. Date charges referred: \_\_\_\_\_.
- c. Proposed trial site: \_\_\_\_\_.
- d. Expected duration of trial: \_\_\_\_\_ (hours)(days).
- e. Prior Sessions: \_\_\_ Yes \_\_\_ No
- f. Names of Related case(s)(if any): \_\_\_\_\_.
- g. Additional Counsel (not listed above):  
\_\_\_\_\_.
- h. Pretrial Agreement: \_\_\_ Yes \_\_\_ No
- i. Article 39(a) session requested by \_\_\_ TC \_\_\_ DC to resolve:

2. Special requests (e.g. explain missing signature(s), specific times):

\_\_\_\_\_  
\_\_\_\_\_

\_\_\_\_\_  
Trial Counsel / date

\_\_\_\_\_  
Defense Counsel / date

**HAWAII JUDICIAL CIRCUIT  
NAVY-MARINE CORPS TRIAL JUDICIARY  
(GENERAL) (SPECIAL) COURT-MARTIAL**

<b>UNITED STATES</b>  <b>v.</b>  <b>ACCUSED</b>	<b>TRIAL DEADLINES</b>  <b>Date:</b>
---	--

Date of Arraignment \_\_\_\_\_ Military Judge \_\_\_\_\_

Trial Counsel \_\_\_\_\_ Defense Counsel \_\_\_\_\_

Misc Notices \_\_\_\_\_ *Normally same date as motions filed*  
Trial Counsel: RCM 701(a)(1), 701(a)(3), 701(a)(4), 701(a)(6), &  
MRE 301(c)(2), 304(d)(1), 311(d)(1), 321(c)(1), 413(b), 414(b),  
513  
Defense Counsel: MRE 404B, 412, 807, Certain Defenses

Witness Requests \_\_\_\_\_ *Normally about a month prior to trial*  
Witness Responses \_\_\_\_\_ *Normally a week after the request*  
Witness 802 \_\_\_\_\_ *As soon as it is ripe*

Motions Filed \_\_\_\_\_ *Normally 2 weeks prior to Motion hearing*  
Motions Answered \_\_\_\_\_ *Normally 1 week prior to Motion hearing*

Forum Selection \_\_\_\_\_ *At least 10 days prior to trial*  
Members Finalized \_\_\_\_\_ *At least 1 day prior to Plea 39a*

39(a) Pleas/Motions \_\_\_\_\_ *At least 1 week prior to trial*

Pre-Trial Matters \_\_\_\_\_ *Normally a week prior to trial includes  
questionnaires and witness lists*

39(a) Admin \_\_\_\_\_ *Normally 1 day prior to trial*

Trial Dates \_\_\_\_\_

\_\_\_\_\_  
Trial Counsel Signature

\_\_\_\_\_  
Defense Counsel Signature

The above deadlines are hereby ordered.

\_\_\_\_\_  
Military Judge (Date)

**HAWAII JUDICIAL CIRCUIT  
NAVY-MARINE CORPS TRIAL JUDICIARY  
(GENERAL) (SPECIAL) COURT-MARTIAL**

<p><b>UNITED STATES</b></p> <p><b>v.</b></p> <p><b>ACCUSED</b></p>	<p><b>ACCUSED’S NOTICE OF ANTICIPATED PLEAS AND FORUM ELECTION</b></p> <p><b>Date:</b></p>
--	--

1. **Forum Election.** Pursuant to Rule for Courts-Martial 903(b), I, ACCUSED NAME, elect to be tried by a court-martial composed of members / members with enlisted representation / military judge alone.

2. **Entry of Pleas.** Pursuant to Rule for Courts-Martial 910, I, ACCUSED NAME, enter the following pleas:

<b>Charge</b>	<b>Plea</b>
Charge (I) Specification:	

\_\_\_\_\_  
ACCUSED NAME  
RANK, U.S. Marine Corps / Navy

\_\_\_\_\_  
I. M. DEFENDER  
RANK, U.S. Marine Corps/Navy  
Detailed Defense Counsel

\*\*\*\*\*

**Certificate of Service**

I hereby attest that a copy of the foregoing was served on the court and opposing counsel personally / electronically/ by facsimile on (DATE).

\_\_\_\_\_  
I. M. DEFENDER

**HAWAII JUDICIAL CIRCUIT  
NAVY-MARINE CORPS TRIAL JUDICIARY  
(GENERAL) (SPECIAL) COURT-MARTIAL**

<p><b>UNITED STATES</b></p> <p><b>v.</b></p> <p><b>ACCUSED</b></p>	<p><b>CERTIFICATE OF WITHDRAWAL FILING</b></p> <p><b>Date:</b></p>
--	---

Pursuant to Hawaii Circuit Rule 6.2.10, notice of withdrawal of referred charges in the above-captioned case is hereby filed with the court. The charges were withdrawn by (convening authority) on (date), and (dismissed)(referred to summary court-martial)(other appropriate action).

\_\_\_\_\_  
COUNSEL NAME  
RANK, U.S. Marine Corps/Navy  
Trial Counsel

\*\*\*\*\*

**Certificate of Filing**

I hereby attest that a copy of the foregoing was filed with the court personally / electronically / by facsimile on (DATE).

\_\_\_\_\_  
COUNSEL NAME

**HAWAII JUDICIAL CIRCUIT  
NAVY-MARINE CORPS TRIAL JUDICIARY  
(GENERAL) (SPECIAL) COURT-MARTIAL**

<b>UNITED STATES</b>  <b>v.</b>  <b>ACCUSED</b>	<b>MOTION TO</b>  <b>Date:</b>
---	--------------------------------------

1. **Nature of Motion.** Pursuant to (cite applicable RCM and/or MRE), the defense / government moves the court to (describe nature of motion) based upon (cite primary legal basis for motion).

2. **Summary of Facts.**

a. Set forth the pertinent facts for the motion. If you attach documents to the motion, label them as “Attachment” with a number and specifically reference them at the appropriate spot in your factual summary. Ensure Attachments are paginated.

b. The preferred format in the Hawaii Judicial Circuit for all motions is double line spacing, 12-point font of the style of Courier New or Times New Roman.

3. **Discussion.**

a. Number or letter all subparagraphs in a particular section.

b. Identify the applicable law; then apply the facts to the law in support of the motion. Provide the military judge with a hard copy of all cited cases.

4. **Evidence and Burden of Proof.** List or describe the testimony and evidence that will be presented in support of the facts alleged in the motion. Also indicate the standard for the burden of proof and assignment of the burden of persuasion applicable to the motion. For motions with dual or shifting burdens, set out what the burdens are and how they should be applied by the court.

Additionally, if you are requesting production of a witness for an Article 39(a) motion session, include a discussion along with the all supporting authority.

5. **Relief Requested.** List the specific relief sought.
6. **Argument.** Indicate whether or not you desire oral argument on the issue presented in the motion.

\_\_\_\_\_  
Counsel Name  
Rank, USMC/USN  
Trial / Defense Counsel

\*\*\*\*\*

**Certificate of Service**

I hereby attest that a copy of the foregoing motion was served on the court and opposing counsel personally / by facsimile / electronically on (DATE).

\_\_\_\_\_  
COUNSEL NAME  
Rank, (JAGC), U.S. Navy / Marine Corps  
Detailed Defense Counsel  
Individual Military Counsel  
Civilian Defense Counsel



## **THE BAILIFF'S HANDBOOK**

The military court-martial is a visible procedure dedicated to the proposition of equal justice under the law. A court-martial should be conducted to command the respect and assure all that the law is functioning and order will be preserved. Anything that distracts from respect for the law and the authority of the court is to be avoided.

The court-martial should not be disturbed by small administrative matters. Every party to the court-martial should know what is expected of them. The military judge and trial counsel receive the assistance of a bailiff who has been instructed as to his or her responsibilities. The bailiff should be senior to the accused. A bailiff is disqualified if he or she is, or has been, in the same case, the accuser, a witness, an investigating officer, counsel, or has previously served as a member of the accused's court-martial.

The bailiff should receive specific instructions as to his or her duties from the trial counsel before and after each session of court. While the court is in session, the bailiff is under the supervision of the military judge and will assist the military judge and counsel in the conduct of an orderly trial. The bailiff should be familiar with the location of the principle offices and facilities within the law complex.

### **DUTIES OF THE BAILIFF**

#### **Prior to Court-Martial**

1. The bailiff will report in the uniform designated by the military judge to trial counsel at least 30 minutes before the beginning of each day's proceedings. Thereafter, the bailiff will report to the military judge 15 minutes before the reconvening of each of the day's proceedings.
2. The bailiff ensures that the courtroom spectator area and deliberation room for court members are neat and orderly. He or she will place the furniture in the proper arrangement as directed by the trial counsel or the court reporter.
3. The bailiff, with assistance of trial counsel or the court reporter will ensure that the military judge has the desired desk supplies and that the court members have pencils and pads of papers in their deliberation room.

### **ENTRY AND DEPARTURE OF MILITARY JUDGE**

4. When counsel for both sides, the accused, the reporter, and if applicable, court members, are present in the courtroom, the bailiff will notify the military judge and escort the judge to the courtroom. When the bailiff enters the courtroom with the military judge, he or she will announce: "All rise." When the military judge announces a recess or adjournment the bailiff will announce: "All rise." If need be, the bailiff will instruct the spectators to stand fast until the military judge has departed the courtroom. The military judge will advise the bailiff of any departure from this procedure.

## ENTRY OF COURT MEMBERS

5. When the court members enter the courtroom and when the court members stand to be sworn, the bailiff will announce: "All rise" in a voice that can be heard by all, unless advised of different procedure by the military judge.

## SPECTATORS AND MEMBERS OF THE NEWS MEDIA

6. Military trials are usually open to the public. Spectators and members of the news media are welcome in the courtroom to observe the trial proceedings, unless otherwise instructed by the military judge. The bailiff should see that they enter the courtroom, be seated, and leave quietly while the court is in session.

7. As the law does not permit picture taking or any type of broadcasting in or from the courtroom. The bailiff will not permit broadcasting-capable equipment to be taken into the courtroom. Any problems concerning this matter should be brought to the attention of the trial counsel without delay.

8. Courtroom rules do not permit spectators to eat, sleep, smoke, chew gum, or engage in conversation while the court is in session. The bailiff should quietly and diplomatically inform offenders of these rules.

9. Anyone talking or making distracting noises in the areas outside of or adjacent to the courtroom while court is in session will be informed by the bailiff that a court is in session and they can be heard in the courtroom.

10. Rowdiness and violence are not unknown in the courtroom. The bailiff must be alert and prepared to take immediate steps to suppress unruly behavior.

## COURT MEMBERS – IN CLOSED SESSION

11. When the court members are in closed session, they are the only ones permitted in the deliberation room. Therefore, the bailiff will not enter that room or permit anyone else to enter during the closed session.

12. The bailiff is the only contact between the court members and the parties to the trial during the periods the court members are deliberating. The bailiff will be available to the court members outside their deliberation room and immediately notify counsel and the military judge when the court members are ready for the court to be reopened.

13. If the bailiff is instructed to deliver any item or message to the court members in closed session, he must first inform the military judge and obtain his or her approval.

## MISCELLANEOUS DUTIES DURING TRIAL

14. The bailiff will be prepared to furnish the following services:

a. Summon the court members to the courtroom at the beginning of each session of court when directed to do so by the military judge or trial counsel.

b. While the court is in session, collect written questions from the court members upon the military judge's request and hand them to the court reporter, the military judge, and counsel as instructed.

c. Summon witnesses to the courtroom when requested by counsel.

d. While the court is in session, deliver findings and sentence worksheets to the president of the court when instructed to do so.

e. Deliver items of evidence to the deliberation room, if instructed to do so by the military judge, when the members retire to the deliberation room.

f. Perform administrative errands during the trial as requested by the military judge or counsel.

#### THE BAILIFF'S RELATION TO THE ISSUES AND PARTIES OF THE TRIAL

The bailiff must remain neutral during the trial of a case. In other words, the bailiff should not take the side of prosecution or defense. **The bailiff must never participate in any discussion of the merits of the case and should never attempt to predict the outcome of the trial.** The bailiff must not make any comments on the performance of counsel or on the testimony of a witness. **The bailiff shall not reveal to members the matters discussed during sessions of the trial held outside the presence of the members.**

# HAWAII JUDICIAL CIRCUIT COURT-MARTIAL MEMBER QUESTIONNAIRE

Please complete the following questionnaire and provide to the appropriate authority. Because of the sensitive personal information requested, no copy will be retained on file outside of the Legal Office. However, counsel and the military judge will use the questionnaire to prepare for trial and a copy will be attached to the record of trial.

1. Name \_\_\_\_\_ Grade \_\_\_\_\_ Date of Rank \_\_\_\_\_ Service \_\_\_\_\_

2. Active Duty Base Date \_\_\_\_\_ Date Current Tour Began \_\_\_\_\_ Years of Service \_\_\_\_\_

3. Military Awards / Decorations: \_\_\_\_\_  
\_\_\_\_\_

4. Current Duty Position: \_\_\_\_\_ Work Phone: \_\_\_\_\_

5. Unit (down to **Company Level**): \_\_\_\_\_

6. Date of Birth \_\_\_\_\_ Gender \_\_\_\_\_ Race or Ethnic Origin \_\_\_\_\_ Marital Status \_\_\_\_\_

7. Age and gender of any children \_\_\_\_\_

8. Age and occupation of spouse if married \_\_\_\_\_

9. Civilian Education: College / Vocational / Civilian Professional School / Civilian Post-Graduate:  
\_\_\_\_\_  
\_\_\_\_\_

Date graduated or dates attended (and number of years), school, location, degree/major: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

10. Military Education: Dates attended, school/course title. \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

11. Duty Assignments: Last **four** assignments, units, and dates of assignments. \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

12. Have you ever sat as a court-martial member or juror in any other case? \_\_\_\_\_ If so, how many special courts-martial \_\_\_\_\_; general courts-martial \_\_\_\_\_. What was the general nature of the charges for these cases (rape, murder, theft, etc.) \_\_\_\_\_  
\_\_\_\_\_

**PRIVACY ACT WARNING:** This document contains personal information concerning an individual. Use and disclosure thereof is governed by SECNAVINST 5211.5 (series). Unauthorized disclosure of personal information from this document could subject the discloser to criminal penalties.

**HAWAII JUDICIAL CIRCUIT  
COURT-MARTIAL MEMBER QUESTIONNAIRE**

13. Have you ever conducted an Article 15 or Summary Court-Martial? \_\_\_\_ If so, how many times? \_\_\_\_  
For what type of offense(s)? \_\_\_\_\_

Did any of these cases resulted in a finding of Not Guilty? \_\_\_\_\_

14. Have you ever sat as a member for a Board of Inquiry and/or Administrative Discharge Board? \_\_\_\_  
If so, how many times? \_\_\_\_\_.

15. Have you or a close relative or friend ever been the victim of any crime? Explain. \_\_\_\_\_  
\_\_\_\_\_

16. Have you or a close relative or friend ever been the witness to any crime? Explain. \_\_\_\_\_  
\_\_\_\_\_

17. Have you or a close relative or friend ever testified in any legal proceeding? Explain. \_\_\_\_\_  
\_\_\_\_\_

18. Have you or a close relative or friend ever been arrested for, accused of, or investigated for committing  
any crime? Explain. \_\_\_\_\_  
\_\_\_\_\_

19. Have you ever dealt with any military or civilian law enforcement agency (CID, NCIS, local police,  
etc)? \_\_\_\_\_ If so, was/were your experience(s) positive or negative? Explain. \_\_\_\_\_  
\_\_\_\_\_

20. Have you ever visited a military brig for any reason? \_\_\_\_\_

21. What is your opinion of the military's criminal justice system? \_\_\_\_\_  
\_\_\_\_\_

22. Do you believe that anything about your religious beliefs would make it difficult for you to sit in  
judgment of another person? Explain. \_\_\_\_\_

23. Do you have any specialized training in criminal justice, law, medicine, science, psychology, or  
biology? Explain. \_\_\_\_\_

24. Do you believe you may be disqualified to sit as a court member for any reason? Explain. \_\_\_\_\_  
\_\_\_\_\_

25. If you were the accused at a court-martial, would you be willing to be judged, and if found guilty,  
sentenced by a person who has provided information similar to your responses and who has your personal  
temperament, views and morals? \_\_\_\_\_

Signature of Member: \_\_\_\_\_ Date: \_\_\_\_\_

**PRIVACY ACT WARNING:** This document contains personal information concerning an individual. Use and disclosure thereof is governed by SECNAVINST 5211.5 (series). Unauthorized disclosure of personal information from this document could subject the discloser to criminal penalties.

**TECHNOLOGY SUPPLEMENT**  
**HAWAII JUDICIAL CIRCUIT RULES OF COURT**  
**USE OF ELECTRONIC MEDIA**

These rules supplement the Rules of Court, Hawaii Judicial Circuit, to address the use of electronic media in courts-martial.

1. Introduction. “Electronic media” is any form of graphic or other data display, any image, picture, moving image or picture, sound, or any combination of these media, which is presented to a court-martial through an electronic device, such as an image projector, a speaker, a “speaker-phone” telephone, or a video monitor combined with a computer, VCR, DVD or other electronic media player, and includes video-teleconference transmissions and computers employing similar software.

a. Properly used, electronic media can substantially enhance the ability of the prosecution to fairly represent the interests of the government and the defense to zealously represent anyone accused of a crime. Appropriate use facilitates both the quality of representation and the efficiency of courts-martial. As a result, the use of electronic media in the Hawaii Circuit is encouraged. At the same time, however, electronic media must be acknowledged as a powerful tool, the use of which must be subject to procedural rules that encourage superlative advocacy through technology while ensuring the dignity, efficiency, and fairness of courts-martial.

b. For example, if used during opening statements, material displayed must satisfy R.C.M. 913 (i.e., referencing only evidence counsel expect to be offered, and in good faith believe to be admissible, and a brief statement of the issues anticipated in the case). *See* R.C.M. 913 (Discussion). During trial, any material to be introduced into evidence and published by electronic means must first be properly admitted under the Military Rules of Evidence. If used during closing arguments, any matter displayed electronically should either have been admitted into evidence, or be a fair comment on the evidence admitted, such as an accurate summary of data or other similar demonstrative aid. Ultimately, use of electronic media will be subject to the objections of opposing counsel and will be within the discretion of the judge to admit or exclude consistent with applicable authority.

This supplement to the Hawaii Circuit Rules of Court is to be construed consistently with the Rules for Courts-Martial, the Military Rules of Evidence, applicable case law, the Navy-Marine Corps Trial Judiciary Rules, and the other Hawaii Circuit Rules of Court.

2. Pre-Trial Requirements. This rule is a rule of notice and, if required by the judge in the interests of justice, of disclosure. It is not a rule of discovery and it does not provide any substantive rights to either the prosecution or to the defense to obtain the content of any electronic media not otherwise subject to the rules governing discovery.

a. Notice.

(1) Prior to Docketing. To ensure facilities (i.e. a properly equipped courtroom) and equipment are available (e.g., where portable equipment is needed), counsel shall provide notice of the intent to use electronic media via [docketing] memo at the time counsel request a trial date. The [docketing] memo shall be addressed to the opposing counsel, [and] the judge, [and the Court Clerk,] and it shall describe generally the technology and purpose desired for use (e.g., electronic media to display evidence, the presentation of remote live testimony, or otherwise to bring matters before the court-martial). No further elaboration is necessary in the [docketing] memo.

(2) After Docketing. If a case has already been docketed for trial when counsel determine use of electronic media is necessary or desired, [notice] [an amended docketing memo] must immediately be filed with opposing counsel and the court [including the Clerk]. Counsel are cautioned that delay in submitting notice to the court could result in facilities or equipment, including remote access to witnesses, being unavailable.

b. Judge Alone Cases.

(1) In guilty plea cases before a military judge alone, use of electronic media shall be discussed with the judge at a conference under R.C.M. 802 sufficiently in advance of trial to resolve logistics and other issues related to the use of electronic media, such as whether it consists of classified or contraband material.

(2) In cases contested before a military judge alone, in mixed plea cases where the electronic media relates to a plea of not guilty, in conditional guilty plea cases, or in the disposition of guilty pleas (military judge or members for sentencing) with the permission of the judge, counsel should follow the procedures for notice and disclosure in a contested members case.

c. Contested Members Cases.

(1) Notice. Unless previously provided by the (docketing) memo, notice of intent to use electronic media must be provided to opposing counsel and to the presiding military judge at arraignment. Notice shall describe generally the technology and purpose desired for use of electronic media (such as ExhibitONE® or similar technology to display evidence, the presentation of remote live testimony, or otherwise to bring facts before the court-martial) and the notice shall indicate whether any exhibit is classified or of a contraband nature, such as pornography. No further elaboration is necessary at arraignment. Failure to provide notice at arraignment risks unavailability of needed facilities, equipment, or access to remote witnesses. Pretrial notice is not required for the use of electronic media for impeachment or in rebuttal;

however, if notice of such an intention is not provided, counsel risk unavailability of necessary facilities, equipment, or access to remote witnesses unless already approved.

(2) Disclosure.

A. Where either party has provided notice of an intent to use electronic media, counsel should discuss the proposed use with the judge at a conference under R.C.M. 802. The judge shall, by entry of a Case Management/Pretrial Order (CMO/PTO) or otherwise, set the date on which disclosure, if any, of electronic media to the court or to opposing counsel is required. The judge may provide different disclosure dates in the CMO/PTO for different uses of electronic media and may direct descriptions or summaries of electronic media be disclosed in lieu of a copy in order to protect the value of the presentation. For example, the nature and origin of material to be introduced into evidence and published via electronic media may be required to be disclosed, if necessary, sufficiently in advance of trial to dispose of any objections or to provide any needed safeguards, such as for the use of contraband or classified information.

B. Where electronic media are intended for use in opening statement or closing argument, proponent counsel shall discuss such use with the judge at an R.C.M. 802 conference. Counsel are cautioned that such use of electronic media must comply with the Rules for Courts-Martial, Military Rules of Evidence, and case law applicable to opening statements and closing arguments. Counsel are highly encouraged to disclose the content of such electronic media to opposing counsel. In addition, counsel should submit any media intended for use in opening statement or closing argument to their supervisory counsel for review prior to use. Disclosing the contents to supervisory counsel and to opposing counsel will help ensure such use of electronic media is properly within the governing rules and will minimize the potential for objections that would interrupt the presentation of counsel and require an Article 39(a), UCMJ, session at a critical point in the presentation of the proponent's case. As a precondition to using electronic media in opening statements or closing arguments, the judge may require disclosure of the nature of the presentation, or the contents thereof, to the judge and opposing counsel, if necessary in the interests of justice. Ordering disclosure of contents should ordinarily occur only so far in advance as is necessary to resolve any issue, giving the utmost consideration to protecting the value of the presentation from premature disclosure.

d. Motions. The content of electronic media proposed for use by either side during their respective cases in chief may be made the subject of a pretrial motion *in limine* by either counsel. Such a motion should be disposed of in accordance with the terms of the CMO setting the date for submission and hearing of pre-trial motions. Objections to electronic media that are not readily susceptible of resolution as a pre-trial matter, such as an objection to opening statements, refreshed recollection, impeachment, rebuttal, or closing argument, may be disposed of in the discretion of the judge.

e. Remote live testimony.

(1) Remote live testimony includes, but is not limited to, testimony by video-



teleconference, closed circuit television, telephone, or other similar technology. To use remote live testimony, counsel must provide notice to opposing counsel and to the judge, using the docket or other notice procedures set forth in paragraph 2.a., b. or c. above.

(2) In a contested case, counsel requesting the use of remote live testimony during their case-in-chief must submit a written motion, at the time required by the applicable CMO, requesting such remote live testimony and setting out the justification therefor, pursuant to the governing case law and Rules for Court-Martial. See R.C.M. 914A (and 914B, when implemented). If opposed, counsel may submit briefs in support of their respective positions and request the matter be heard at an Article 39(a), UCMJ, session in accordance with the CMO. Counsel should carefully consider methods for ensuring the integrity of remote testimony. Such measures may include the appointment of an officer to be present at the site of the remote witness to administer the oath, and to ensure the integrity of the testimony from intrusion by other personnel or reference material not otherwise permitted.

(3) Counsel requesting remote live testimony shall annotate their witness list to indicate which witnesses are expected to testify remotely.

### 3. Trial Procedure.

#### a. Admission and Publishing of Exhibits.

##### (1) Loading Media.

A. Counsel are encouraged to reserve and use courtroom facilities and electronic equipment for training, familiarization, moot courts, and other similar exercises. However, counsel should not pre-load any media into electronic devices in the courtroom for a trial until they have requested and received permission to do so from the judge. Permission to preload any evidence into courtroom electronic devices, and to connect laptops to electronic display media, should be requested pre-trial at an R.C.M. 802 conference.

B. Classified information or exhibits of a contraband nature may ONLY be loaded and displayed on electronic devices previously cleared to contain and exhibit such items. Permission to use such devices must be obtained from the judge at a pretrial conference under R.C.M. 802.

##### (2) Offering/Admitting Evidence Electronically.

The procedures for the use of electronic media in a members trial should be the subject of discussion with the judge at a conference under R.C.M. 802. The preferred method of admitting evidence electronically will ordinarily be to pre-admit the evidence, and the electronic media display thereof, at an Article 39(a), UCMJ, session.

##### (3) Publishing Pre-Admitted Evidence.

Counsel may not operate the electronic media control panel to activate the monitors of the court-martial members without the permission of the judge. When electronic exhibits have been admitted into evidence at an Article 39(a) session, counsel will ordinarily be given permission to publish/display those exhibits at counsel's discretion. Under these circumstances, once the court-martial is called to order, counsel should request permission to activate the members' monitors and publish/display the enumerated item of previously admitted evidence. Once authorized by the judge to do so, counsel may activate the members' monitors. If a series of exhibits are being published, counsel may request and be permitted to publish/display the series without seeking permission for each item individually.

(4) Evidence Not Pre-Admitted.

A. Counsel may not operate the electronic media control panel to activate the monitors of the court-martial members without the permission of the judge.

B. When electronic exhibits have not been previously admitted into evidence outside the members' presence, such as when used to refresh recollection or to impeach, counsel shall use standard evidentiary procedures to use or offer that evidence at trial. Counsel should initially request to activate only the monitors of the witness and may do so only upon a grant of permission by the judge. If an exhibit is not admitted into evidence when use of the exhibit is completed, counsel shall turn off the monitors of the witness, orally informing the record.

C. If an electronic exhibit used to refresh or impeach is admitted into evidence, counsel should request to activate the members' monitors and to publish the item or items of evidence to the members.

(5) Electronic Imaging.

A. Counsel may publish documentary and other items of admitted evidence by use of visual presentation equipment (e.g., ELMO), after requesting and receiving permission from the judge.

B. In switching between items of evidence on the visual presentation equipment, counsel shall ensure the image being used is "frozen" on the monitors or that the members' monitors are turned off prior to removing a published item. Members' monitors should remain off, or the image of the last item of evidence published should remain frozen on their monitors, until the next item of admitted evidence is in place to be published electronically. This practice will result in a smooth transition from one item of evidence to the next and will minimize the potential for error in publishing the next item. As in the case of other electronic items of evidence, counsel may request and be granted permission to publish a series of admitted items without seeking permission for each item individually.

(6) Witness Monitors. Counsel may activate the monitor of a witness at the

appropriate time in their questioning, after first requesting and being granted permission of the judge. Members' monitors may not be activated until the proponent counsel has requested and been granted permission by the judge to publish an item of evidence by electronic means.

b. Remote Live Testimony. Before beginning any remote live testimony, proponent counsel shall request an Article 39(a), UCMJ, session during which the remote witness will be properly placed before the remote camera or telephone and a sound check completed. The receiving monitor will then be turned off or the telephone placed on "hold." Once the members are present, proponent counsel should request to call the witness for remote live testimony. Upon receiving permission, proponent counsel may activate the receiving monitor or telephone and the remote witness will be sworn and testify.

c. If technical problems are encountered, such as loss of the phone connection or other transmission signal, proponent counsel should request a recess in order to resolve the problem.

#### 4. Preservation of Evidence for the Record

a. Electronic Media Not Admitted as Evidence.

When electronic media are used at trial but are not admitted into evidence, such as a PowerPoint opening statement or closing argument, or an item used to refresh recollection, or otherwise, the media should be printed, labeled as an Appellate Exhibit, and included in the record of trial.

b. Real Evidence. When items of real evidence are published to the court by use of visual presentation equipment (e.g., ELMO), proponent counsel shall prepare an accurate color photograph of such exhibit and move to substitute that photograph for the original exhibit in the record of trial.

c. Annotations to an Exhibit.

(1) Oral Descriptions. All annotations made to an exhibit by a witness made to an exhibit by a witness using the touch-screen monitor should be clearly described for the record by the witness or counsel. If a witness uses multiple colors, print fonts, symbols, or the like to annotate a document, an oral description of each convention used shall be provided by the witness or by counsel.

(2) Annotated Exhibits.

A. Whenever a witness uses the touch-screen monitor to make annotations on an exhibit that was previously admitted into evidence, the annotations shall be preserved for the record separately from the original exhibit, which shall remain unaltered. There is no need, however, to separately preserve an unmodified exhibit that is neither intended nor offered as evidence until the witness modifies it.

B. At the conclusion of a witness annotating an exhibit, the proponent counsel will request admission into evidence of the annotated exhibit as a separate prosecution or defense exhibit marked next in order as an appendix to the original exhibit. For example, if a map is admitted and marked as “PE-1,” the annotated version should be marked as “PE-1(a) for ID.” A subsequent annotation of the same exhibit should be marked “PE-1(b) for ID” (if it is intended to be a separate exhibit, such as when a later annotation would obliterate a previous one). The opposing counsel should use a similar marking convention. For example, if the defense counsel modifies PE-1(a) during cross examination, the modified version should be marked DE-1 for ID. A second modification altering DE-1 for ID should be marked DE-1(a) for ID. Counsel need not mark and capture for the record each mark made on an exhibit as a new exhibit. However, counsel must take care that exhibits are separately captured and saved for the record each time a new mark would alter or obliterate a preceding marking and when control of the exhibit changes for purposes of moving the item into evidence (i.e., from prosecution [PE] to defense [DE] or the reverse).

C. Upon admission into evidence by the judge, the proponent counsel shall request that the electronic media exhibit be “saved” as annotated, marked as the appropriate exhibit number, and that a printed copy be substituted in the record of trial.

D. If the offered exhibit is not admitted into evidence, the court reporter shall save the exhibit electronically and print a copy to be appended to the record, marked as the exhibit numbered “for ID.”

(3) Corrections. If a witness needs to make a correction to an annotation, counsel shall first request permission of the judge to make the necessary correction.

(4) “Clear All” Function. When counsel has completed questioning a witness using ExhibitONE or similar electronic media, counsel must request permission to verify with the court reporter that all witness annotations on the touch-screen have been preserved for the record. Upon such confirmation by the court reporter, counsel must then request permission from the judge to activate the “clear all” function. Only the judge may authorize counsel to hit the “clear all” button to remove markings from the touch-screen monitor.

d. Audio-Video and Remote Live Testimony.

Evidence published in an audio or audio-video medium, or remote live testimony, shall be recorded during its presentation in court and transcribed verbatim, subject to the requirements of R.C.M 1103 regarding verbatim transcripts. Proponent counsel will provide the court reporter any electronic file used, which shall be saved in the court reporter’s electronic file of the case and forwarded with the printed record of trial. If cassettes (audio or video) or CDs are admitted into evidence, these must be labeled with the caption of the matter, the date, the prosecution or defense exhibit number, and shall be forwarded as part of the original record of trial.

5. Use of Electronic Media in Deliberations.

a. When the court members retire to deliberate, a printed copy of all previously admitted and published exhibits will ordinarily be provided to the senior member to take into the deliberation room. If an original exhibit was admitted electronically, the printed copy shall be an exact duplicate of the original, including color.

b. If members of the court request to see or hear evidence admitted in an audio or audio-video medium, the judge will assemble the members in open court and replay the desired audio or audio-video evidence, if determined to be appropriate. Ordinarily, remote live testimony should be treated as any other witness testimony and, if replayed, only the audio track should be used. If testimony has been provided using a videotaped deposition, any replay of that testimony shall only be of the audio track, just as if the witness had testified personally in court. Any replay of audio or audio-video media is a matter subject to objection by either the government or the defense and it remains in the discretion of the judge.

6. Effective Date. This supplement are effective on the date Circuit rules are published.

C.M. GLASER-ALLEN  
CDR, JAGC, USN  
Circuit Military Judge

# INTRODUCTION

The intent of this document is to serve as a primer to all persons directly and indirectly involved in military justice in the Navy and Marine Corps. Although primarily intended for the courts-martial practitioner, this text provides insight for staff judge advocates and convening authorities into court-martial processing. The focus of this document is directed at locales where military judges are not permanently assigned. However, the significance of the standards and procedures detailed within provide a worthwhile outlook of military justice practice servicewide.

The mission statement of the Navy-Marine Corps Trial Judiciary states that the judiciary,

“provide(s) crucial support to commanders in ensuring the maintenance of good order and discipline within our operating forces, while always guaranteeing due process and fundamental fairness for every court-martial accused.”

The trial judiciary is absolutely committed to this proposition. Judges throughout the circuits are also dedicated to fulfilling courts-martial requirements throughout their areas of responsibilities.

Each counsel and command should realize this fact: **NO** case will want for lack of a military judge. Regardless of venue, a military judge will be available for motions, Article 39(a) sessions or trial. Accordingly, every court-martial in every circuit is a priority. No trial counsel or defense counsel or their chains of command should ever say, “can’t go to trial; there is no judge available.”

The procedures and management tools discussed in the following pages are general guidelines. Procedures for ensuring judicial coverage in one circuit may not mirror what is necessary for another circuit. The overarching goal and objective is effective and efficient management of court sessions as well as ensuring prompt, fair administration of justice regardless of the location or frequency needed.

## Case Management

In 2005, the Trial Judiciary undertook a *Seapower 21* study of the geographic military justice case loads throughout the Navy and Marine Corps. The study found that the number of courts-martial cases at some locations no longer amounted to a “full-time” case load for the resident judge. As the result of the *Seapower 21* study, several military judge billets were transferred or eliminated by the Judge Advocate General. To increase overall efficiency, several trial judicial circuits were also consolidated. Eliminating some of the high-grade billets within the trial judicial circuits resulted in significant savings, a portion of which was set aside to fund increased travel requirements.

To fill the need at these locations in which there was no longer a resident military judge, a management device referred to as “Terms of Court” was then adopted. “Terms of Court” were considered to be regularly scheduled predictable sessions of courts-

martial in those locations. This management tool was intended from the outset to be pre-planned sessions of court where a military judge would travel to a designated location and would remain “in residence” as long as necessary to address any matter requiring the attention of a judge.

For example, a term of court might be set at Great Lakes Naval Station for the second week of each month. The regularity of posting a military judge at predictable intervals permits counsel and convening authorities to prepare and schedule matters for this pre-planned period of time. These pre-planned sessions also would allow a military judge to manage cases that have been referred for trial by hearing motions and resolving other necessary pre-trial matters. Overall, this general concept delivered a case management process that more effectively and efficiently allocated cases to the trial judiciary for disposition while at the same instance provided a time certain for resolution of military justice matters.

This brief paper provides additional background about Terms of Court and how to manage them. It is not intended to be an academic article. Rather, these comments provide clarification for managing cases in practical terms. The intended audience is for those directly and indirectly involved in the administration of military justice. The objective here is to provide general guidance for counsel, convening authorities, and RLSO/NLSO supervisors and commanding officers.

1. Regular Terms of Court. These pre-planned periods are those deemed required by the servicing Circuit Military Judge. The frequency and duration of these pre-planned periods may be adjusted to meet local demand or spikes in military justice requirements. For example, while a particular site may ordinarily be fully serviced by a Term of Court one week per month, certain local conditions, such as the return of a deployed unit or battalion or squadron may require adjustment. Consultation with the Circuit Military Judge by local RLSO/NLSO/LSSS would then be necessary to alter or adjust the planned cycle. Proper planning and anticipation of increased needs would enhance the efficiency required for alteration of planned schedules.

Regular Terms of Court should ordinarily be used for matters that are not time-sensitive and can be deferred for a time certain during a regular term when these matters can be completed. Examples include judicial training, R.C.M. 802 sessions, Article 39(a) sessions (arraignments, motions practice, docketing sessions, etc.) or even judge alone guilty pleas<sup>1</sup>. It should be stressed here that recent changes to the Rules for Courts-Martial provide alternative remote means to conduct Article 39(a) sessions. Such sessions on the record may include resolution of pre-trial motions or even arraignments<sup>2</sup>.

One necessary component and requirement for successful management of these pre-planned sessions of court is that all parties must remain vigilant and in frequent contact with opposing counsel as well as the assigned military judge or Circuit

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<sup>1</sup> This is not an exhaustive list. Contested members cases may be tried during a Regular pre-planned session of judge availability as well as a members sentencing case. The point is, a good portion of military justice practice can be adjudicated at pre-planned sessions. The goal of the trial judiciary is to provide professional judicial services when and where needed – not to interfere with military justice processing based a rigid time-based formula.

<sup>2</sup> It is recognized that not all trial sites have video-teleconferencing technology available.

Military Judge. It is imperative that all parties ensure that matters are reliably scheduled or, in the event no matters are docketed, that the Regular Term of Court be cancelled. While most circuits use a written docket request form to schedule matters, experience has shown that the military judge with cognizance over a Term of Court must also discuss pending matters with counsel via frequent teleconferences with all concerned counsel (R.C.M. 802). The key to efficient management of cases is for all parties to ask a lot of questions of each other regarding scheduling, and then to document the case status, either with a written docket request endorsement, a memorandum from the court, email (see ¶ 8 below on use of e-mail in complex cases), or an Art. 39(a) session. Occasionally, a military judge must grant or deny a continuance under difficult circumstances, and, sometime, make both parties unhappy with the schedule. All should remember that continuances are only granted for reasonable cause shown; a military judge's decision for granting a continuance will only be overturned for an abuse of discretion. Counsel should ensure that a factual record is well-developed to support any contested decisions on scheduling.

2. Special Terms: Experience has shown that after balancing all necessary considerations (further discussed at ¶ 4 below), the practical result is that contested cases (and some guilty pleas-judge alone or with members) will require docketing during a "Special Term". A Special Term is simply a time period granted by a military judge which falls outside the periodic pre-planned Term of Court in any given location. Usually, Special Terms are scheduled to meet the specific demands of obtaining witnesses, evidence or other trial necessities in any particular case. In other words, contested cases should proceed when the witnesses and evidence from both sides are ready for presentation to a trier of fact. Should this time fall outside a pre-planned session, counsel should seek a Special Term.
  - Note: When a Special Term is used, consideration may be given to cancelling the preceding or subsequent regular term and moving routine matters to the Special Term. This correctly accommodates the needs of litigation, while preserving the general efficiencies of pre-planned terms. I stress that litigation requirements are the driving force, not a pre-planned session.
3. Combined Terms: Occasionally, if a geographic location generates a significant number of cases, both Regular and Special Terms could be needed for a brief period. For example, where a Regular Term might be scheduled for the second week of a month, an additional Special Term could be scheduled to try a contested case the week immediately following a Regular Term, resulting in a two-week Combined Term, which may be sufficient to dispose of routine matters as well as the contested case.
4. Scheduling Considerations: Contested trials (this may also include guilty plea cases) generally need to be scheduled when counsel are logistically able to marshal their witnesses and other evidence and can present their cases without holding the court open between terms of court, once members are seated. Contested courts-martial



should be docketed by agreement of counsel, if possible, as long as the agreed upon date is consistent with judicious processing of the case. If counsel are not able to agree, then each should submit alternative dates to the military judge who should schedule the trial based on the needs of the parties and other scheduling considerations, including the following (this is a representative list **not** an exhaustive one):

- **Commitments of counsel in other cases.** This is most often encountered when civilian defense counsel are retained, but it can also pose a challenge for individual military counsel (IMC), and even detailed counsel in some circuits, particularly where counsel must travel to the trial venue.
- **Commitment of counsel generally.** Trial practitioners as well as their clients, commands and convening authorities should realize that military judges generally view military justice as having priority over leave, legal assistance, training opportunities, temporary additional duty or other collateral duties. While military judges make all efforts to accommodate the inherent tension of conflicting schedules, the fair, expeditious and just administration of justice will always be the military judge's default position, particularly when an accused is in pre-trial restraint.
- **Priority among cases.** Military judges understand that cases have a status priority. These priorities may by their very nature resolve scheduling conflicts of counsel. For example, general courts-martial usually take priority over special courts-martial. Federal criminal cases generally take priority over federal civil cases; federal cases have priority over state cases; and within a state, criminal cases take priority over civil matters. Military judges are also cognizant that courts-martial duties have priority over other collateral duties including leave or temporary duty for training. While these priorities are generally recognized, military judges do not use them inflexibly.
- **Expert witnesses.** Expert witnesses typically have narrow windows in which to attend trial and need significant preparation time, including development of forensic or other technical evidence.
- **Remote witnesses.** Remote witnesses must often be scheduled significantly in advance to accommodate travel, including international travel; deployed witnesses might have narrow time windows in which to participate in trial proceedings, so as to limit critical operational impacts. Permanent change of station or release from active duty of witnesses may also be a concern. For all types of witnesses the question surrounding the government's obligation to produce them for trial is often a contested issue. All parties should be cognizant of other acceptable and legal avenues of placing evidence in front of the trier of fact. These options may include depositions, affidavits and video-teleconferencing among other options. [See ¶ 8 below regarding case management orders which anticipates resolving witness requests in sufficient time as to not impact the orderly conduct of a trial.]

- **The status of the accused.** The accused might be under pretrial restraint, have demanded speedy trial, or have some other special need, such as medical care.
  - **Logistical requirements, holidays, travel issues, security issues or needs of the Convening Authority**
  - **Conflicting needs of other cases/venues.** Within each judicial circuit, the Circuit Military Judge is charged with the responsibility to ensure responsive judicial support to each location within that circuit. When needed, judicial resources external to the circuit may be provided to accommodate surges or spikes of activity – advanced planning is critical in these situations to allow sufficient time to coordinate support.
5. Resolving Schedule Conflicts (R.C.M. 802 sessions). Generally speaking, military judges will insist, to the maximum extent possible, that counsel resolve their own scheduling conflicts and agree on dates for pretrial and trial sessions. This obviously eliminates issues for resolution by the trial judge. If counsel are not able to agree on trial milestones or trial dates or if a military judge suspects dilatory trial tactics or excessive delay issues, a R.C.M. 802 session with the military judge can often result in highlighting the reason for a conflict and lead to an agreement or resolution of the matter. The role of the military judge at an R.C.M. 802 session is one of a mediator and facilitator. Care must be exercised by all parties not to inadvertently conduct a “chambers hearing” that should only be conducted on the record. That said, a great deal can ordinarily be communicated between counsel and the military judge to resolve pretrial scheduling matters, reserving those that cannot be resolved by consent for resolution by written order, or at an Article 39(a). Counsel should be cognizant that matters to be resolved at an Article 39(a) session may be answered via video-teleconference [see R.C.M. 805 (c)].
6. Role of the Convening Authority and Counsel. Regular Terms of Court are most efficient when they are anticipated and planned for by the convening authority and counsel. However, it should be stressed that pre-planned Terms of Court may not be “one size fits all”. As previously discussed, Special Terms of Court may be arranged with the cognizant Circuit Military Judge or assigned trial judge when deemed warranted.
- Convening Authority (CA): CAs can reduce the cost and frequency of Special Terms of Court through negotiation with the defense and include, as a material term of a Pretrial Agreement, the adherence to a scheduled Term of Court. Generally, this would be in the case of a guilty plea, or a guilty plea with members sentencing.
  - Defense Counsel (DC): DCs might negotiate for a specific Term of Court, in a Pretrial Agreement, as consideration for sentence relief, or for other considerations (e.g., to accommodate additional development of sentencing evidence, attendance of certain witnesses with or without government funding,

or other matters), provided the client is in a position to plead guilty at the specified Term of Court.

7. Role of Commanding Officers<sup>3</sup> and Supervising Attorneys: Close control of courts-martial docketing procedure by military judges alone will never be an adequate substitute for leadership within the other organizations providing military justice services. Docket management is largely a function of case control. While the judiciary obviously has certain essential tools to control the flow of a case, the convening authority, and to an even greater extent, the litigants and their supervising attorneys are in the best, first position to determine when a case goes to trial. These same officials are also in the best position to ensure that all appropriate measures have been taken by each side to ensure that the case is diligently progressing in an expeditious manner. Leadership by commanding officers and supervising attorneys should include clear training on case management as well as personal oversight of all cases assigned to their area of responsibility. Trial and Defense Counsel must be trained (and strictly monitored) to take the initiative to file motions and requests when appropriate. Generally, counsel prosecuting and defending courts-martial have little to no experience in proper case management and often times demonstrate no urgency in their approach to case management. Where counsel wait and or assume action, they run the inherent risk of being surprised by opposing counsel or the military judge. Commanding officers and supervising attorneys share the responsibility for the problems in docketing and case management and case preparation. Prudent counsel who desire ownership of a litigation timeline should not wait for filings from the other side, with or without a case management order. Commanding Officers and supervising attorneys must take personal responsibility for training and strictly monitoring their counsel to proactively and zealously pursue the respective interests of their clients. Use of Terms of Court, whether Regular, Special or Combined is the critical and most necessary facet of the case management equation.
8. Complex Cases. Litigating complex, contested cases presents unique challenges to the effective management of such cases in the context of Terms of Court. All counsel should understand that the military judge has a number of tools that, when used in combination, can result in the fair and efficient disposition of such cases.
  - R.C.M. 802 sessions. These conferences should be used early and often in complex cases to keep the military judge informed of developments in the case. An “802” should be held immediately upon referral to discuss pretrial motions and other pretrial events. This information should then be used as the basis for the military judge issuing a Case Management Order. When the

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<sup>3</sup> The phrase and term of “Commanding Officer and Supervising Attorneys” is used for brevity purposes only. It should be interpreted in the broadest sense to include all personnel directly involved in military justice litigation. The phrase, as used here, is not intended to specifically refer to Convening Authorities but rather judge advocate chains of command. The phrase should be interpreted as including, but not limited to, Staff Judge Advocates, Officers in Charge, Military Justice Officers, Chief and Regional Defense Counsel, Senior Trial and Senior Defense Counsel.

military judge and counsel are remotely located, an efficient and effective method for summarizing the conference for the record, without need of a court session, is for the military judge to use e-mail (see below).

- Telephone/Video-Teleconferences. There is no requirement in R.C.M 802 that counsel be physically present with the military judge or co-located with each other. Phone conferences are particularly efficient when multiple counsel are detailed or retained and are in different locations. R.C.M. 802 specifically references R.C.M. 914B and permits use of remote technology in conducting a conference. The military judge will be vigilant not to entertain argument on motions or make rulings on contested issues during an 802 conference. Counsel should not confuse an “802” conference with an Article 39(a) hearing.
- E-mail. R.C.M. 802 requires a summary be placed in the record of those matters agreed upon at a conference. This need not be done in open court, though that is typical. An alternative is for the military judge (or either counsel) to draft an e-mail contemporaneously with the conference and route it to the other trial participants for comment. E-mail has been likened to as “evidence-mail”. Once all parties have endorsed the e-mail outlining the substance of an R.C.M. 802 conference, that e-mail may then be printed and entered into the record as an appellate exhibit. This method reduces the risk of inaccuracy or forgotten matters which should be on the record.
  - In complex cases that are likely to generate a significant number of e-mail conferences or communications, a good technique is to open an early appellate exhibit (e.g., A.E. III – Electronic Mail) and designate it an “open” exhibit in which all e-mail summaries of conferences and other communications with counsel are deposited as “line items” throughout the course of pretrial and during trial. At the end of trial, the exhibit is closed and a listing of line items is appended as the cover sheet, much like a table of contents, for ease of reference during post-trial reviews.
  - If using e-mail as a trial communications tool, all parties should take care to ensure e-mail “discipline”; that is, the original author of an e-mail must select a subject line that is unique (e.g., DISCLOSURE CLASSIFIED MANUAL). Subsequent “via” addressees who comment and return, or forward the e-mail, may not change the subject and may not discuss topics other than that designated in the subject line. A new topic must begin a new e-mail chain and when that topic is completed, the email chain must be closed, printed, and added to the open appellate exhibit as the next line item. If this protocol is not maintained, email will become

unworkable, with multiple topics discussed in numerous emails, eliminating the possibility of finding a specific reference or response.

- An example of an “open” exhibit:

Appellate Exhibit III: Electronic Mail Correspondence

- Line item 1: 2 Jan 08 SUBJ: US V GROTZEL: DISCLOSURE OF CLASSIFIED MANUAL
- Line item 2: 10 Jan 08 SUBJ: US V GROTZEL: ARRAIGNMENT DATE
- Line item 3: 15 Jan 08 SUBJ: US V GROTZEL: TRIAL DATE
- Appellate Exhibit III - CLOSED 16 JAN 08

➤ Case Management Orders (CMO). A carefully developed and thorough CMO is the key to an orderly pretrial phase and is equally important to ensure trial is not interrupted because of incomplete pretrial practice. The best practice employed by most military judges is to have counsel confer and agree on as many required filing deadlines and hearing dates as they are able. However, before accepting the proffered dates from counsel, military judges ensure that the dates agreed upon by counsel are realistic/feasible (e.g., motions to compel cannot be set to be filed before answers to requests) and properly expeditious (e.g., counsel would not be permitted to unnecessarily “delay” a case by agreement if earlier processing is appropriate in the judge’s experience). Those matters that are not agreed upon should be submitted to the military judge in writing with options by each counsel, and a justification for each option. After thorough discussion with counsel at a pretrial conference (and, if contentious, based on additional documentation – remember that R.C.M. 802 conferences are not the proper forum for disposing of contested issues), the military judge will issue a comprehensive CMO. The CMO should anticipate all of the logistical and other needs of bringing a complex and/or contested case to trial.

- A good CMO should clearly identify pretrial motions, required filing deadlines, and Article 39(a) sessions for arraignment and motions (as needed), pretrial tasks, such as pre-admission of evidence, vetting of voir dire questions, and trial dates and locations. Where rulings require actions by counsel or others, for example, where the military judge orders an inquiry pursuant to R.C.M. 706, the order will direct compliance by a date certain, with notice to opposing counsel and the military judge, to ensure forward progress of the case is maintained.
  - Many motions can be resolved by consent of the parties in an R.C.M. 802 session (e.g., discovery issues, witness attendance). Other motions, which raise legal questions, but do not require the taking of testimony, should be resolved in writing (e.g., jurisdiction,

multiplicious charges). Counsel should understand that all pre-trial motions do not require an Article 39(a) session. [See R.C.M. 905(h)]

- Those motions that appear to require an evidentiary hearing should be carefully reviewed to ensure that in-court testimony is essential to a counsel's presentation of facts. If other methods of evidence gathering (e.g., affidavits, stipulations, business records) are sufficient to dispose of the motion, no hearing would be needed (e.g., if not agreed upon, discovery issues or witness attendance might be resolved with written submissions). If testimony from a remote location is necessary, consider alternatives to the "live" appearance of the witness at the Article 39(a) session. See options below (Remote Article 39(a) Sessions; and Remote Live Testimony).
  - Those motions that require testimony should be scheduled for hearing at the time most conducive to orderly pretrial and trial phases. Counsel should anticipate the impact of a favorable/unfavorable ruling on the development and preparation of their case on the merits. Some issues might require time in which the parties can adjust to meet the requirements of the ruling (e.g., a request for an R.C.M. 706 board or an expert consultant or witness, if granted, will require time in which to engage and prepare the expert). The CMO must logically group and schedule motions to facilitate and expedite trial.
  - For example, resolution of witness requests must be scheduled in the CMO soon enough for both parties to marshal their evidence during the trial term assigned. Contested witness requests do not always need a hearing to resolve. Many are ultimately resolved by consent, or by written motion and written ruling. However, if a witness request requires a hearing, that Article 39(a) session might effectively be scheduled during a Regular Term of Court, sufficiently in advance of the actual trial term to allow the parties to respond to the ruling. Once the duty to produce is determined, the prudent trial practitioner will ensure witnesses will be available at trial.
- Depositions. Unlike civil cases, depositions in a criminal case are not discovery tools. They are authorized to preserve testimony. The taking of depositions should be considered in any case in which there is a chance one or more witnesses will be unavailable to testify at trial.
- Importantly, when authorized by the convening authority during the pre-referral stage, or the military judge in the post-referral stage, the

designated deposition officer has “subpoena power” and can compel<sup>4</sup> the attendance of witnesses to the deposition.

- Depositions can be by written interrogatories, oral deposition recorded by a court reporter or video-taped testimony. Counsel requesting a deposition should consider which mechanism best addresses their needs, keeping in mind that, if the witness ultimately is unavailable to testify, the deposition may be admitted into evidence.
  - The convening authority and counsel should consider whether an Article 32 investigating officer should also be designated a deposition officer. In this latter capacity, the Art. 32 Investigating Officer would be empowered to issue a subpoena and compel attendance of witnesses at risk of unavailability. Unavailability can include operational necessity. Compare R.C.M. 702 and Art. 49, UCMJ.
- Remote Art. 39(a) Sessions. Recent revisions to R.C.M. 804 permit “remote” sessions of court for purposes of Art. 39(a). It generally allows the military judge to conduct video-teleconferencing of Art. 39(a) sessions, provided the accused and his counsel are co-located. This rule does provide a new and very useful tool to help manage courts-martial, but the law on this specific topic is not yet fully developed. The request or need for remote Art. 39(a) sessions should be contemplated early in pretrial planning, discussed at pretrial conferences, litigated, if needed, and scheduled in the CMO.
- Remote Live Testimony. Revised R.C.M. 703(b)(1) authorizes the military judge to permit witnesses to testify via remote means on the merits or on a motion, with the consent of both parties. If the practical difficulties of producing the witness outweigh the significance of the witness’ personal appearance, the military judge may authorize the witness to testify remotely on an interlocutory question, even over an objection. The definition and procedures for receiving testimony via remote means are in new R.C.M. 904B. As with remote Art. 39(a) sessions, the use of remote live testimony should be contemplated as early as possible and discussed with the military judge. Effective use of both remote testimony and remote sessions can greatly facilitate the expeditious and efficient courts-martial practice.
9. Sentencing. Historically, approximately 90% of courts-martial are resolved by plea or plea agreement. Accordingly, at a minimum, 90% of courts-martial will include a sentencing proceeding. Inexperienced counsel often times focus too intently on the merits or pursuit of plea agreements, and devote less time anticipating the needs – evidentiary and logistical - of a sentencing hearing. The first pretrial conference is *not* too early to begin to plan what will be needed during a sentencing proceeding, should one be required.

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<sup>4</sup> See R.C.M 702. There are limitations to taking a deposition.

- All of the tools discussed above apply to sentencing. However, the tension between the defense's desire to have a robust sentencing case and the Government's need to conserve resources can often be more readily resolved by video-taped or remote live testimony than during trial on the merits. The needs of the parties should be thoroughly vetted well in advance of trial, agreed to or litigated, and, in either event, incorporated into the CMO, as appropriate to meet the needs of the case.

## CLOSING COMMENTS

This discussion has not been designed or intended to be a cookbook or formula on how to properly or effectively manage pre-planned trial sessions in those areas not serviced by a resident military judge. This text was not intended to be an all-inclusive primer on trial advocacy or trial tactics. The sole intent of this writing is to provide military justice practitioners a clear view of what is available from the trial judiciary and to offer some helpful insight into the general use of pre-planned sessions of court.

The basic tenet all should take away from this discussion is that the Navy-Marine Corps Trial Judiciary is designed and focused to provide service to the Fleet by supplying professional judicial services for courts-martial. The efficiency goal of the Trial Judiciary is to maximize the professional services of highly trained military judges, **not** to limit the effectiveness or efficiency of those commands charged with providing litigation services to the Fleet.

Regular Terms of Court are **not** carved in stone nor intended to limit or regulate any commander's obligation to ensure good order and discipline. These pre-planned sessions are designed exclusively to adjudicate those cases and pre-trial necessities which are routine in nature. Regular Terms of Court may be adjusted as necessary; Special Terms of Court may be ordered as needed; and, Combined Terms of Court directed when required. Regular Terms of Court will be able to address many if not most local litigation requirements. However, these scheduled sessions cannot and will not fit all the varying needs of operational units, the complexities of litigation or the logistical dictates of a modern world.

Efficiency and effectiveness of military justice litigation depends upon a competitive yet professional interplay between competing interests in the due process arena with the military judge as the final arbiter. Effective communication between counsel consistent with professional representation is essential. Personal involvement in the overall courts-martial process and mentoring by Commanding Officers and supervising attorneys is absolutely critical. In the end, interaction and consultation with the cognizant Circuit Military Judge or myself will undoubtedly satisfy any perceived judicial availability issue.

/s/

B. W. MacKenzie  
CAPTAIN, JAGC, USN  
Chief Judge,  
Navy-Marine Corps Trial Judiciary