

Office of the Presiding Officer
Military Commission

7 October 2004

SUBJECT: Presiding Officers Memorandum (POM) # 4-2: Motions Practice

This POM supercedes POM # 4-1 issued 12 Aug 2004

1. This POM establishes the procedures for motions practice. A "motion," as used in this POM, is a request to the Presiding Officer, either in his capacity as the Presiding Officer or for action by the full commission, for any type of relief, or for the Presiding Officer, either in his capacity as the Presiding Officer or for action by the full commission, to direct another to perform, or not perform, a specific act. This POM does not address or establish procedures concerning Protection of Information as referenced in Section 6D(5), Military Commission Order No. 1, and requests to obtain access to evidence. This POM is issued UP DOD MCO No. 1, paragraphs 4A(5)(a)-(d) and 6A(5), and MCI No. 8, paragraph 5. The following definitions apply.

- a. A "filing" includes a motion, response, reply, supplement, notice of a motion, request for special relief, or other communication involved in resolving a motion.
- b. A "motion" is the original request from the moving party - the party requesting the relief.
- c. A "response" is the opponent's answer to a motion.
- d. A "reply" is the moving party's answer to a response.
- e. A "supplement" is a filing in regard to a motion other than a motion, response, or reply.
- f. A filing is "sent" or "filed" when the sender sends it via email to the correct email address of the recipients. If there is a legitimate question whether the email system worked correctly (bounced email notification for example,) the sender shall again send the filing until satisfied the email went through or an email receipt is received.
- g. A filing is "received" when it is sent to the proper parties per paragraph 3 below - with the following exceptions:

(1) The recipient was OCONUS when the email was sent in which case the filing is received on the first duty day following return from OCONUS.

(2) The filing was sent on a Friday, Saturday, or Sunday when the recipient was not OCONUS, in which case the filing is received the following Monday. If the following Monday is a Federal holiday, the filing is received on the following Tuesday.

(3) Upon request by the receiving party or the Chief Prosecutor or Defense Counsel or their Deputies on behalf of their counsel, the Presiding Officer establishes a different "received date" to account for unusual circumstances. Requests to extend the time a filing was received shall be in the form of a special request for relief.

2. The Assistant to the Presiding Officer may not resolve motions, but is authorized to manage the processing of motions and other filings directing compliance with this POM to include form and content. Only the Presiding Officer may grant a delay or departure from the time required for a filing.

3. All filings will be sent to the Presiding Officer, the Assistant, opposing counsel on the case, and the Chief Prosecutor and Defense Counsel and their deputies. The guidance in POM #3 (Communications, Filings, and Contact, and Problem Solving with the Presiding Officer) applies to motions practice.

4. All filings will address only one topic with a helpfully descriptive subject line. For example, if a counsel were working on more than one motion, each notice of motion, each motion, each response, each reply, and each supplement, if any, would be contained in a separate email.

5. Notice of motions. As soon as a counsel becomes aware that they will or intend to file a motion or other request for relief, they shall file a Notice of Motion to those listed in paragraph 3 above stating the name of the accused, specific nature of the relief that shall be sought, and when they intend to file the motion. This requirement to file a Notice of Motions shall not serve to delay filing requirements, or other notice of motions requirements, established by the Presiding Officer, Commission Law, or POMs.

6. Acknowledgements and receipts. When opposing counsel receives a filing to which they have a responsibility to reply, respond, or act, they will immediately send an email to the sender acknowledging that the filing was received.

7. Format for motions:

a. Each motion will be styled United States of America v [Name of accused as per the charge sheet.] Listing of a/k/a is not required.

b. The name of the motion will be descriptive. (EX: [(Government) (Defense)] Motion to Exclude the Statement of Fred Smith.) Generic names such as "Motion for Appropriate Relief" are not helpful and will not be used.

c. Motions will contain the following information in the following order in a numbered paragraph. Use Arabic numbers.

(1) A statement that the motion is being filed within the time frames and other guidance established by this POM or other direction of the Presiding officer, or a statement of the reason why it is not.

(2) A concise statement of the relief sought.

(3) (Optional): An overview of the substance of the motion.

(4) The facts, and the source of those facts (witness, document, physical exhibit, etc.) As much as possible, each factual assertion should be in a separate, lettered paragraph. This will permit responses to succinctly admit or deny the existence of facts alleged by the moving party. If the facts or identity of the source is Protected or classified, that status will be noted.

(5) Why the law requires the relief sought in light of the facts alleged including proper citations to authority relied upon.

(6) The name(s) of the file(s) attached to the email that are included in support of the motion.

(7) Whether oral argument is *required* by law, and if so, citations to that authority, and how the position of the party cannot be fully known by filings in accordance with this POM.

(8) A list of the legal authority cited, and if the authority is available on the Internet, the URL ([www.address](#)) shall be included. A URL is not required for cases decided by any United States court available through on-line reference services such as Lexis or WestLaw. When the full Commission is assembled, counsel are responsible for providing one printed copy of any authority cited to the Commission. (Note also paragraph 12 below as to required attachments.)

(9) The identity of witnesses that will be required to testify on the matter in person, and/or evidentiary matters that will be required.

(10) Additional information not required to be set forth as above.

c. The subject line of the email that sends the motion will be usefully descriptive. (EX: Defense Motion to Exclude the Statement of Fred Smith - US v Jones.) If the motion is contained in the body of an email, the sending email address shall be sufficient authentication. If the motion is in the form of an attachment, the attached file shall be given a usefully descriptive name, and the attachment shall contain the typed name and email address of the moving party as authentication.

8. Responses and other filings shall be filed not later 7 calendar days from the date received. Relief from this requirement may be granted by the Presiding Officer. Requests to extend the time for filing a response shall be in the form of a special request for relief.

9. Form of responses:

a. Each response will be styled the same as a motion.

b. The name of the response shall be "[((Government) (Defense))] Response to [(Government) (Defense)] Motion to (Name of motion as assigned by moving party.)"

c. Responses will contain the following information in the following order in a numbered paragraph. Use Arabic numbers.

(1) A statement that the response is being filed within the time frames and other guidance established by this POM or other direction of the Presiding Officer, or a statement of the reason why it is not.

(2) Whether the responding party believes that the motion should be granted, denied, or granted in part. In the later case, the response shall be explicit what relief, if any, the responding party believes should be granted.

(3) Those facts cited in the motion which the responding party agrees are correct. When a party agrees to a fact in motions practice, it shall constitute a good faith belief that the fact will be stipulated to for purposes of resolving a motion.

(4) The responding party's statement of the facts, and the source of those facts (witness, document, physical exhibit, etc.), as they may differ from the motion. As much as possible, each factual assertion should be in a separate, lettered paragraph. If the facts or identity of the source is Protected or classified, that status will be noted.

(5) A list of the legal authority cited, and if the authority is available on the Internet, the URL (www.address) shall be included. A URL is not required for cases decided by any United States court available through on-line reference services such as Lexis or WestLaw. When the full Commission is assembled, counsel are responsible for providing one printed copy of any authority cited. (Note also paragraph 11 below as to required attachments.)

(6) How the motion should be resolved.

(7) The name(s) of the file(s) attached to the email that is included in support of the filing.

(8) Whether oral argument is *required* by law, and if so, citations to that authority, and how the position of the party cannot be fully known by filings in accordance with this POM.

(9) The identity of witnesses that will be required to testify on the matter for the responding party in person, and/or evidentiary matters that will be required.

(10) Additional facts containing information not required to be set forth as above.

d. The subject line of the email that sends the response should be usefully descriptive. (EX: Response to Motion to Exclude the Statement of Fred Smith - US v Jones.) If the response is contained in the body of an email, the sending email address shall be sufficient authentication. If the response is in the form of an attachment, the attached file shall be given a usefully descriptive name, and the attachment shall contain the typed name and email address of the responding party as authentication.

10. Replies.

a. Counsel may submit a reply to a response being careful that matters that should have been raised in the original motion are not being presented for the first time as a reply. Replies are unnecessary to simply state the party disagrees with a response.

b. Replies shall be filed within three days of receiving a response.

c. Replies shall:

(1) Be styled the same as the motion except designated a reply.

(2) Be generally in the format set forth above for responses with the information required for responses.

11. Supplements to filings.

a. Counsel may submit supplements to filings, but supplements should be reserved for those cases when the law has recently changed, or if material facts only recently became known.

b. Supplements shall be filed within 3 days of receiving the filing to which a supplement is desired, the new facts learned, or discovery of the law that has recently changed, *provided however*, that the party wishing to file a supplement has first obtained permission from the Presiding Officer briefly stating the reason why a supplement is necessary, and sending copies of the request as provided in paragraph 3.

c. Supplements may be filed for any reason *provided however*, that the party wishing to file a supplement has first obtained permission from the Presiding Officer briefly stating the reason why a supplement is necessary, and sending copies of the request as provided in paragraph 3.

d. Supplements shall contain those facts, and that law, necessary to supplement a previous filing generally following the format for replies or responses.

12. Required attachments to all filings. Any filing that contains citations to legal or other authority shall contain that authority as a separate attachment with the following exceptions:

a. The authority is available in full form on the Internet in which case the URL (www.address) shall be provided in the filing. Those providing a URL will confirm that the URL is still valid before filing.

b. The authority is a case decided by a United States court in which case the proper citation should be contained in the filing.

c. The authority has been previously been provided in the form of an attachment by either party in any filing with respect to the motion to which a response, reply, or supplement is being filed. Attachments filed in different motions shall be attached again. In the case of large attachments previously provided to the Presiding Officer in a different motion, a party may request an exception to the attachment requirement from the Assistant.

d. When the full Commission is assembled, counsel are responsible for providing one printed copy of any authority cited that was not previously provided in printed form to the Commission.

13. Voluminous attachments not in electronic form. If a filing requires an attachment that is not in electronic form, counsel may make a special request for relief suggesting how the attachment shall be provided. The request shall be filed with those persons indicated in paragraph 3 of this POM.

14. Special requests for relief.

a. Counsel may at times have requests for relief that do not involve lengthy facts or citations to authority. A motion in the form of a special request for relief relieves counsel of the specialized format for motions generally. For example, a counsel may make a special request for relief using the abbreviated format below to request: an extension of a time set by a POM or direction of the Presiding Officer; an exception to a requirement to digitize attachments; or like matters that do not require involved questions of law or fact.

b. Either the Presiding Officer or the Assistant to the Presiding Officers may direct that a special request for relief be resubmitted as a motion.

c. Counsel must not attempt to file a motion in the form of a special request for relief to avoid submitting a notice of motions, or because the time for a notice of motion or other filing has passed.

d. The content of a special request of relief will contain the style of the case, the precise nature of the relief requested, those facts necessary to decide the request, citations to authority, and why the relief is necessary.

e. The special request for relief will include counsel's statement and rationale concerning whether the Presiding Officer may grant the relief on his own or if the relief sought can be granted solely by the full commission.

15. The Chief Prosecutor or Defense Counsel, or their Deputies, should request that the Presiding Officer set a time for a reply or other filing when their respective prosecutor or defense counsel is unavailable in situations not addressed in this POM. Requests to extend the time shall be in the form of a special request for relief.

16. Time for filing motions and other filings. The Presiding Officer will ordinarily set the schedule for the time to file notice of motions, motions, and other filings. If no specific schedule is set, the following applies:

a. Notice of motions shall be filed within 5 calendar days of the day that the Presiding Officer *announces* the date of the first open session with the accused. (Note this is not the same as the date *of* the first open session with the accused.)

b. Motions shall be filed within 7 calendar days after the notice of motions is due as per paragraph 16a above.

c. Responses shall be filed not later than 7 calendar days after receiving a motion.

d. Replies shall be filed not later than 5 calendar days after receiving a response.

17. Filings that are substantially or entirely comprised of classified information. In the event that a motion or filing is comprised entirely or substantially of classified information, the person preparing the filing will send a notice of motion sufficiently detailed - consistent with not revealing classified information - to assist the Presiding Officer in scheduling resolution of the matter. Counsel will then provide a complete filing in written form with opposing counsel following the format described in this POM. Counsel preparing the filing will make two additional copies for the Presiding Officer and Assistant to review when security considerations can be met.

18. Rulings. The Presiding Officer shall make final rulings on all motions submitted to him based upon the written filings of the parties submitted in accordance with this POM, and the facts and law as determined by the Presiding Officer, unless:

a. Material facts are in dispute that are necessary to resolution of the motion requiring the taking of evidence, or

b. A party states in a filing that the law does not permit a ruling on filings alone accompanied by authority why the Presiding Officer cannot rule on the filings alone, or

c. The motion requires action by the full commission.

19. Nothing in this POM should be construed to dissuade counsel from sharing that information, to include motions and other filings, to ensure a full and fair trial.

20. A notice of motion is not a motion, and it does not place an issue or matter before the Commission for decision. If a party files a notice of motion but does not file a motion, the Commission will not take any action on the underlying issue.

21. Various matters have been presented to the Appointing Authority for his decision and/or action. A request to the Appointing Authority is not a request for the Commission to take action or grant relief.

a. If a party wishes the Commission to grant relief or take action on a matter which has been raised with, or is currently before, the Appointing Authority the party must file a motion or request for other relief in accordance with this POM.

b. If a party has requested the Appointing Authority to grant relief or take action, and that request is denied, the party may request the Commission grant the same or different relief by filing a motion or request for other relief in accordance with this POM. All filings and other matters exchanged between the party and the Appointing Authority will be forward with the motion or request for other relief.

Original signed by:

Peter E. Brownback III
COL, JA, USA
Presiding Officer