

SUPPLEMENTAL DECLARATION OF SHAYANA KADIDAL

I, Shayana Kadidal, hereby declare as follows:

1. I am an attorney with the Center for Constitutional Rights and, along with others, represent the petitioners in this case, *Center for Constitutional Rights et al. v. United States et al.*, USCA Misc. Dkt. No. 12-8027/AR. I make this supplemental declaration in connection with the Post-Argument Supplemental Brief of Petitioner-Appellants' in support of their application for a writ of mandamus.

2. After the oral argument in this case on October 10, I corresponded with David Coombs, counsel for the defense in the proceedings below. Mr. Coombs informs me that all the courtroom proceedings (excluding, of course, the R.C.M. 802 Conferences) are being recorded on audio. At the end of each session, Mr. Coombs receives a CD with the audio file(s) from the proceedings. Under the trial court's direction, Mr. Coombs is only permitted to use the CD as support for his motions. On occasions, in addition to the audio recording, he reports that there is a court reporter present, who uses either a Dictaphone or stenography to record the proceedings. On those occasions, however, as always, the proceedings are also audio recorded.

3. As described at oral argument (Audio at 59:00), one of the Petitioner-Appellants here, journalist Kevin Gosztola, requested from the OJAG on August 3d thru FOIA the order of the trial judge publicly produced to this Court on that same date by the government. The request is attached hereto. The document has not been produced thru FOIA, some two months later, despite the fact that it has been released to the public through the proceedings before this Court. Indeed, the request has not been responded to, other than to notify Mr. Gosztola that his request was forwarded from the Office of Judge Advocate General (which the government insisted at argument was the FOIA custodian and the "only entity authorized" to control release of docu-

Monday, October 22, 2012

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FOI Request

Request for April 24 Bradley Manning Decision

Requested by [KevinGosztola](#) on Aug. 3, 2012 for the [Office of the Judge Advocate General of United States of America](#)

Status: Awaiting Response, past due by 1 month, 3 weeks

Tags: [bradley manning](#), [military](#), [military justice](#), [wikileaks](#)

From FireDogLake.com on Aug. 3, 2012:

FOIA REQUEST

Expedited processing requested

Dear FOIA Officer:

Pursuant to the federal Freedom of Information Act, 5 USC § 552, I request access to and copies of an April

24 decision and/or ruling issued by Judge Army Col. Denise Lind in the court martial proceedings for PFC. Bradley Manning. This decision directly addressed a motion for access to decisions, rulings, orders or any transcripts in the court martial of Manning. Lind denied an attorney with the Center for Constitutional Rights (CCR) the opportunity to address the court. She read the decision on this motion in front of the public and credentialed media. Therefore, it should have no information in the decision or ruling that would be considered classified or necessary to withhold from the public. The contents could also not be said to violate the privacy of Manning if disclosed to the public because all the material was read while credentialed media and the public were present.

I would like to receive the information in the following format: electronic.

As a representative of the news media I am only required to pay for the direct cost of duplication after the first 100 pages. Through this request, I am gathering information on the court martial proceedings against PFC. Bradley Manning that is of current interest to the public because the government alleges he is responsible for possibly the largest security breach in American history.

I have a right to access records in the court martial of Manning but thus far have been denied. I am a plaintiff who, as of August 2, has signed on to a lawsuit filed by CCR that is before the United States Court of Appeals of the Armed Forces (CAAF) and seeks to force the judge to grant the press and public access to court martial records. It has been suggested that the Freedom of Information Act (FOIA) is available to journalists like myself and, as members of the press, we should use it if we want to gain access. That is a patently absurd argument for the government to make. I do not believe the government has any intention of filling any FOIA requests before Manning's court martial is over, which is why I have signed on to the lawsuit that is before CAAF.

Since the government insists the press has FOIA available as some kind of substitute for access to court martial records, the Judge Advocate General's Office should at least be able to release the judge's decision that lays out why the press and public should have no access to records. Furthermore, the government has informed attorneys with CCR that they plan to make the judge's decision or ruling on the motion a matter of public record on August 10, 2012. If the Judge Advocate General's Office does not release a copy of the judge's decision or ruling on this April 24 motion for access, it will be showing just how spectacularly ridiculous the government's position is in defending secrecy in the court martial of Manning.

This information is being sought on behalf of Firedoglake for dissemination to the general public. Over 8,500 people have shown interest in the disclosure of this decision by signing on to the request.

Please waive any applicable fees. Release of the information is in the public interest because it will contribute significantly to public understanding of government operations and activities.

If my request is denied in whole or part, I ask that you justify all deletions by reference to specific exemptions of the act. I will also expect you to release all segregable portions of otherwise exempt material. I, of course, reserve the right to appeal your decision to withhold any information or to deny a waiver of fees.

As I am making this request as a journalist and this information is of timely value, I would appreciate your communicating with me by email, rather than by mail, if you have questions regarding this request. My email is [redacted].

I am requesting expedited processing of this request Pursuant to 5 U.S.C section 552(a)(6)(E) based on

compelling need and “urgency to inform the public concerning actual or alleged Federal Government activity.” I certify, as required by regulation, that the compelling need for expedited processing is true and correct to the best of my knowledge and belief. This request is central to the transparency that is required for there to be an accurate recounting of the activities of the United States government in regard to the transparency of court martial proceedings currently taking place in the case of Pfc. Bradley Manning, currently on trial for his life. The prompt release of information as a means of informing the public about this case is crucial.

I look forward to your reply within 20 business days, as the statute requires.

Thank you for your assistance.

Sincerely,

Kevin Gosztola

Co-Filed with the following individuals:

(Paul) Spencer Dawkins

a logan

a harper

A Longley

A Goodman

A Lynn Raiser

A. Waldschmidt

A. Dragun

A. Raclare Kanal

A.B. Kovats

"A.K., Anka & Chloe" Jhangiani

Aaron Todd

Aaron Kunkle

aaron urbanski

Aaron Walters

Aaron Molloy

Aaron Ucko

Aaron Dailey

Aaron Gayken

[Click here to show all co-filers](#)

From Kevin Gosztola to Office of the Judge Advocate General on Aug. 29, 2012:

Hi,

I wanted to follow up on the following public records request. No acknowledgement letter has been received yet.

Thanks for your assistance.

From Patoir, Maanvi M CIV (US) to Kevin Gosztola on Aug. 29, 2012:

Classification: UNCLASSIFIED

Caveats: NONE

Mr. Gosztola,

Our office does not have record of having received this FOIA request. Do you know to whom it was originally sent? It is not within our purview to maintain documents related to criminal trials. We will refer this request to the Office of the Judge Advocate General, Criminal Law Division and to Office of the Staff Judge Advocate for the Military District of Washington for their direct response to you.

v/r,

Maanvi

From MuckRock to Office of the Judge Advocate General on Aug. 29, 2012:

Thanks for your help. This request was originally mailed to:

Office of the Judge Advocate General
ATTN: DAJA-AL
2200 ARMY PENTAGON, RM 1E739
WASHINGTON, DC 20310-2200

Any help you can provide in helping get it to the correct office for processing is appreciated.

From Thomas, Lisa CIV (US) to Kevin Gosztola on Sept. 11, 2012:

Classification: UNCLASSIFIED

Caveats: NONE

Sir,

Your FOIA request was referred to the OTJAG Criminal Law Division. The contact information for OTJAG Criminal Law Division is below:

Mr. Allan Pfautsch
Paralegal Specialist
Office of The Judge Advocate General
Criminal Law Division
2200 Army Pentagon
Washington, DC 20310
[\[redacted\]@mail.mil](mailto:[redacted]@mail.mil)

Please contact Mr. Pfautsch directly regarding the status of your case.
Thank you.

Your request was also referred to the Military District of Washington. The contact information is below:

Deputy Chief of Staff for Personnel
Military District of Washington
ATTN: Toni Jelks
103 Third Avenue, SW
Washington, DC 20319
[\[redacted\]@us.army.mil](mailto:[redacted]@us.army.mil)

Please contact Ms. Jelks directly regarding the status of your case. Thank you.

v/r,

From MuckRock.com to Office of the Judge Advocate General on Oct. 11, 2012:

To Whom It May Concern:

I wanted to follow up on the following Freedom of Information request, copied below, and originally submitted on Aug. 3, 2012. Please let me know when I can expect to receive a response, or if further clarification is needed.

Thank you for your help.



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Want to be notified about interesting government documents like this one? Sign up for our mailing list. We only send it out when we have something interesting to say, and we'll never sell or spam your address. You can unsubscribe easily any time you want.

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Rules Of Practice Before Army Courts-Martial

26 March 2012

UNITED STATES ARMY TRIAL JUDICIARY
RULES OF PRACTICE BEFORE ARMY COURTS-MARTIAL

PREAMBLE

These Rules of Practice before Army Courts-Martial (Rules of Court) supplement the Rules for Courts-Martial (RCM) and, together with the RCM, govern trials by courts-martial presided over by judges assigned to or affiliated with the United States Army Trial Judiciary. These Rules of Court are applicable to all cases tried in and all counsel practicing before Army courts-martial, including accused who choose to proceed *pro se* pursuant to RCM 506(d). They are effective upon approval by the Chief Trial Judge and supersede all rules previously published as Rules of Practice Before Army Courts-Martial. A copy of these rules will be maintained by each military judge, by each military trial and defense counsel and court reporter, and in every Army courtroom. Detailed defense counsel will provide a copy of these rules to civilian counsel and/or individual military counsel immediately after such counsel is retained or made available.

Adherence to these rules will promote an orderly, expeditious, and just disposition of court-martial cases, and provide for more efficient application of judicial and legal resources. Counsel, as officers of the court, are ethically obligated and expected to be familiar with and follow these rules, as well as Army Regulation 27-26, *Rules of Professional Conduct for Lawyers* (RPCL), and current American Bar Association Standards for Criminal Justice, to the extent that the latter apply at courts-martial.

These rules are but a means to the orderly administration of justice and are promulgated under RCM 108 and 801(b), and Chapter 7, Army Regulation 27-10. Counsel will adhere to these rules; however, noncompliance does not give rise to any rights or remedies for an accused and the rules will be interpreted and applied in that light. Counsel may be required to explain the failure to comply with these rules and the military judge is empowered to take appropriate action pursuant to applicable law and regulation. (See Rules 3.3 and 3.4, RPCL. See also RCM 109 regarding suspension of counsel from practice in courts-martial and RCM 809 regarding contempt procedures pursuant to Article 48, UCMJ.) A trial judge may modify, amend, revoke, or set aside any rule contained herein only with the approval of the Chief Trial Judge.

Michael J. Hargis

MICHAEL J. HARGIS
COL, JA
Chief Trial Judge

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RULES OF COURT

Section I. Docketing Procedures and Continuances.

RULE 1: Docketing. The military judge (judge) responsible for a case will establish docketing and calendar management for that case to ensure compliance with these rules. Each judge, or the judge's clerk of court (clerk) (unless that judge is co-located with the Chief Circuit Judge) will maintain a current master docket on the Army Courts-Martial Internet Docket (ACMID) posted on the Army Trial Judiciary homepage (www.jagcnet.army.mil/usatj) and update it at least weekly.

RULE 1.1: Procedures. In addition to the RCM 308 requirement for commanders to immediately inform the accused of preferred charges, trial counsel will deliver, or cause to be delivered, a copy of preferred charges to the appropriate Trial Defense Service (TDS) field office at the earliest possible date so that military defense counsel can be appointed and begin case preparation. Absent extraordinary circumstances, within 24 hours of referral, the trial counsel will cause the charges to be served on the accused and defense counsel and simultaneously provide a copy of the charge sheet(s), all applicable convening order(s), and a complete copy of the accused's Enlisted or Officer Record Brief to the judge or, at the judge's discretion, his/her clerk. The charge sheet must indicate the date on which the charges were served on the accused, IAW RCM 602. If such service has not been completed within 24 hours of referral, upon completion of such service the trial counsel will immediately provide the judge with another copy of the charge sheet(s) showing such service. Additionally, the trial counsel will ensure the copy of the accused's Enlisted or Officer Record Brief provided to the judge contains the following correct and complete information:

- The accused's date of birth
- The accused's MOS or Branch Code
- The accused's marital status
- The accused's GT score
- The accused's Basic Active Service Date
- The accused's sex / redcat
- The accused's complete civilian education

(If accused's Enlisted or Officer Record Brief is incomplete, the trial counsel shall provide this information to the judge by separate memorandum.) These documents may be provided in hardcopy or by e-mail. Also within 24 hours of referral, the trial counsel will initiate an Electronic Docket Request (EDR) (Appendix A) and send it to the detailed defense counsel, who will complete Section B and, within three duty days of receipt from the trial counsel, return it to the trial counsel, who will complete Section C and forward it to the judge within one duty day of receipt from the defense counsel. The EDR must contain specific, factual support for all requested dates. The trial counsel must inform the judge in the docketing request if the accused is in pretrial confinement. Normally within one duty day of receipt of the completed EDR, the judge will set an arraignment and/or trial date, if the judge has not already set such dates. The judge will ordinarily, within 20 days of service of charges and consistent with Chapter 5, AR 27-10, set a trial date. Any period of delay from the judge's receipt of the referred charges until arraignment is considered pretrial delay approved by the judge per RCM 707(c), unless the judge specifies to the contrary. If counsel are unavailable to proceed on the scheduled date, they must move for a continuance (see Rule 1.2 below). The judge may use a pretrial order (PTO) to direct dates for compliance regarding discovery and notice. See Appendix B for a sample PTO.

RULE 1.2: Continuances. Motions for a continuance will be in writing unless made verbally on the record. Counsel will promptly send the motion to opposing counsel and the judge and may use email. The motion shall include: (1) a statement of the specific facts supporting the requested delay; and (2) a statement of the duration of the delay. Unless a different time is set by the judge, opposing counsel will indicate in writing his/her position regarding the delay within 48 hours of receipt of the motion. The judge may act on the motion without an Art. 39(a) session or RCM 802 conference. The judge has sole

responsibility to set or change trial dates; only the judge may grant a continuance. Requests for continuance are not granted until affirmatively acted upon by the judge.

RULE 1.3: Duty Days. For purposes of these rules, a “duty day” is Monday through Friday, unless formally designated as a federal holiday or training holiday approved by the appropriate GCMCA-level senior operational commander. Unless otherwise prescribed by appropriate authority, a “duty day” does not include Saturday and Sunday. In deployed areas, a “duty day” is determined by the GCMCA-level senior operational commander.

Section II. Pretrial Practice and Notice Requirements.

RULE 2: Counsel Requirements.

RULE 2.1: Trial counsel requirements.

RULE 2.1.1: Pretrial agreement. When the Convening Authority accepts an accused's offer to plead guilty pursuant to a pretrial agreement, the trial counsel will immediately provide a signed copy of the offer portion only to the judge, at least two duty days prior to trial. If the pretrial agreement includes a signed stipulation of fact, it must also be provided to the judge (including all enclosures) with the offer portion of the pretrial agreement. Otherwise, stipulations of fact must be provided to the judge immediately after signature by all parties, but at least two duty days prior to trial.

RULE 2.1.2: Notice of Pretrial Agreements, Alternate Disposition and Not Going Forward. After referral, the trial counsel will immediately notify the judge and defense counsel if an alternate disposition of the charges is likely. To facilitate docket management and trial preparation after referral of charges, trial and defense counsel will notify the judge immediately when an offer to plead guilty or a request for discharge/resignation in lieu of court-martial has been submitted. Additionally, trial counsel will notify the judge when the offer to plead guilty or request for discharge/resignation will be presented to the GCMCA for decision and whether the SJA is supporting the request. Immediately when such a decision is made but at least two duty days prior to trial, trial counsel will notify the judge and defense counsel of any charges or specifications upon which the Government will not present evidence.

RULE 2.1.3: Witnesses. Trial counsel is responsible for notifying all requested witnesses of the time, place, and uniform for the trial. Witnesses will be instructed to be present at a time so that the court will not have to recess awaiting their presence; however, the court will cooperate with witnesses whose absence from duty or job is especially disruptive or who provide essential services or missions to the extent that a fair, orderly, and expeditious trial is not sacrificed. Counsel will notify the judge when such witnesses are to be called so that appropriate coordination can be accomplished. Requests for delay to obtain or await arrival of witnesses normally will not be favorably considered in the absence of prior coordination with the judge. The timing of witnesses is crucial to the orderly presentation of a case. Unless otherwise ordered by the judge, before beginning their case in chief, counsel will provide the bailiff with a list of witnesses, in the order to be called, so the bailiff can have witnesses standing by to present their testimony.

RULE 2.1.4: Court members. Trial counsel is responsible for notifying the members of the time, place, and uniform for the trial. Members will not be informed of the projected pleas or any other information about the court-martial, to include the accused's name or the nature of the charges. Trial counsel is responsible for confirming that each panel member has personally acknowledged the notification.

RULE 2.1.5: RCM 802 Sessions. Unless a different time is set by the judge, trial and defense counsel will arrive at the judge's chambers for an RCM 802 session fifteen (15) minutes in advance of the time set for any proceedings on the record. Should the judge publish standard questions

for discussion during this RCM 802 session, trial and defense counsel must be prepared with answers to those standard questions.

RULE 2.1.6: Article 39(a) Sessions. Trial and defense counsel will discuss what matters, if any, need to be addressed at an Art. 39(a) session immediately before trial begins, and its likely duration. Trial and defense counsel should request an Art. 39(a) session for an earlier date if it is anticipated that substantial time will be required to resolve the matters, so as not to have the members standing by unnecessarily. The judge will decide whether such matters will be resolved on the day of trial or on a day prior to trial. If such matters will be resolved on the trial date, trial and defense counsel will consult the judge so the Art. 39(a) session can begin as early as possible on that date. Trial counsel will consult the judge for a decision as to the time court members should be present and ready to proceed so as to avoid needless waiting by court members and others. Reporting times for court members will be scheduled to minimize waiting times for members; unless otherwise indicated by the judge, that time will be the time listed on the docket for the members to be called. With the judge's approval, members may be placed on call if a lengthy Art. 39(a) session is expected or when the judge otherwise deems it appropriate.

RULE 2.1.7: Section III Disclosures. Unless otherwise ordered by the judge, prior to arraignment or not later than two duty days after the trial date is set if arraignment is the day of trial, the government will disclose to the defense that information required to be disclosed under MRE Section III.

RULE 2.1.8: Witness lists. Unless otherwise ordered by the judge, no later than seven duty days prior to trial, the trial counsel will provide the judge, opposing counsel and court reporter a written list containing each witness' full name (correctly spelled), and unit/duty station or city and state of residence (as applicable) for each witness to be called, indicating whether the witness will be called during the merits and/or during the sentencing phases of trial. Unless otherwise ordered by the judge, no later than seven duty days prior to any scheduled Art. 39(a) session to resolve pretrial motions, the trial counsel will provide the judge, opposing counsel, and court reporter a written list containing each witness' full name (correctly spelled), and unit/duty station or residence (as applicable) for each witness to be called during the Art. 39(a) session. These lists should ordinarily be typed or computer generated, but must always be legible.

RULE 2.1.9: Trial documents. No later than two duty days before trial, the trial counsel will provide the judge and defense counsel the following documents, as applicable, by hardcopy or e-mail: all amending court-martial convening orders; and, in trials with members, a seating chart, flyer, and draft findings and sentence worksheets (see Rule 22). The judge may also require copies of proposed voir dire questions in writing and completed court member questionnaires. No later than one duty day before trial on the merits, trial counsel will provide to the detailed court reporter for marking all exhibits which may be used during the merits or sentencing phase of the trial (see Rule 15).

RULE 2.1.10: Court Reporters. Trial counsel is responsible for notifying the detailed court reporter of the date/time, or changed date/time, of any Art. 39(a) sessions and trial. Trial counsel will ensure the court reporter is sworn.

RULE 2.2: Defense counsel requirements.

RULE 2.2.1: General. Unless the judge sets a different deadline, defense counsel will notify the trial counsel and judge, in writing, at least ten duty days before an Art. 39(a) session to resolve motions or the date of trial (whichever is earlier), of the forum and pleas and will file all motions. This is a minimum notice requirement. Defense counsel will, whenever possible, provide such notice and file all motions as far in advance as possible to ensure the orderly administration of justice. If the plea or forum changes after notification, defense counsel will immediately inform the judge and trial counsel of the change.

RULE 2.2.2: Pleas. If the accused intends any plea other than "to the specification(s) of (the) (all) charge(s), (guilty) (not guilty)", the defense counsel will specify in the notice in 2.2.1, above, the actual pleas to be entered, unless such pleas were provided to the judge previously in the offer portion of a

pretrial agreement. If the pleas will be to a named lesser included offense, defense counsel will also provide a copy of the re-written specification which accurately represents the plea, which will be attached to the record of trial as an appellate exhibit.

RULE 2.2.3: Evidence and discovery issues. Defense counsel will notify trial counsel of any witnesses or evidence the defense wants the Government to produce. Such requests will comply with applicable RCMs and orders. Unless the judge sets a different deadline, absent extraordinary circumstances, such requests will be made not less than ten duty days prior to the scheduled Art. 39(a) session and/or the trial date for all witnesses, whether local, active-duty military or other witnesses. (Earlier notice may be required for some witnesses, e.g., laboratory experts, chain-of-custody witnesses or out-of-country witnesses.) Further, it is not unreasonable to require an accused to exercise his or her rights under the Compulsory Process and Confrontation Clauses of the Sixth Amendment in advance of trial, and to be compelled to announce his or her intent to call certain witnesses. Therefore, the judge may require the Government to provide notice to the accused of its intent to use an analyst's report as evidence at trial, after which the accused may be given a reasonable period of time in which he or she may object to admission of the evidence absent the analyst's live appearance at trial. *See Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527 (2009). When the prosecution denies production of defense-requested witnesses or evidence, such denials will be furnished to the defense counsel in writing and reasons for the denial will be stated. If the defense still desires the witness or evidence, the defense counsel will immediately file a motion for appropriate relief, in the form of a motion to compel, with the judge, serving a copy on the trial counsel. If the defense counsel undertakes to obtain a witness on his or her own and such witness does not appear, absent extraordinary circumstances, a continuance will not normally be granted to obtain the presence of such witness. Counsel for both sides are required to bring any discovery problem immediately to the judge's attention.

RULE 2.2.4: Notice of certain defenses. Unless the judge sets a different deadline, defense counsel will notify the trial counsel in writing at least ten duty days before the scheduled Art. 39(a) session and/or the trial date (whichever is earlier) of the intent to offer the defense of alibi, innocent ingestion, or lack of mental responsibility, or the intent to introduce expert testimony as to the accused's mental condition, and of all other notices required by RCM 701(b)(2).

RULE 2.2.5: Witness lists and marking of exhibits. Same requirement as in Rule 2.1.8 above. The accused need not be listed as a witness in this notice requirement. Defense counsel will comply with the requirement to provide exhibits to the court reporter for marking as in Rule 2.1.9 above.

RULE 3: Motions practice. Absent unusual circumstances, such as a particularly complex case, counsel should be prepared to dispose of all motions at one preliminary session. This requires counsel to conduct all reasonable investigation to identify and perfect motions in advance of that one preliminary session. Requests to file motions beyond the deadline set by the judge from counsel who do not comply with this requirement may not be favorably considered. Motions will consist of a written pleadings containing: (1) the relief sought; (2) the burden of persuasion and burden of proof; (3) the facts in issue as believed by counsel and supported by the evidence; (4) a list of evidence and witnesses to be produced; (5) argument and the legal authority upon which the argument is based and contrary legal authority of which counsel is aware; and (6) a conclusion that restates the relief sought. A format for motions is at Appendix C. Unless the judge directs otherwise, both parties will submit all motions in this format. The motion will also state whether the moving party desires to present evidence or oral argument, or both, on the motion. Unless the judge sets a different schedule, the nonmoving party, if opposing the motion, will file a response with opposing counsel and the judge within three duty days after the motion is received or two duty days before any scheduled hearing on the motion, whichever is earlier. The response should follow the format for motions and must include that party's desire whether to present evidence or oral argument, or both, on the motion. The judge may consider failure to file a timely response as conceding the merits of the motion. If neither party desires a hearing and the motion does not involve disputed issues of fact, the judge may rule on the basis of the matters filed. Motions requiring findings of fact must be supported by evidence presented by the parties or by a written stipulation of fact.

RULE 3.1: Filing of Motions. Motions are considered filed with the court when the moving party has provided the signed original, including any enclosures, to the clerk (in person or by confirmed email), as well as a copy, including all enclosures, (also in person or by confirmed email), to both opposing counsel and the judge. Motions sent by mail, courier or other carrier are not considered filed until physically received. In extraordinary circumstances, the judge may allow filing to consist of a copy, including all enclosures, to the clerk, opposing counsel and to the judge and may authorize providing the original motion, including any enclosures, to the court reporter before the motions hearing. Should a motion submitted to the the judge be altered or amended in any way from the motion provided to the clerk, the heading of the motion must identify it as a “corrected copy” and reflect the date of correction. The corrected copy of the motion is considered filed under the same circumstances as above.

RULE 3.2: Speedy trial motions. Speedy trial motions will contain a stipulated chronology of dates and events to which the parties agree and, if needed, a separate chronology from each party for those dates and events as to which there is no agreement.

RULE 3.3: Stipulations in motions hearings. If a motion or objection does not involve a factual dispute, counsel will, to the extent possible, endeavor to enter into a written stipulation of fact or expected testimony concerning undisputed matters for the limited purpose of obtaining a ruling on a motion or objection.

RULE 3.4: Counsel Certification. Every motion, pleading, or other document submitted to the court by a party will be signed by at least one counsel of record. Counsel’s signature constitutes a certification that he or she has read the motion, pleading, or other document; that, to the best of the signer’s knowledge, or upon information and belief formed after reasonable inquiry, it is well grounded in fact and warranted by existing law or is a good faith argument for the extension, modification, or reversal of existing law; and that it is not interposed for any improper purpose, such as to harass or cause undue delay.

RULE 4: Pretrial sessions.

RULE 4.1: Requests. If counsel desires an RCM 802 conference or Art. 39(a) session before the scheduled trial date beyond those set forth above, he or she may request it. The request should include: (1) the purpose of the proposed session; (2) the estimated duration of the session, including, as to Art. 39(a) sessions, the number of witnesses to be called; (3) a proposed date and time of the session; and (4) whether opposing counsel concurs in or objects to the proposed session. Such pretrial sessions are desirable, and the judge may direct such sessions when litigation or resolution of such motions is expected to be lengthy or when disposition of the motion is likely to affect proceeding with trial on the scheduled trial date.

RULE 4.2: Arraignments. Either party may request, or the judge may direct *sua sponte*, an Art. 39(a) session solely for arraignment. Counsel should be prepared for arraignments shortly following service on the judge of the documents set forth in Rule 1.1 above.

Section III. Decorum and Conduct.

RULE 5: Punctuality. Punctuality in all matters affecting the court is required of all parties and reflects preparation and professionalism. When a party unavoidably is or will be late, or the proceedings will be delayed, the judge will be notified as soon as possible and provided an explanation.

RULE 6: Decorum.

RULE 6.1: General. Counsel for both sides shall assist the judge with maintaining a solemn and dignified atmosphere throughout the trial. Generally speaking, counsel are responsible for the conduct of the witnesses they call during court proceedings. As a traditional mark of respect for the judicial system,

all persons in the courtroom, regardless of rank or grade, except the court reporter, will rise when the judge enters or leaves the courtroom. All persons, except the judge and court reporter, will rise when the entire court member panel enters and leaves the courtroom. The trial counsel is responsible for saying (or having the bailiff say), "All rise," whenever the judge or entire court member panel enters or leaves the courtroom. All parties should remain in place until the judge indicates that all may be seated, or upon the full departure of the judge and members.

RULE 6.2: Bar of the courtroom. No one other than a trial participant is allowed inside the bar of the courtroom without the judge's permission when court is in session. When court is not in session, supervisory attorneys and paralegals are allowed inside the bar.

RULE 6.3: Prohibitions. Eating and drinking are not permitted in the courtroom during open sessions (except water or other non-alcoholic beverage in an unmarked opaque container for the trial participants). Chewing gum and tobacco products are not permitted in the courtroom at any time. Absent prior approval by the judge, passing notes or whispering over the bar between trial participants and the gallery is prohibited. Photographs, video and sound recordings (except those by the detailed court reporter or otherwise authorized by the military judge), and radio and television broadcasts shall not be made in or from the courtroom during any trial proceedings. Cell phones, radios, pagers, iPods, BlackBerrys, and similar devices are not allowed in the courtroom unless they are completely turned off. No explosives, flammable liquids, caustic materials, or other hazardous materials will be brought into the courtroom without the judge's prior approval. Firearms or weapons, except when used as exhibits or otherwise explicitly authorized by the judge (e.g., civilian law enforcement personnel or courtroom security officers), are not permitted in the courtroom (see also Rules 15.6, 30 and 31). A copy of Rule 6.3 will be posted near the entry of the courtroom and inside the courtroom.

RULE 6.4: Facility cleanliness. Trial counsel is responsible for ensuring that the courtroom, deliberation room, waiting rooms, and latrines are clean and in proper order before and after each trial. This includes emptying trash containers in all areas. This responsibility also applies to counsel who serve as U.S. Magistrate Court prosecutors in a courtroom used for Magistrate Court; the courtroom and other areas will be in proper order for courts-martial after each session of Magistrate's Court.

RULE 7: Addressing the judge. Counsel and other persons connected with the trial, including court members, witnesses, court reporters, accused, and spectators, will address the judge as "Judge," "Your Honor," or "Sir" or "Ma'am" in the courtroom. Elsewhere, counsel should bear in mind the circumstances and presence of others when addressing the judge.

RULE 8: Ex parte communications. *Ex parte* communications between counsel and the judge concerning any case, except as to docketing and other routine or purely administrative matters, are prohibited. Where counsel desire to inform the judge of unusual problems or issues that are likely to affect the duration, progress, or orderly disposition of the case, counsel may confer with the judge in the presence of opposing counsel (either in person, via telephone conference, or via email with copies furnished to opposing counsel), as provided in RCM 802, or request an Art. 39(a) session. Counsel may also file a brief or memorandum with the judge and opposing counsel, to be made an appellate exhibit, advising the court of the matter in question. In the unusual circumstances when a communication must be made *ex parte*, it should normally be made in writing. Such writing may, upon good cause, be sealed by the judge.

RULE 9: Uniform requirements. Army courts-martial are Federal courts, under Article I of the United States Constitution, and are due the same deference as any other Federal court. Army courts-martial are formal, dignified proceedings charged with determining significant and weighty issues. Accordingly, the appearance and demeanor of all participants in Army courts-martial – civilian or military, counsel or witness -- should reflect the gravity and solemnity of those proceedings.

RULE 9.1: Civilian counsel and civilian court reporters. Male civilian counsel and male civilian court reporters will wear a conservative coat and tie, shirt, slacks, and shoes. Female civilian

counsel and female civilian court reporters will wear appropriate conservative business clothing. Civilian clothing for males and females generally should be such as they would wear to a place of worship or job interview.

RULE 9.2: Military trial participants. Unless the judge orders otherwise, the uniform for military trial participants in Army trials is a Class A uniform (the judge may authorize the court reporter to wear a Class B uniform). Unless the judge orders a uniform other than a Class A or B uniform for trial, judges must wear a Class B uniform under a required black judicial robe while presiding at Army trials. In forward deployed areas, judges should wear the locally prescribed field uniform or ACUs under a required black judicial robe while presiding at Army trials; the judge also may authorize military trial participants to wear the locally prescribed field uniform or ACUs.

RULE 9.3: Civilian witnesses/military witnesses in civilian clothing. To the extent that counsel have control over civilian witnesses' attire, their clothing should be of the type that they would wear to a place of worship or job interview. As an exception to Rule 9.2 above, military witnesses permitted to testify in civilian clothing (*e.g.*, CID agents and MPI investigators) also will wear civilian clothing they would wear to a place of worship or job interview.

RULE 9.4: Exceptions. The judge may grant individual exceptions to the above uniform requirements for good cause shown (for example, an accused returning from an extended absence without ready access to a Class A uniform).

RULE 10: Spectators.

RULE 10.1: General. Spectators are encouraged to attend courts-martial and shall be permitted to observe all trial proceedings, unless otherwise determined by the judge. While no age restrictions apply as to who may be a spectator, no one will be permitted to disrupt the dignified, formal atmosphere of the court-martial. The bailiff will advise parents to consider the nature of expected testimony before bringing young children into the courtroom as spectators, as testimony in some cases may unavoidably be graphic, vulgar, and/or obscene.

RULE 10.2: Restrictions. Spectators may enter and leave the courtroom during open sessions but will not be permitted to disturb or interrupt court proceedings by their conduct. Spectators will not indicate or demonstrate in any manner agreement or disagreement with testimony, procedures or results at a trial, nor will their appearance or attire be permitted to detract from the dignity of the proceedings or to create a disruption. Spectators will not sleep or engage in loud whispering.

RULE 10.3: Sanctions. Spectators who violate these rules may be excluded from the courtroom, held in contempt, or both. A copy of Rule 10 will be posted near the entry to the courtroom and inside the courtroom to place spectators on notice of these rules.

Section IV. Trial Procedure.

RULE 11: Pleas. The accused and counsel will stand and face the judge when entering pleas, and defense counsel will enter the accused's plea. Should the accused's plea be particularly complex, defense counsel may mark the accused's written plea, submitted IAW Rule 2.2.2 above, as an appellate exhibit and when called upon to enter a plea, may announce that the accused pleads as set forth in that appellate exhibit.

RULE 12: Stipulations. Similar to Rule 3.3, if an issue arising during trial does not involve a factual dispute, counsel shall endeavor, to the extent possible, to enter into a stipulation of fact or expected testimony prior to trial concerning the undisputed facts. Counsel may enter stipulations for the limited purpose of obtaining a ruling on a motion or objection.

RULE 12.1: General. Absent extraordinary circumstances, all stipulations shall be in writing.

RULE 12.2: Marking. Stipulations will be marked as Prosecution, Defense, or Appellate Exhibits, as appropriate. Stipulations of expected testimony will be read to the trier of fact but not taken into the deliberation room. Stipulations are not to be mentioned to court members unless previously received into evidence at an Art. 39(a) session.

RULE 13: Voir dire.

RULE 13.1: Conduct. The judge will ordinarily initiate voir dire examination by asking preliminary questions. The judge will then permit such additional questions by counsel in *en banc* or general voir dire as are deemed reasonable and proper by the judge. The judge may require counsel to submit voir dire questions to the judge in advance of trial.

RULE 13.2: Individual voir dire. Counsel must state specific reasons for any desired voir dire of individual members. Subsequent individual voir dire will be limited to those specific reasons and any reasonable follow-up questions.

RULE 13.3: Questionnaires. To expedite voir dire, the trial counsel should provide new members with questionnaires before trial under RCM 912, using the format at Appendix E, and provide those to the judge and, upon request, the defense counsel. No post-trial questionnaires or surveys will be sent to any member nor will any post-trial assessment be requested from any court member except upon approval of the judge.

RULE 13.4: Challenges. Counsel will not state challenges, or lack thereof, in the presence of court members.

RULE 14: Opening statements. Counsel shall confine their opening statements to what they expect the evidence to prove and to issues in the case. Counsel will not use opening statements to argue or instruct as to the law. Counsel will not show to the members during opening statements evidence that has not previously been admitted.

RULE 15: Exhibits.

RULE 15.1: Marking. To save time prior to trial, counsel shall have the court reporter mark any exhibit "for identification," including objects and documents, intended to be used or introduced at trial. See Rules 2.1.9 and 2.2.5. This includes demonstrative exhibits. Prosecution exhibits will be numbered consecutively with Arabic numbers, defense exhibits with capital letters, and appellate exhibits with Roman numerals. Generally, those exhibits that are to be considered on either the merits of the case or in sentencing will be marked as prosecution or defense exhibits; all others should be marked as appellate exhibits (such as those used during motions hearings). To the extent possible, counsel should consider the order in which the exhibits are to be referenced and make every effort to have those exhibits marked sequentially consistent with their use during the trial or hearing. Counsel shall consult in advance with the court reporter on the means to mark exhibits not readily amenable to marking which may require tagging, stickers, or other atypical marking for identification. When questioning a witness or addressing the court about an exhibit, counsel shall specify the exhibit number or letter. Any exhibit shown to a witness must be marked and previously shown to opposing counsel before being used with that witness. Prosecution and defense exhibits will be referred to as "for identification" until the judge admits the exhibit into evidence. Once counsel has concluded examination on or use of an exhibit, it shall immediately be returned to the court reporter's custody. Under no circumstances may a counsel or witness maintain control of an original exhibit after it has been marked as an exhibit without the express permission of the judge. Likewise, neither a counsel nor a witness may mark or in any way alter an exhibit after it has been admitted into evidence without the express permission of the judge.

RULE 15.2: Copies. When a counsel requests to publish a document admitted in evidence to the members, that counsel will have previously made copies for each member and opposing counsel will have previously confirmed those copies are accurate reflections of the original. When counsel are offering an exhibit for which they wish a copy/reproduction substituted in the record (e.g., original personal records of an accused or original family photographs; original checks or other negotiable instruments) the counsel should be prepared with an exact copy/reproduction or accurate representation when offering the exhibit. The copy/reproduction should mirror the actual exhibit as closely as possible, to include the use of color copies (for photographs) or standard 8 1/2 x 11 paper copies (charts, PowerPoint slides) as appropriate.

RULE 15.3: Demonstrative evidence. Photographs, charts, maps, diagrams, and similar testimonial aids should be large enough and positioned for all parties to see. Copies of photographs or other aids (including electronically presented exhibits) may be furnished to each trial participant, in the sole discretion of the judge, when appropriate.

RULE 15.4: Presentation before trial. The trial counsel will show prosecution exhibits to defense counsel before trial. Defense counsel will similarly show defense exhibits to trial counsel before trial, unless otherwise granted an exception by the judge.

RULE 15.5: Substitution. If an item of evidence is inappropriate for inclusion in the record, counsel offering the item shall arrange for and request that a suitable substitute (e.g., a photograph) be inserted in the record. This request should be made when the exhibit is offered into evidence or before the court-martial is adjourned. If the judge approves the request, the trial counsel will ensure that a suitable substitute is included. If a copy of a document must be substituted in the record of trial, only a legible, permanent-type photocopy, not a fax copy, may be used. If an exhibit is in color, the copy must be in color. If photographs are substituted for an exhibit, the photograph must clearly and accurately reflect the evidentiary value of the exhibit (e.g. signatures on a urine bottle or the serial number on a weapon).

RULE 15.6: Safeguarding evidence and firearms. The counsel offering a piece of evidence is responsible for safeguarding that evidence until it is released to the court reporter or to an evidence custodian at the end of trial. Evidence that has not been admitted or has been rejected shall remain out of the members' sight. For safety reasons, if firearms are marked as exhibits, the trial counsel will ensure that before they are brought into the courtroom, they are rendered inoperable in a manner that does not change their evidentiary value, e.g., a locking device or plastic flexi-cuff through the magazine well and chamber while the slide is locked to the rear. Exhibits which could be used as a weapon, such as a knife or pair of scissors, will be attached to an evidence board.

RULE 15.7: Sealed Exhibits. When the judge orally orders any portion of the record sealed, including, but not limited to, matters reviewed *ex parte*, classified materials, medical or mental health records (whether or not reviewed in chambers and/or admitted as evidence), autopsies, MRE 412 sessions (to include motions and responses relating to MRE 412 and regardless whether the matters litigated UP MRE 412 are admitted or not), and child and adult pornographic materials, the trial counsel will ensure the judge prepares a written order detailing the limitations on access to the sealed matters. See *generally* RCM 1103A. This includes exhibits actually admitted into evidence. The trial counsel will ensure the sealed matters are not further reproduced or copied and will remain only in the original record of trial. One suggestion is to place the pages of the record or exhibit ordered sealed in a large envelope, then two-hole punch the envelope on the bottom for placement in the appropriate place in the original record of trial, with the opening of the envelope at the bottom of the record of trial. The Staff Judge Advocate's Office is responsible for reviewing the allied papers and ensuring all required documents are sealed before reproducing the record and mailing the accused or the accused's defense counsel his or her copy. The trial counsel will ensure a copy of the judge's written order sealing the page(s) or exhibit(s) is attached to the outside of the envelope and placed in the other copies of the record of trial. All exhibits and documents ordered sealed, to include videos and images of child pornography, will be appended to the record of trial as set forth above, will not be removed unless ordered by a judge, and will be sent to the Clerk of Court for the Army Court of Criminal Appeals for inspection in accordance with that court's rules.

RULE 16: Witnesses.

RULE 16.1: Presence in the courtroom. Witnesses generally should not sit in the courtroom prior to their testimony. Unless the judge excludes them pursuant to MRE 615, witnesses who will testify only on sentencing may observe the trial on the merits or guilty plea providence inquiry. After witnesses have been permanently excused, they may remain as spectators. The judge will consider MRE 615 and applicable law in deciding whether victims may be excluded from proceedings.

RULE 16.2: Preparation. Trial counsel will ensure that all witnesses understand the physical layout of the courtroom, where they should go, and what they should do upon entering the courtroom. Counsel should arrange before a trial session for witnesses to be immediately available when called to testify. Military witnesses must not salute the judge or president of the court in the courtroom.

RULE 16.3: Oaths and identification. Trial counsel will swear all witnesses testifying on the merits in the presence of the members and fully identify them even if they have been previously sworn and identified at an Art. 39(a) session. If a witness is later permanently excused and recalled, the witness will be resworn. If a witness is later temporarily excused and recalled, the witness will be asked if they are the same person who previously testified in the court-martial and will be reminded he/she is still under oath. Trial counsel will not announce the witness' social security number or require the witness to do so. The trial counsel should identify the witness in his initial leading question, as in the following examples:

(1) Are you Staff Sergeant Will E. Peters, of Battery A, 2d Battalion, 7th Air Defense Artillery, 11th Air Defense Artillery Brigade, Fort Bliss, Texas?

(2) Are you Mrs. June A. Cleaver, of Smithville, Georgia?

Witnesses who do not wish to disclose their home town in open court are not required to do so. In such cases, trial counsel will state, after the witness has given his or her name, that the other identifying information has already been provided to the reporter for inclusion in the record, if the identification does not otherwise appear in the record. The form at Appendix F may be used to provide such information to the court reporter.

RULE 16.4: Gestures or Actions by Witnesses. If, during testimony, witnesses make gestures having evidentiary value or engage in other nonverbal conduct, the counsel examining the witness is responsible to concisely and accurately describe the witnesses' actions for the record. If not done contemporaneous with counsel examination, counsel should request the military judge's permission to describe such gestures or actions for the record.

RULE 17: Conduct of Counsel.

RULE 17.1: Standing. Unless otherwise authorized, counsel will stand when addressing the judge (to include when making objections) and court members or examining witnesses.

RULE 17.2: Demeanor. Counsel will not indicate, in any manner inconsistent with the dignified nature of a court-martial, agreement or disagreement with testimony, argument by opposing counsel, a court ruling, or other procedures at trial, except by proper objection or motion.

RULE 17.3: Undue familiarity. Counsel shall refrain from any familiarity among themselves, with the judge, with court members, or with witnesses, in the presence of the accused or other trial participants, or while court is in session or during any recess. Colloquy between multiple defense counsel or between multiple trial counsel will not be permitted during trial without the judge's prior approval and then should be infrequent and of short duration. Opposing counsel will not confer while court is in session without the judge's prior approval.

RULE 17.4: Treatment of witnesses and positioning. Counsel will conduct questioning of witnesses and arguments to the court at a reasonable distance from the witness or court. This reasonable distance will be from a relatively fixed location (e.g., from counsel table, a lectern, or the end of the court-member box). Counsel will not roam, pace, or aimlessly wander throughout the courtroom nor take a position that blocks the view between a witness and other trial participants. Counsel will not first approach a witness without asking prior permission of the judge. Witnesses will be treated with fairness and consideration – they will not be crowded, shouted at, ridiculed, humiliated, or otherwise abused. All witnesses, except children, will be referred to by their surnames and titles, as applicable.

RULE 17.5: Double-teaming. Except with prior permission of the judge, only one counsel per side may examine any one witness or rise to address the court on any particular issue, motion, argument, or objection.

RULE 17.6: Conduct of opposing counsel. During argument of counsel or examination of a witness, opposing counsel shall remain seated at counsel table, except when rising to state an objection. Opposing counsel shall not talk to others or otherwise engage in conduct that diverts attention from counsel's argument or examination. (The foregoing does not prohibit counsel whispering or passing notes to a co-counsel or the accused, and vice-versa, if attention is not otherwise diverted from opposing counsel's presentation.)

RULE 17.7: Sidebar conferences. Sidebar conferences will not be used. If matters must be discussed out of the presence of the court members, counsel will request an Art. 39(a) session.

RULE 17.8: Offers of proof. Offers of proof are not evidence. A judge's essential findings will not be based on offers of proof. Offers of proof will be used only in those rare circumstances set forth in MRE 103(a)(2).

RULE 17.9: Judicial Notice. Counsel will advise the judge and opposing counsel in writing, as soon as possible and preferably before trial, of any requests for judicial notice. Counsel will provide a copy of the applicable law, regulation, order or other source to be used in determining whether to take judicial notice, which will be appended to the record of trial as an appellate exhibit, unless it can be reasonably anticipated to be readily available to any possible reviewing authority. This is especially important in Article 92 and Assimilative Crimes Act cases where local regulations and state statutes may not be readily available to the appellate courts.

RULE 18: Court Reporter. Each time the court convenes or reconvenes, the court reporter shall note in the record the presence or absence of the trial participants and the time at which the court convenes or reconvenes. The court reporter shall also note the time at which recesses are taken and the time of closing and of adjournment. Court reporters shall 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.

RULE 19: Objections. When counsel initially enters an objection, he or she will state only "Objection, Your Honor." Counsel will not provide a specific basis for it unless asked by the judge. Opposing counsel will immediately cease examination and await the judge's resolution of the objection. Before making any argument on an objection, counsel will request permission from the judge. Any argument will be direct and succinct. Motions *in limine* are encouraged regarding evidentiary issues counsel believe are likely to be contested at trial. After the judge rules on an objection or makes any other ruling, counsel shall not make further argument or comment, except with the express permission of the judge. After a ruling, counsel may, however, make offers of proof to preserve an objection or issue for appellate purposes or request reconsideration. In trials with members, such offers of proof should normally be made in an Art. 39(a) session. See MRE 103(c).

RULE 20: Closing arguments. In closing argument, counsel may make reasonable comment on the evidence, challenge the veracity of a particular witness, and draw such inferences from the testimony as will support the party's theory of the case, but shall not assert a personal belief in the justness of a

particular cause, the guilt or innocence of the accused, or the credibility of a witness, including the accused.

RULE 21: Instructions. If either counsel desires any specialized instructions (those not contained in DA Pamphlet 27-9, *Military Judges' Benchbook* or any approved interim change to the *Benchbook*), such instruction shall be submitted in writing with supporting authority, if any, to the judge and opposing counsel at least two duty days prior to the date set for trial, unless the judge directs a different deadline.

RULE 22: Findings and sentence worksheets. In trials with members, trial counsel will prepare tailored findings and sentence worksheets, using the formats in DA Pamphlet 27-9, *Military Judges' Benchbook*, and submit them to the judge and opposing counsel at least two duty days prior to trial, unless the judge directs a different deadline. Any lesser included offenses likely to be in issue will be reflected on the findings worksheet to reflect a proper finding as to the lesser included offense.

RULE 23: Presentation of the accused. In trials with members, the accused and his or her counsel will stand and face the president of the court prior to announcement of the findings, and, if necessary, the sentence. In a trial before military judge alone, the accused and defense counsel will stand and face the judge prior to such announcement(s).

RULE 24: Trial procedure guide. Unless otherwise modified by the judge, the trial guide in DA Pamphlet 27-9, *Military Judges' Benchbook* with approved interim changes will be used. An unofficial DA Pamphlet 27-9, *Military Judges' Benchbook* containing all approved interim changes is available at www.jagcnet.army.mil/usati.

RULE 25: Restraint of the accused and witnesses.

RULE 25.1: Accused. The accused will not be physically restrained in a manner observable by the court members unless the judge approves the restraint in advance. If defense counsel have a concern with regard to the nature of restraint of the accused, it shall be brought to the attention of the judge immediately and outside the presence of members.

RULE 25.2: Witnesses. Because of special security needs at Fort Leavenworth and other installations with confinement facilities and the frequency of trials involving inmate witnesses, and considering the familiarity of those assigned to such installations with inmates wearing restraints and prison uniforms, trials at those installations involving inmate witnesses may necessitate that such witnesses testify in the uniform and restraints compatible with their custody status. Whenever possible, inmate witnesses will not wear restraints other than hand irons. Counsel should coordinate with the judge well in advance of trial if they need any special security precautions or exceptions. All parties will take every precaution to prevent witnesses from being seen by members in any form of restraint or prison clothing, unless the witness is scheduled to testify in those restraints or clothing. In all cases, the judge will rule on the uniform and restraint, if any, of all witnesses and state such rationale on the record.

RULE 26: Withdrawal by counsel.

RULE 26.1: Trial counsel. After referral, trial counsel shall not be permitted to withdraw unless substitute qualified counsel is detailed prior to or simultaneously with the relief of the withdrawing counsel.

RULE 26.2: Detailed defense counsel. After referral, detailed military defense counsel may not withdraw from representation of the accused without the judge's approval, whether or not the accused wishes to release the detailed military counsel. Approval will take into consideration compliance with RCM 505(d)(2), RCM 506(b)(3) and RCM 506(c), as applicable.

RULE 26.3: Individual counsel. Once individual military or civilian counsel enters an appearance (to include a written appearance), such counsel may not withdraw from representation of the accused without the judge's approval, whether or not the accused wishes to release the counsel.

Approval will take into consideration compliance with RCM 506(c), as applicable. Willful failure of a fee-paying client to comply with the terms of the contract for representation may provide grounds for counsel to request to withdraw. The mere failure, however, to pay the fee does not terminate the attorney's obligations as an officer of the court. Approval of the request to withdraw will take into consideration whether: (1) counsel has taken reasonable steps to avoid foreseeable, material prejudice to any substantial right of the accused; (2) adequate time exists to employ other counsel without undue prejudice to the accused or the Government; and (3) the interests of justice and orderly administration of justice are advanced.

Section V. Post-Trial Matters.

RULE 27: Post-trial and appellate rights. The defense counsel will explain to the accused his or her post-trial and appellate rights prior to trial with the aid of an applicable form tailored to the level of court-martial; however, the defense counsel and accused should ordinarily not sign or date the form until the date the sentencing phase begins. The defense counsel will submit the completed and signed form to the judge at the start of sentencing proceedings, after the court reporter has marked it as an appellate exhibit.

RULE 28: Records of trial.

RULE 28.1: Original Documents Related to the Case. After referral and service of the charges on the accused and before arraignment, trial counsel shall submit original signed documents pertaining to the case to the court reporter. This includes, but is not limited to, the DA Form 5112 and magistrate's memorandum approving or disproving pretrial confinement, charge sheet, forwarding recommendations, Article 32 report of investigation (if applicable), pretrial advice, and convening authority referral documents. Trial counsel should make a working copy of all documents, but should ensure all work product and matters which may not be admissible (e.g., counseling statements) and matters not related to offenses charged are not placed in the original files. If and when additional documents pertaining to the case are created after referral (e.g., discharge/resignation in lieu of court-martial, withdrawal of charges, motions, judicial orders or requests for deferment) counsel are obligated to deliver the original of these documents to the court reporter for inclusion of the record as soon as possible. The assigned court reporter will maintain all original documents until the record of trial is assembled. Once delivered to the court reporter, no one may remove original documents from the original file without the express permission of the judge. Likewise, after delivery to the court reporter original documents and exhibits may not be altered, amended, removed or marked on in any way without the express permission of the judge.

RULE 28.2: Errata. Changes in the record of trial due to errors will be made by trial and defense counsel by recording the necessary changes on an errata sheet. Substantive changes should first be coordinated by counsel with the court reporter. If there is disagreement, the matter shall be presented to the judge for resolution.

RULE 28.3: Trial counsel review. Before forwarding any record of trial to the judge for authentication, trial counsel present for trial must personally review it for accuracy and completeness and initiate corrective action, as required. Trial counsel should ensure that the record is free of transcription errors when it is forwarded to the judge for authentication.

RULE 28.4: Defense counsel review. Trial counsel will ensure that a photocopy of the record is provided to the defense counsel present for trial concurrently with the original record being provided to trial counsel for review. Defense Counsel will note on the authentication sheet the date they received the record for review. Court reporters preparing the record of trial may use the modified DD Form 490 at Appendix G to facilitate record of receipt. The purpose of defense counsel being provided the record is to provide an opportunity to submit necessary corrections, if any, prior to authentication, not to prepare and complete post-trial submissions on behalf of the accused.

RULE 28.5: Time for review. When providing the record of trial to counsel for errata, the court reporter will set a due date based on the counsel reviewing 150 pages per day. Counsel will expeditiously review records of trial and comply with that due date (except as noted below). Except in extraordinary circumstances, counsel should be able to review at least 150 pages of double-spaced typing per calendar day while they are at home station and not on leave or pass, or in trial or conducting an Article 32 investigation. If counsel are not at home station, are on leave or pass, or are in trial or conducting an Article 32 investigation during the period before the due date, counsel should contact the court reporter for adjustment of the due date. If trial counsel or others responsible for post-trial processing experiences inordinate delay awaiting defense counsel review, after reasonable efforts they may consult the judge and forward the record for the judge's authentication.

RULE 28.6: Court reporter responsibility after authentication. Following the judge's authentication of the original record, the reporter will ensure that all changes are made to other copies of the record, which then shall be distributed as required. To facilitate this, trial counsel must ensure the court reporter receives the record after the judge has authenticated it.

RULE 28.7: Electronic Review. At the direction of the judge, when the judge deems it feasible to ensure the presence of all exhibits by means other than personal observation, the transcript may be forwarded by e-mail and the judge will correct the transcript by editing the Microsoft Word document itself. The original and all copies of the authenticated transcript shall be produced from the judge's edited Word document. The judge will e-mail his/her errata sheet and authentication page to the court reporter, followed by mailing the hard copy of both documents to the court reporter.

Section VI. Supporting Trial Personnel.

RULE 29: Bailiff. Unless the judge directs otherwise, the court requires a bailiff at every Art. 39(a) session at which witnesses will be called and at every trial. The bailiff will obtain witnesses as they are called to testify, call everyone to rise when the judge or the entire panel enters or leaves the courtroom, and take care of administrative errands during trial. The bailiff will neither be a witness, nor the unit escort, nor a guard for the accused. Likewise, a bailiff should neither have an interest in the case nor a close association with the accused or a victim of a charged offense. In cases of an enlisted accused, the bailiff will ordinarily be a noncommissioned officer senior to the accused. In cases of an officer accused, the bailiff will ordinarily be an officer senior to the accused, if reasonably available. If not reasonably available, the bailiff will be a noncommissioned officer in the rank of SFC or above. Trial counsel is responsible for obtaining and briefing the bailiff as to the bailiff's duties (see Appendix D) and providing the bailiff a copy of Appendix D. If a bailiff is not present, trial counsel will perform the bailiff's duties.

RULE 30: Guards. Unless otherwise directed by the judge, guards, if necessary, will not be permitted inside the bar of the courtroom. Firearms or weapons, except when such are to be exhibits or when otherwise explicitly authorized by the judge (e.g., civilian law enforcement personnel and courtroom security officers), are not permitted in the courtroom. (See Rule 15.6 regarding firearms as exhibits; Rule 25.1 regarding restraint of the accused; Rule 31 regarding courtroom security.) In forward deployed areas where Soldiers normally carry firearms / weapons, the judge may set special rules for firearms or weapons in the courtroom.

RULE 31: Courtroom security. The judge may require that courtroom security officers attend selected trials or hearings. If so, the trial counsel is responsible for ensuring this requirement is satisfied. When used, courtroom security officers will be military law enforcement personnel or United States Marshals attired as the judge directs (which may include their regular uniform, carrying a loaded sidearm and other equipment designated by the Provost Marshal where the trial is held). Use of a courtroom security officer is not an indicator that the accused presents a security or flight risk. An instruction to members to that effect may be appropriate in the judge's discretion.

Section VII. Effective Date.

RULE 32: Effective date. The foregoing Rules of Practice Before Army Courts-Martial are approved and effective on the 26th day of March 2012.

Michael J. Hargis

MICHAEL J. HARGIS
COL, JA
Chief Trial Judge

APPENDIX A

UNITED STATES OF AMERICA

v.

NAME
RANK, U.S. ARMY
UNIT

)
)
)
)
)
)
)

DOCKET REQUEST

(AR 27-10)

SECTION A

(To be completed by trial counsel and delivered to defense counsel not later than the first duty day after referral of charges to trial.)

1. Type of court-martial: ___ GCM ___ SPCM
2. Date charges referred to trial: _____.
3. Date referred charges served upon the accused: _____.
4. Accused (has been) (is not) in pretrial confinement (since _____).
5. Name of detailed defense counsel: _____.
6. Date referred charges provided to defense counsel: _____.
7. The prosecution will be ready for trial on and after: _____. The military judge should consider the following matters when setting a trial date: [ANY pretrial restraint other than pretrial confinement should be noted]

_____.

8. Companion case(s): _____

Printed Name/Telephone Number

(CPT)(MAJ)(LTC), JA
Trial Counsel

Email Address

Date

SECTION B

(To be completed and delivered by defense counsel to trial counsel not later than the third duty day after receipt.)

1. The defense:

[] requests an earlier trial date of _____

[] does not oppose a trial date as indicated in Section A.

[] requests a delay until _____ for the following

reason(s): _____
 _____.

2. Anticipated forum: ____ MJ alone ____ Officer Panel ____ Enlisted Panel

3. Anticipated pleas: ____ Guilty ____ Not Guilty ____ Mixed

4. Anticipated motions:

 _____.

5. Estimated number of days for trial: _____.

6. Civilian counsel: _____ (Name) _____ (Telephone Number)

 Email Address

 Printed Name/Telephone Number

 (CPT)(MAJ)(LTC), JA
 Defense Counsel

 Email Address

 Date

SECTION C

(To be completed by trial counsel and delivered to the military judge not later than the first duty day after return from the defense counsel.)

1. Contents of Section B are noted. The prosecution:

does not oppose the trial date requested by the defense.

opposes the earlier trial date or delay requested by the defense for the following reasons:

_____.

2. Estimated number of days for trial: _____

Printed Name/Telephone Number

(CPT)(MAJ)(LTC), JA
Trial Counsel

Date

NOTE: Charge Sheet(s), Convening Order(s), and ERB or ORB must be delivered, e-mailed, scanned or faxed to the military judge within 24 hours of referral.

APPENDIX B

UNITED STATES OF AMERICA)	
)	
v.)	Docketing Order
NAME)	
RANK U.S. Army)	(Date)
UNIT)	

1. I am the docketing judge in this case. (_____ is the trial judge assigned to the case.) Trial is scheduled to convene at _____ hours on _____ 20___. Pursuant to RCM 701 and 801, the following orders are issued to ensure a fair, orderly, and expeditious trial of this court-martial:

a. Counsel for each side will notify each other, as well as the Court, of the substance of any anticipated motions, including motions *in limine*, not later than 1200 hours local time, (15 duty days prior to trial) 20___. The following issues, if relevant, will be addressed in your notice to each other and the Court.

- (1) Objections based on defects in the preferral, forwarding, investigation or referral of charges (RCM 905(b)(1)).
- (2) Objections based on corrections or defects in the Article 32 investigation or pretrial advice (RCM 906(b)(3)).
- (3) A request for a bill of particulars (RCM 906(b)(6)).
- (4) Whether a sanity board will be requested, or whether there is any good faith basis to question the mental capacity or responsibility of the accused (RCM 906(b)(14)).
- (5) Any motions for discovery, production of evidence or witnesses, including patient records or communications (MRE 513(e)(1)(A)), any consultants or experts (RCM 701, 703, 905(b)(4), and 906(b)(7)), and, if applicable, whether a hearing is requested.
- (6) Any request for continuance (RCM 906(b)(1)).
- (7) Any request for investigative support.
- (8) Any request for change of venue (RCM 906(b)(11)).
- (9) Any evidentiary issues, the resolution of which may cause a delay in the scheduled proceedings of this case.
- (10) Any motions for severance of charge or accused (RCM 905(b)(5), (9)).
- (11) Any objections based on denial of individual counsel (RCM 906(b)(6)).
- (12) Any motions to suppress evidence (RCM 905(b)(3)). The provisions of MRE 304(d), 311(d), and 321(c) shall be strictly adhered to. Notice of intent to admit statements of the accused, evidence seized from the person or property of the accused, or prior identification of the accused, shall be provided to counsel for the accused at the earliest possible time.

b. The trial counsel shall submit in writing to the defense counsel a complete list of witnesses the government anticipates calling in all phases of the trial by 1200 hours local time, (ten duty days before date inserted in para 1a) 20__.

c. The defense counsel shall submit in writing to the trial counsel: a complete list of witnesses whose production by the government is requested by the defense by 1200 hours local time, (ten duty days before date inserted in para 1a) 20__ (RCM 703(c)(2)(A)); and by 1200 hours local time, (ten duty days before date inserted in para 1a) 20__, a complete list of the names and addresses of all witnesses, other than the accused, whom the defense intends to call during the defense case in chief and provide all sworn or signed statements known by the defense to have been made by such witnesses in connection with the case (RCM 701(b)(1)(A)). (Counsel are reminded of RCM 703(b) and (c) concerning what must be contained in the request and potential penalties for failure to submit the name of a witness in a timely manner. If any witnesses requested by counsel are represented by their own defense counsel, counsel shall contact their counsel and determine if the witness is a suspect, and if the witness will invoke his or her Article 31, UCMJ, rights.)

2. Each motion will be in writing (RCM 905(a)). Counsel will state the grounds or basis of each motion, and the specific ruling or relief sought. Counsel will cite the legal authority supporting each motion. Motions are due to the opposing party and the Court by 1200 hours local time, (ten duty days prior to trial), 20__.

3. Each response to a motion submitted is due to the opposing party and the Court by 1200 hours local time, (seven duty days prior to trial), 20__. Any issues regarding the production of witnesses will be addressed as promptly as possible in an RCM 802 session with counsel for each side and the military judge. This may be done in a conference call.

4. Notice of any defenses described in RCM 701(b)(2) shall be provided in writing to the trial counsel no later than 1200 local time, (insert date in Para 1b) 20__. In accordance with Court rules, the defense counsel will notify the Court and trial counsel of trial forum and anticipated pleas in writing at least five duty days before trial.

5. Trial counsel shall provide the military judge with any pretrial agreement (less quantum) and, stipulation of fact as soon as signed by all the parties. If the case is resolved by alternatives to court-martial, trial counsel shall notify the military judge immediately.

(Signature block of military judge)

APPENDIX C

MOTION AND RESPONSE FORMAT

UNITED STATES OF AMERICA)
)
 v.) (Prosecution)(Defense) Motion
) (for Appropriate Relief)
) (to Dismiss)
 (Last Name), (First Name)(MI)) (*in Limine*)
 (Rank), U.S. Army,)
 (Company))
 (BN), (BDE)) (Date)
 10th Mountain Division)
 Fort Drum, New York 13603)

RELIEF SOUGHT

The (Prosecution)(Defense) in the above case requests that the Court (compel the Government to produce Defense requested witnesses)(dismiss Specification 1 of Charge II for failure to state an offense)(prevent the Defense from admitting inadmissible hearsay testimony). The (Prosecution)(Defense) (does)(does not) request oral argument. [These are examples only. Counsel should list in the introductory paragraph a specific summary of what they are requesting the court to do.]

BURDEN OF PERSUASION AND BURDEN OF PROOF

[Here state which side has the burden and the applicable standard]. [Note: The moving party generally has the burden of persuasion (see RCM 905(c)(2)), except that the Prosecution has the burden of persuasion on motions based on lack of jurisdiction (RCM 905(c)(2)(B), denial of speedy trial (same), running of the statute of limitations (same), suppression (MRE 304(e), 311(e)(1) and 321(d)), and unlawful command influence (*United States v. Biagase*, 50 M.J. 143 (1999)).

The burden of proof is generally preponderance of the evidence (RCM 905(c)(1)). Clear and convincing evidence is the standard for consent searches (MRE 314(e)(5)), subterfuge suppression motions (MRE 313(b)), and MRE 321(d)(2) to show a subsequent identification is untainted. The above is NOT an exhaustive list, but only provides examples of the burdens for the more frequently used motions.]

FACTS

[(Note: If the parties can agree to undisputed facts, include, "The Prosecution and Defense, with the express consent of the accused, agree to stipulate to the following facts for the purposes of this motion...."]

WITNESSES/EVIDENCE

The (Prosecution will have)(the Defense requests) the following witnesses/evidence produced and present for this motion: [Facts and offers of proof are not evidence for purposes of the motion unless the opposing counsel agrees to stipulate. Otherwise, the parties should be prepared to call witnesses, request the court take judicial notice, or offer documentary evidence or some other form of proof.]

LEGAL AUTHORITY AND ARGUMENT

[Separate multiple arguments into separate paragraphs with bold headings so the court can follow. Include analysis of the application of the facts to the law. Cite the legal authority upon which you rely

within the body of the argument. Include contrary legal authority, if aware. Do not merely list statutes and cases. For example:]

A soldier may be ordered to provide a urinalysis sample if the order is based upon probable cause (cite authority here). The urinalysis test in this case was not, however, based on probable cause. The company Commander, CPT X, admits to getting an anonymous phone call saying that SPC Y (the accused in this case) had been seen, three weeks ago, with a person the anonymous caller “knew” used marijuana. The caller did not describe how he “knew” the other person used marijuana. Based solely on that information, CPT X ordered SPC Y to take a urinalysis test. Therefore, the results of the urinalysis test are not admissible as evidence against the accused (cite legal authority here).

Or

While the urinalysis in this case was ordered by the Commander, CPT X, he did so at the request of Mr. A, a counselor at ADAPCP, as part of SPC Y’s enrollment in ADAPCP. Evidence protected by the Limited Use policy is not admissible in a court-martial (cite authority here). Because the urinalysis test results in this case are protected by this policy, they are inadmissible.

Or

The accused told his friend, SPC Y, two days after the alleged rape occurred that “she (the victim) wanted me.” The Defense wants to call SPC Y to testify to this statement. The Government moves *in limine* to prevent that testimony as inadmissible hearsay (cite authority here).

CONCLUSION

Based on the above, the (Prosecution)(Defense) requests that the Court (compel the Government to produce Defense requested witnesses)(dismiss Specification 1 of Charge II for failure to state an offense)(prevent the Defense from presenting inadmissible hearsay testimony). [Be specific.]

(Name of Counsel)
(Rank), JA
(Trial)(Defense) Counsel

[A CERTIFICATE OF SERVICE IS NOT REQUIRED.]

I certify that I have served or caused to be served a true copy of the above on the (Trial)(Defense) Counsel on _____ 20__.

(Name of Counsel)
(Rank), JA
(Trial)(Defense) Counsel

APPENDIX D

BAILIFF'S DUTIES

1. Uniform for Bailiff.
 - a. Court member trials: Class A (Green or ASU), Class B or ACU, as designated by the judge.
 - b. Judge alone trials: Class A (Green or ASU), Class B or ACU, as designated by the judge.
2. Duties.
 - a. The bailiff will report to the trial counsel in the courtroom 30 minutes before the court start time to help the trial counsel set up the courtroom.
 - b. The bailiff is the only link between the parties (judge, counsel, accused, court reporter, and court members) and anyone else when the court is in session. The bailiff will deliver any necessary messages to the parties during trial.
 - c. The bailiff will ensure that the court members remain sequestered during deliberations. The bailiff will post himself or herself outside the door of the deliberation room and will let the parties know when the court members are ready to have the court reconvene.
 - d. The bailiff will remain alert at all times.
 - e. During trial, the bailiff will position himself or herself so that he or she not only observes the parties, but also any spectators. The bailiff will ensure a quiet and orderly atmosphere exists in the waiting room area and spectator gallery at all times. The bailiff will politely escort loud, disruptive, or sleeping spectators from the courtroom. Children may observe trials, but if they become disruptive, the bailiff will ensure that they leave the courtroom.
 - f. Food, chewing gum, beverages (other than water), cameras, tape recorders, videocameras, and weapons (unless authorized by the judge) are not permitted in the courtroom. The judge may permit parties (counsel and the accused) and court members to have a beverage (e.g., a cup of coffee or water) in the courtroom. Photographs, video and sound recordings (except those by the detailed court reporter or otherwise authorized by the military judge), and radio and television broadcasts shall not be made in or from the courtroom during any trial proceedings. Cell phones, radios, iPods, BlackBerrys, pagers, and similar devices that make noise are not allowed in the courtroom, unless they are disengaged (completely turned off). The bailiff will assist the court in enforcing these prohibitions in a dignified, professional fashion. Absent a situation involving self-defense or defense of another, a bailiff shall not make physical contact with anyone in the gallery.
 - g. Witnesses are not allowed to sit as spectators before they testify unless permitted by the military judge. If the witness is present only to testify during the sentencing phase of the trial, however, the witness may observe the findings portion of the trial before testifying.
 - h. The bailiff will announce loudly, "ALL RISE," on the following occasions:
 - (1) Each time the judge enters or leaves the courtroom while wearing the judicial robe.
 - (2) Each time the court members collectively enter or exit the courtroom.

i. The bailiff will ensure the members are in proper order before they enter the courtroom. Members should refer to the seating chart posted in the deliberations room, for reference.

j. As counsel call for a witness, the bailiff will quickly leave the courtroom to obtain the witness and escort the witness into the courtroom. Counsel should provide to the bailiff a list of witnesses and the order in which they are to be called, so the bailiff can position the next witness close to the courtroom (in the event the witness waiting area is located some distance from the courtroom). After the witness testifies, the bailiff will escort the witness from the courtroom while obtaining the next witness.

k. The bailiff will not discuss the testimony of witnesses or the happenings within the courtroom with the court members, with other witnesses, spectators, or anyone else while the trial is ongoing.

l. After each trial day and after the trial terminates, the bailiff will assist the trial counsel in restoring the courtroom, deliberation room, waiting room area, and latrines to a neat and orderly appearance. This duty may include emptying the trash containers in these rooms and ensuring each latrine contains an adequate supply of toilet paper, paper towels and soap.

m. After trial concludes, the bailiff is responsible for entering the deliberations room and recovering all notes, slips of paper and other written documents. The bailiff will not read any of these documents, but will take them directly to the nearest shredder and destroy them.

n. The bailiff's duties continue until the trial counsel releases the bailiff after trial.

c. _____

d. _____

13. Past duty assignments (last 10 years).

<u>From/To</u>	<u>Command</u>	<u>Position</u>
_____	_____	_____
_____	_____	_____
_____	_____	_____
_____	_____	_____
_____	_____	_____
_____	_____	_____
_____	_____	_____
_____	_____	_____

Signature _____

APPENDIX F

Witness Identification Form

Rank (if military): _____

Full Name: _____
 First Middle Last

(If military): Unit of Assignment: _____

 Installation & State: _____

(If Civilian): City, State: _____

APPENDIX G

AUTHENTICATION OF THE RECORD OF TRIAL

IN THE CASE OF

[NAME, SSN, RANK]

[UNIT AND ADDRESS]

I received the completed record of trial for review and authentication on _____ (date) _____.

(Name of Military Judge)
(MAJ)(LTC)(COL), JA
Military Judge

DATE: _____

ACKNOWLEDGEMENT OF RECEIPT AND EXAMINATION

I received the record of trial for review in the foregoing case on _____ (date) _____.

(Name of Defense Counsel)
(CPT)(MAJ)(LTC), JA
Defense Counsel

DATE: _____

The record of trial was served on defense counsel on _____ (date) _____. After verifying receipt with defense counsel on _____ date _____ and conferring with the military judge on review by defense counsel on _____ date _____, the record was forwarded for authentication without completion of defense counsel's review.

(Name of CoJ)
(CPT)(MAJ)(LTC), JA
Chief, Military Justice

UNITED STATES ARMY TRIAL JUDICIARY
RULES OF PRACTICE BEFORE ARMY COURTS-MARTIAL

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