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This instruction implements the Uniform Code of Military Justice (UCMJ), the Manual for Courts-Martial (MCM), and Air Force Policy Directive (AFPD) 51-2, *Administration of Military Justice*. It provides guidance and procedures for administering military justice. Users of this instruction must familiarize themselves with the UCMJ, MCM, and applicable Department of Defense (DoD) Directives. It applies to individuals at all levels, including Air National Guard (ANG) members and Air Force Reserve Command (AFRC) members. Commands may supplement this instruction only with the prior, written approval of Air Force Legal Operations Agency, Military Justice Division (AFLOA/JAJM), 1500 West Perimeter Road, Suite 1130, Joint Base Andrews Naval Air Facility Washington, MD 20762; DSN 612-4820. This instruction requires the collection and maintenance of information protected by the Privacy Act of 1974. The authority to collect and maintain this information is in 10 U.S.C. §§ 854 and 865. Privacy Act System of Records Notice F051 AF JA I, *Military Justice and Magistrate Court Records*, applies. Refer recommended changes and questions about this publication to the Office of Primary Responsibility (OPR) using the AF Form 847, *Recommendation for Change of Publication;* route AF Form 847s from the field through Major Command (MAJCOM) functional managers. Ensure that all records created as a result of processes prescribed in this publication are maintained in accordance with Air Force Manual (AFMAN) 33-363, *Management of Records*, and disposed of in accordance with the Air Force Records Disposition Schedule (RDS) located in the Air Force Records Information Management System (AFRIMS).

SUMMARY OF CHANGES

This document has been substantially revised and must be completely reviewed. Major changes include: incorporation of resignations for the good of the service (RILO) procedures; modification of court-martial processing metrics and measures; new victim impact statement requirements; requirement of quarterly status of discipline (SOD) meetings; new DNA processing requirements; new Sex Offender Processing guidance; central witness funding procedures; clarification on state versus UCMJ jurisdiction in cases involving a hung jury or mistrial; updated pretrial agreement guidance; providing records of trial (ROT) to victims after they have testified in a court-martial; the addition of General Counsel of the Department of Defense Memorandum "Policy and Procedures Applicable to DoD and United States Coast Guard (USCG) Civilian Personnel Subject to Uniform Code of Military Justice (UCMJ) Jurisdiction in Time of Declared War or a Contingency Operation as Attachment 2, and incorporation of TJAG Policy Memos MJ-01, *The Staff Judge Advocate's Responsibilities to Defense Counsel*, and MJ-02, *Searches and Seizures Involving Air Force Defense Personnel* into the text of Chapter 13. A new Chapter 14 has been added to incorporate TJAG Policy Memos TJS-03 and TJS-04, *Air Force Standards for Criminal Justice* and *Judicial Conduct and Discipline of Air Force Trial and Appellate Military Judges*. *Air Force Standards for Criminal Justice, Uniform Rules of Practice Before Air Force Courts-Martial, The Air Force Uniform Code of Judicial Conduct, Regulations and Procedures Relating to Judicial Discipline,* and *The Air Force Judicial Ethics Advisory Council* have been added as Attachments 3, 4, 5, 6, and 7, respectively. This AFI also implements the Report of Result of Trial memorandum, replacing the AF Form 1359, *Report of Result of Trial.*

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Chapter 1

PURPOSE, COMMAND INFLUENCE, AND PROFESSIONAL CONDUCT

1.1. Purpose. This instruction sets forth requirements for the administration of military justice. The primary sources of rules and guidance on military justice are in the Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 801, et seq., and the Manual for Courts-Martial (MCM).

1.2. Unlawful Command Influence (Articles 37 and 98, UCMJ; Rules for Courts-Martial (RCM) 104). The military justice system must operate free of unlawful command influence. Staff Judge Advocates (SJAs), their staffs, and all personnel involved in the military justice process must be sensitive to the existence, or appearance, of unlawful command influence. Likewise, they must be vigilant and vigorous in efforts to prevent it and to respond appropriately to its occurrence. SJAs should periodically discuss with commanders the importance of avoiding even the appearance of unlawful command influence, and act decisively when appraised of facts or circumstances which might give rise to it.

1.3. Ethics and Standards of Conduct. Legal ethics and expected standards of conduct in the Air Force are contained in the *Air Force Rules of Professional Conduct* and *Standards for Civility in Professional Conduct*, discussed in Chapter 14, and *Air Force Standards for Criminal Justice* at Attachment 3.

1.3.1. General Application. These rules and standards apply to all military and civilian lawyers, paralegals and nonlawyer assistants in The Judge Advocate General's Corps, USAF.

1.3.2. Application to Foreign National Attorneys Overseas. These rules and standards apply to all foreign national lawyers employed overseas by the Department of the Air Force, to the extent these rules are consistent with applicable domestic law and professional standards.

1.3.3. Application to All Practitioners in Air Force Proceedings. The rules and standards also apply to all lawyers, paralegals and nonlawyer assistants who practice in Air Force courts or other proceedings, or assist others practicing in such proceedings. This includes, but is not limited to, civilian defense counsel (and their associates and non-lawyer assistants) who have no connection to the USAF other than as participants in such proceedings. Military defense counsel at trial, or appellate defense counsel on appeal, shall provide copies of the *Air Force Rules of Professional Conduct* and *Standards for Civility in Professional Conduct* and the *Air Force Standards for Criminal Justice*, to civilian defense counsel of record. In any case in which military counsel is excused or not detailed, trial counsel shall ensure that civilian counsel has been provided the referenced rules and standards.

Chapter 2

COURT-MARTIAL CONVENING AUTHORITY AND JURISDICTION

Section 2A—Court-Martial Convening Authority

2.1. General Court-Martial Convening Authority (RCM 504(b)(1)). The following Air Force commanders may exercise general court-martial convening authority (GCMCA):

2.1.1. Commanders of organizations identified by Article 22(a)(7), UCMJ, who have been authorized to exercise GCMCA by the Secretary of the Air Force (SecAF) or the express authorization of TJAG to convene GCMs.

2.1.2. Commanders of organizations not identified by Article 22(a)(7), UCMJ, who are designated and authorized to convene GCMs by SecAF under Article 22(a)(8), UCMJ, or empowered by the President under Article 22(a)(9), UCMJ.

2.1.3. Requests for authorization to exercise GCMCA are forwarded through command channels to AFLOA/JAJM.

2.2. Special Court-Martial Convening Authority (RCM 504(b)(2)). The following Air Force commanders may exercise special court-martial convening authority (SPCMCA):

2.2.1. Commanders authorized to convene GCMs under paragraph 2.1.

2.2.2. Commanders of organizations identified by Article 23(a), UCMJ, who have been authorized to exercise SPCMCA by SecAF. Submit requests for SecAF action under Article 23(a)(7) to AFLOA/JAJM.

2.2.3. Commanders of organizations identified by Article 23(a)(4), UCMJ, who are not authorized to exercise SPCMCA by SecAF, but are authorized by the appropriate MAJCOM commander to convene special courts-martial. MAJCOM SJAs send a copy of all such authorizations to AFLOA/JAJM.

2.2.4. Commanders who are not authorized to exercise SPCMCA by SecAF, can be authorized by the commander of an Air Force component of a unified or specified combatant command. The commander of an Air Force component of a unified or specified combatant command may only authorize subordinate commanders to exercise SPCMCA if the subordinate commander commands an organization identified by Article 23, UCMJ, and the subordinate commander commands an organization or unit assigned, or attached to the Air Force component commander's command. The Air Force component command SJA sends a copy of all such authorizations to AFLOA/JAJM.

2.3. Summary Court-Martial Convening Authority (RCM 504(b)(3), RCM 1302). SPCMCAs and GCMCAs may convene summary courts-martial (SCM). The commanding officer of a detached squadron or other detachment of the Air Force may convene a SCM, as provided in Article 24(a)(3), UCMJ, only with the express authorization of the Air Force GCMCA over the detached squadron or other detachment consistent with RCM 504(b)(2)(B).

Section 2B—Jurisdiction

2.4. Court-Martial Convening Authority Actions Involving Tenant Organizations. All members of a tenant unit or Air Force Element (AFELM), whether designated as a unit or not, are attached to the host command and its appropriate subordinate and higher commands for the exercise of general, special, and summary courts-martial convening authority. On bases, to include joint bases, where a unit of another military service has been designated as the host unit, the Air Force unit that has the preponderance of military justice capabilities will be considered the "host command" for the purposes of this paragraph.

2.4.1. All members of a stand-alone Air Reserve Station or Air Reserve Base are attached to the host command of the nearest active duty Air Force installation and its appropriate subordinate and higher commands for the exercise of general, special, and summary courts-martial convening authority.

2.4.2. Air National Guard (ANG) members who commit UCMJ offenses while on Title 10 orders will ordinarily be tried by the active duty unit to which they are attached, if applicable. ANG members not attached to an active duty unit will be attached to the nearest active duty Air Force installation and its appropriate subordinate and higher commands for the exercise of general, special, and summary courts-martial convening authority.

2.4.3. While attachment for court-martial convening authority purposes does not serve to divest any other commander from the exercise of such authority over a member of the tenant unit, AFELM, or members assigned or attached to a reserve station or base, the concurrent exercise of such authority by the host command is preferred to expeditiously resolve the matter, preserve resources, and retain command prerogatives pertaining to matters affecting the maintenance of good order and discipline within the installation. Members of a tenant unit, AFELM, or members assigned or attached to a reserve station or base, include personnel on temporary duty with or otherwise attached to it. AFI 90-1001, *Responsibilities for Total Force Integration*, may also be applicable.

2.4.3.1. When a support agreement differing from that above is necessary or desirable, it must be documented at the GCMCA level or higher.

2.4.3.2. All judge advocates assigned as senior trial counsel and senior defense counsel, area defense counsel, and defense paralegals are exclusively assigned to the Air Force Legal Operations Agency (AFLOA) for court-martial jurisdiction. All personnel assigned to AFLOA are exclusively attached to the Air Force District of Washington (AFDW) for court-martial jurisdiction. Military judges are assigned to AFDW for court-martial jurisdiction.

2.4.3.3. All commissioned officers and enlisted personnel of the Department of the Air Force assigned or attached to Headquarters U.S. Air Force, the Office of the Secretary of the Air Force, the Office of the Joint Chiefs of Staff, the Department of Defense, or the Office off the Secretary of Defense, are attached for the duration of such assignment or attachment to AFDW and subordinate units for general, special, and summary court-martial convening authority. This paragraph applies to active duty Air Force members and members of the reserve components (Air Force Reserve and ANG) when subject to the UCMJ in accordance with 10 U.S.C. § 802, and it includes those personnel on temporary duty with, or otherwise attached to, the organization.

2.4.3.4. Commissioned officers and enlisted members whose organization is not subordinate to a major command and who are not stationed on an Air Force installation with an Air Force commander authorized to exercise general or special court-martial convening authority are attached to AFDW and the 11th Wing for the exercise of general, special, and summary court-martial convening authority. Such organizations include, but are not limited to, Air Force field operating agencies; Air Force direct reporting units; and Air Force elements of Department of Defense activities, Department of Defense field agencies, and other departments and agencies of the United States Government. Commissioned officers and enlisted members assigned to the North Atlantic Treaty Organization and stationed in Europe are attached to the United States Air Forces Europe (USAFE) for disciplinary purposes. This paragraph applies to active duty Air Force members and members of the reserve components (Air Force Reserve and Air National Guard) when subject to the UCMJ in accordance with 10 U.S.C. § 802, and it includes those personnel on temporary duty with, or otherwise attached to, the organization.

2.4.3.5. All inmates, parolees and members on appellate leave assigned to the Air Force Security Forces Center, Corrections Division, are attached to AFDW and its appropriate subordinate commands for the exercise of general, special, and summary court-martial convening authority.

2.4.4. Sole Authority. This section is the sole authority for legal service support. No other order, writing or implementing agreement is required unless otherwise provided for herein.

2.5. Convening Authority Actions Involving Airmen in Joint Commands and Deployed Areas. While a commander of a unified or specified combatant command may convene courts-martial over members of any of the armed forces, a joint force commander normally should allow court-martial jurisdiction over Air Force members to be exercised by the appropriate Air Force convening authority.

2.5.1. Airmen in a joint command, joint task force, or in a deployed area fall under the Air Force component commander's chain of command for military justice purposes. Air Force convening authorities should exercise court-martial jurisdiction over members of other services only when warranted by RCM 201(e). AFI 38-101, *Air Force Organization*; AFI 51-202, *Nonjudicial Punishment* (Procedures for Multi-service Commanders).

2.5.2. Airmen assigned or attached to an Air Expeditionary Wing, Group, Squadron or Task Force fall under the Air Expeditionary chain of command for military justice purposes.

2.5.3. Airmen remain assigned to a home station unit's chain of command for military justice purposes while attached to a joint command, joint task force, or an Air Expeditionary chain of command.

2.6. Jurisdiction Involving State or Foreign Prosecution Interest.

2.6.1. In General. When a member is subject to both UCMJ and state or foreign jurisdiction for substantially the same act or omission, the determination of which sovereign shall exercise jurisdiction should be made through consultation or prior agreement between appropriate Air Force and civilian authorities. RCM 201(d). If a state or foreign authority's exercise of jurisdiction will not meet/or has not met the ends of good order and discipline, it may be appropriate to seek permission from SecAF to exercise UCMJ authority. Convening authorities and SJAs should foster relationships with local civilian authorities with a view

toward maximizing Air Force jurisdiction. Except as discussed in paragraph 2.6.3., a member who is either pending trial or has been tried by a state or foreign court, regardless of whether the member was convicted or acquitted of the offense(s), should not ordinarily be tried by a court-martial or subjected to nonjudicial punishment proceedings for the same act or omission. This policy is based on comity between the Federal Government and state and foreign governments and is not intended to confer additional rights upon the accused. See *United States v. Kohut*, 44 M.J. 245, 247 (C.A.A.F. 1996) (quoting Manual of the Judge Advocate General of the Navy § 0124, JAGINST 5800.7C (Change 1, 1992)). This limitation does not apply to vacation proceedings held under RCM 1109 and Part V, paragraph 6a(4) of the MCM. A member may be considered to be pending trial when state or foreign authorities have expressed their intention to try the member, even if formal charges have not been brought, e.g., upon arrest of the member or a representation by civilian authorities that they intend to pursue the case.

2.6.2. Procedure. When a member is subject to both UCMJ and state or foreign jurisdiction for substantially the same act or omission, Air Force authorities must determine whether the exercise of jurisdiction is in the best interests of the Air Force. If the exercise of jurisdiction is sought, Air Force authorities (normally the SJA) shall contact appropriate civilian authorities and notify them of the Air Force desire for jurisdiction. Procedures for seeking jurisdiction in foreign locations are discussed in paragraph 2.6.2.1. If civilian or foreign authorities decline or waive the right to exercise jurisdiction, the Air Force may proceed with military justice action, whether court-martial or nonjudicial punishment. If the civilian or foreign authorities are exercising or express their intention to exercise jurisdiction over the member, neither a court-martial nor nonjudicial punishment may proceed as a matter of comity until the state or foreign proceedings are completed. *Ponzi v. Fessenden*, 258 U.S. 254, 260-61 (1922); *United States v. Panchisin*, 30 C.M.R. 921, 924-25 (A.F.B.R. 1961). If a member has been tried in the state or foreign proceedings, UCMJ action may not be taken unless approved by SecAF, as set forth in paragraph 2.6.3. If the state or foreign proceedings end without jeopardy attaching or if the Air Force receives clear intent that state or foreign proceedings will not continue pending UCMJ action, the principle of comity is satisfied and the Air Force may proceed with nonjudicial punishment or court-martial action.

2.6.2.1. Foreign Criminal Jurisdiction. The procedures to determine whether U.S. authorities or host-nation authorities will have primary criminal jurisdiction over military members present in foreign countries will vary from nation to nation. The status of forces agreement, or similar agreement, should address procedures for dealing with concurrent jurisdiction offenses. AFI 51-703, *Foreign Criminal Jurisdiction*, and AFJI 51-706, *Status of Forces Policies, Procedures, and Information*, will be followed in these cases.

2.6.3. Secretarial Approval. Only SecAF may approve initiation of court-martial or nonjudicial punishment action against a member previously tried by a state or foreign court for substantially the same act or omission, regardless of whether the member was convicted or acquitted of the offense(s). These requests may only be submitted after the member has been tried in a state or foreign court. Submit requests, with full justification, through command channels to AFLOA/JAJM. SecAF approval will be granted in only the most unusual cases when the ends of justice and discipline can be satisfied in no other way. A member shall be deemed “tried” by a state or foreign court if:

2.6.3.1. Jeopardy has attached. Follow the state or foreign law to determine when this occurs. At a minimum, jeopardy attaches when the jury is impaneled and sworn, or when the first witness testifies in a judge alone trial. *Crist v. Bretz*, 437 U.S. 28 (1978). State law may consider a member "tried" even if the court ultimately suspends judgment upon discharge of the accused following probation, permits withdrawal of the guilty plea, or applies some form of alternative sentencing. A member will not be deemed "tried" in situations in which jeopardy attached in state or foreign proceedings and the civilian authorities released jurisdiction to the Air Force prior to resolution of the case when state or foreign law would have authorized further prosecutorial action (such as a mistrial).

2.6.3.1.1. A member will not be deemed "tried" if the prosecution is deferred, held in abeyance, or otherwise diverted from normal channels pending completion of one or more conditions as an alternative to prosecution without an initial judicial determination of guilt. If deferral, abeyance or diversion is conditional and the member remains subject to prosecution should he or she violate a condition, UCMJ action should not be taken until after the deferral, abeyance or diversion is completed. As a matter of Air Force policy, UCMJ action is impermissible without first seeking SecAF approval.

2.7. Jurisdiction Involving Federal Agencies.

2.7.1. Department of Justice (DoJ). DoDI 5525.07, *Implementation of the Memorandum of Understand (MOU) Between the Departments of Justice (DoJ) and Defense Relating to the Investigation and Prosecution of Certain Crimes*, sets forth DoD and DoJ responsibilities for investigating and prosecuting offenses over which the two departments have concurrent jurisdiction.

2.7.2. U.S. Secret Service. The U.S. Secret Service (USSS) exercises primary investigative responsibility for all cases involving alleged threats against the President or successors to the Presidency. 18 U.S.C. § 3056. The Chief, AFLOA/JAJM, or a designee, will meet with representatives of DoJ and USSS to determine which department will exercise further jurisdiction in the case.

2.7.3. The *Military Extraterritorial Jurisdiction Act of 2000* (18 U.S.C. § 3261, et seq) (MEJA). Military members, as well as civilians accompanying the force, may be subject to United States civilian federal jurisdiction for offenses committed while overseas. Submit a report of any potential case involving MEJA, through command channels, to AFLOA/JAJM. See AFI 51-1001, *Delivery of Personnel to United States Civilian Authorities for Trial*, and AFPD 51-10, *Making Military Personnel, Employees, and Dependents Available to Civilian Authorities*, for substantive procedural guidance and procedures.

2.7.4. A member either pending trial or who has been tried by a Federal court may not be tried by court-martial or subjected to nonjudicial punishment proceedings for the same act or omission.

Section 2C—Completion of Service

2.8. Completion of Military Service (RCM 202).

2.8.1. Court-martial jurisdiction extends to those persons whose enlistments have expired, but are awaiting discharge. Article 2(a)(1) and Article 3(a), UCMJ. Action with a view to trial must be taken as soon as practicable to preserve jurisdiction. RCM 202(c).

2.8.2. Generally, jurisdiction to try a member of the military by court-martial ceases upon discharge or other separation. Jurisdiction over active duty military personnel normally continues until the member receives a valid discharge certificate, there is a final accounting of pay, and the member has completed administrative clearance processes required by his or her service Secretary. *United States v. Hart*, 66 M.J. 273 (C.A.A.F. 2008). SJAs should recognize that exceptions to this general rule might apply including regaining military jurisdiction for members upon reentry into military service. See RCM 202(a), Discussion (2)(B)(iii) and RCM 204(d). A GCMCA may recall an Airman separated or discharged prior to the expiration of a term of service on active duty so long as the Airman has a reserve commitment as a member of a reserve component. If the matter results in trial by court-martial, the record of trial (ROT) must include evidence that establishes jurisdiction over the accused.

Section 2D—Air Force Reserve and Air National Guard Members

2.9. Jurisdiction Over Air Force Reserve and Air National Guard Members (RCM 202).

2.9.1. In General. ANG Members while in Federal status and Air Reserve members including retired members are subject to UCMJ jurisdiction for offenses committed while on active duty or on inactive duty training status. Reserve members performing continuous duty in an inactive duty for training status overseas are subject to UCMJ jurisdiction from the commencement to the conclusion of such duty. ANG members are subject to UCMJ jurisdiction only when in Title 10, Federal service.

2.9.2. Courts-Martial. Once jurisdiction attaches in accordance with RCM 202(c), a member of a reserve component may either be retained on active duty pending disposition of offenses, or be released to reserve status and recalled as necessary for preferral of charges, pretrial investigation, and trial by court-martial. Prior consultation with the member's reserve component chain of command through JA channels is required. If the member is no longer on active duty when the offense is discovered, the member may be involuntarily ordered to active duty for preferral of charges, a pretrial investigation, and trial by court-martial. In any case in which the accused is a member of the Reserve or ANG, trial counsel must introduce sufficient evidence to establish in-personam jurisdiction over the accused at the time of the offense.

2.9.3. Summary Courts-Martial and Nonjudicial Punishment. Do not involuntarily recall a reserve member to active duty solely to impose nonjudicial punishment or for trial by SCM. Initiate nonjudicial punishment or an SCM during the member's next period of inactive duty training or active duty. MAJCOM commanders or equivalents may grant waivers to this restriction in appropriate cases.

2.9.4. Recall Authority. Subject to the consultation requirement of paragraph 2.9.2, the following may order a Reserve or ANG member to active duty:

2.9.4.1. A GCMCA for the regular component unit to which the member is attached for training purposes;

2.9.4.2. A GCMCA for the regular component unit in which the member performed duty when the offense(s) occurred;

2.9.4.3. A GCMCA of the regular component host unit, as designated in the applicable host-tenant support agreement if the member is assigned to a reserve component unit for training purposes, or was attached to such a unit when the offense(s) occurred; or

2.9.4.4. AFRC/CC, 4 AF/CC, 10 AF/CC, or 22 AF/CC for members assigned or attached to their respective commands.

2.9.4.5. A GCMCA of the host command of members of an Air Reserve Station or Base described in paragraph 2.4.1.

2.9.5. Limitations on Punishment. A Reserve or ANG member recalled to active duty for court-martial without SecAF approval may not be sentenced to confinement or be required to serve a punishment consisting of any restriction on liberty during the recall period of duty. See Article 2(d)(5), UCMJ. A punishment of restriction to specified limits may be imposed only during periods of inactive duty training or active duty ordered for routine (non-disciplinary) purposes. Requests for SecAF approval to recall a reserve member for court-martial to preserve the possibility that the sentence may include confinement are forwarded, via command channels, to AFLOA/JAJM. Generally, requests should be made prior to preferral of charges, but, in any case, must be approved prior to arraignment. The GCMCA must concur in the request and the request shall include as a minimum, the following information:

2.9.5.1. The preferred or anticipated charges and specifications. When charges have been preferred, attach a copy of the charge sheet and personal data sheet.

2.9.5.2. A summary of the evidence relating to each offense. Attach copies of any reports of investigation/inquiry or witness statements.

2.9.5.3. Prior convictions and nonjudicial punishments.

2.9.5.4. Whether the member refused an offer of nonjudicial punishment.

2.9.5.5. The member's background, including civilian employment, family circumstances, and character of military service.

2.9.5.6. Consultation with the member's reserve component chain of command, such as the unit commander (state adjutant general for an ANG member performing Federal service).

2.9.6. Release from Active Duty. At the conclusion of nonjudicial punishment proceedings or final adjournment of the court-martial, the reserve component member who was ordered to active duty for the purpose of conducting disciplinary proceedings should be released from active duty within one working day unless the order to active duty was approved by SecAF and confinement or other restriction on liberty was adjudged. Unserved punishments may be carried over to subsequent periods of inactive-duty training or active duty. RCM 1003(c)(3); RCM 204(b); Article 2(d). Absent contrary binding authority, a reserve component member recalled to active duty with SecAF approval should remain on active duty orders for the duration of confinement or other restriction on liberty the member actually serves. The court-martial convening authority who convenes the court shall fund the active duty orders of the reserve component member being court-martialed, including the duration of confinement.

Section 2E—Retired Personnel

2.10. Jurisdiction Over Retired Air Force Personnel. Retired regular Air Force personnel who are entitled to receive pay (Article 2(a)(4), UCMJ), retired members of a reserve component who are receiving hospitalization from an armed service (Article 2(a)(5), UCMJ), and retired members of a reserve component subject to lawful orders to return to duty (See *Morgan v. Mahoney*, 50 M.J. 633 (A. F. Ct. Crim. App. 1999)), will not be tried by court-martial for acts/omissions while on active duty or inactive duty training, within the statute of limitations, unless their conduct clearly links them with the military or is adverse to a significant military interest of the United States. SecAF approval is required prior to preferral of charges unless there is an immediate statute of limitations problem. If the time prescribed by the statute of limitations is about to expire, prefer charges and request SecAF approval as soon as possible. Send requests for approval, with full justification, to AFLOA/JAJM.

Section 2F—General Officers

2.11. Jurisdiction Over General Officers. Only commanders of Air Force MAJCOMs and superior convening authorities may exercise court-martial convening authority over Air Force general officers. This limitation does not apply to the exercise of court-martial convening authority by the commanding officer of a unified command.

Section 2G—Other Persons

2.12. Jurisdiction Over DoD Civilian Employees, DoD Contractor Personnel, and Other Persons Serving With or Accompanying the Armed Forces Overseas During Declared War and in Contingency Operations (Article 2(a)(10), UCMJ).

2.12.1. Article 2(a)(10) Jurisdiction. Only the Secretary of Defense (SECDEF) possesses the authority to exercise court-martial convening authority and impose nonjudicial punishment (NJP) over persons subject to Article 2(a)(10) with respect to: offenses committed within the “United States,” meaning the several States of the United States, the District of Columbia, and the commonwealths, territories, and possessions of the United States; persons who were not at all times during the alleged misconduct located outside the “United States,” as defined above; and persons who are, at the time court-martial charges are preferred or notice of NJP proceedings is given, located within the “United States,” as defined above. See SECDEF Memorandum (DTM-08-009), dated 10 March 2008, *UCMJ Jurisdiction Over DoD Civilian Employees, DoD Contractor Personnel, and Other Persons Serving With or Accompanying the Armed Forces Overseas During Declared War and in Contingency Operations*.

2.12.1.1. Only SECDEF, geographic combatant commanders (CCDRs), and commanders assigned or attached to geographic combatant commands who also possess GCMCA may exercise court-martial convening authority and impose NJP over persons subject to Article 2(a)(10) with respect to offenses committed outside the "United States," as defined in paragraph 2.12.1. Geographic CCDRs may withhold this authority within their command.

2.12.1.2. Authority to prefer court-martial charges and offer NJP is withheld until the notification requirements outlined in paragraph 2.12.4 are accomplished. Law

enforcement, criminal investigations, and other military justice procedures that precede the preferral of court-martial charges should continue, as applicable, during this notification process.

2.12.1.3. Authority to prefer court-martial charges and offer NJP is withheld whenever DoJ provides notice that it intends to pursue federal criminal prosecution for what is substantially the same offense or a related offense, and such withholding of authority shall remain in effect while DoJ is pursuing its federal prosecution of the case until such prosecution is completed or terminated prior to its completion.

2.12.2. Command Law Enforcement Authority. Commanders at all levels have the authority to investigate any crime allegedly committed by persons subject to the UCMJ, as well as persons subject to MEJA jurisdiction until such time as law enforcement officials have assumed sole investigative responsibility. Such investigations shall be conducted in accordance with practices established with host nation authorities, applicable international law, and international agreements. All criminal allegations shall be coordinated with the appropriate military law enforcement agency such as AFOSI or SFS. Additionally, if the crime committed falls within the investigative jurisdiction of the military law enforcement agency, commanders must notify the appropriate agency to determine if a criminal investigation will be initiated. AFI 71-101v1, *Criminal Investigations Program*, Attachment 2.

2.12.2.1. Apprehension and Arrest. Military law enforcement officers and military criminal investigators are authorized to apprehend persons subject to UCMJ jurisdiction, and arrest and temporarily detain persons subject to MEJA jurisdiction, when there is probable cause that an offense has been committed and that the person committed it, subject to the requirements of RCMs 304 and 305. Although all commissioned, warrant, petty, and noncommissioned officers on active duty may apprehend persons subject to UCMJ jurisdiction, absent exigent circumstances, the apprehension of civilians should be done by law enforcement personnel. The apprehension and arrest of civilians in a foreign nation is almost exclusively a host nation function. When the apprehension, arrest, or temporary detention of a civilian by U.S. authorities is appropriate, such action shall be done in accordance with established procedures, applicable international law, and international agreements.

2.12.2.2. Pretrial Restraint and Confinement. Commanders may order the pretrial restraint or confinement of civilians subject to the limitations of RCM 304(b) and all applicable provisions of the MCM and this instruction. Absent exigent circumstances, Article 2(a)(10) personnel shall not be placed in pretrial restraint or confinement without first consulting with the SJA of the appropriate geographic CCDR.

2.12.3. Command Discretion. The unique nature of exercising UCMJ jurisdiction over civilians requires commanders to evaluate legal and policy considerations before initiating any punitive disciplinary action.

2.12.3.1. Legal Considerations. Article 2(a)(10) applies to individuals serving with or accompanying the Air Force, Army, Navy, Marines, or Coast Guard in the field during declared war or contingency operations. See 10 U.S.C. § 101(a)(13). This generally includes DoD civilian employees and contractors, as well as individuals who are dependent on or connected to the armed forces in some manner. See *United States v.*

Burney, 21 C.M.R. 98 (C.M.A. 1956); *Perlstein v. United States* et al., 151 F. 2d. 167 (3d Cir. 1945). It can also include both U.S. citizens and foreign nationals, but international agreements will likely impact punitive action against any foreign national. Before taking any steps to initiate UCMJ action, it is critical to establish whether or not Article 2(a)(10) jurisdiction applies.

2.12.3.2. Policy Considerations. Even if an individual is legally subject to the UCMJ, as a matter of policy the exercise of jurisdiction under Article 2(a)(10) must also be based on military necessity to support an effective fighting force and be called for by circumstances that meet the interests of justice, such as when federal criminal jurisdiction otherwise does not apply or federal criminal prosecution is not pursued, or when the person's conduct is adverse to a significant military interest of the United States (e.g., alleged misconduct that may jeopardize good order and discipline or discredit the armed forces and thereby have a potential adverse effect on military operations).

2.12.4. Notification Requirements and Procedures. Before initiating any disciplinary action against any person under Article 2(a)(10), commanders, through their SJAs, shall comply with the notification procedures outlined below.

2.12.4.1. General Requirements. In all cases intended to be pursued under Article 2(a)(10), all levels of command must follow the notification requirements of DoD Instruction 5525.11, *Criminal Jurisdiction Over Civilians Employed By or Accompanying the Armed Forces Outside the United States, Certain Service Members, and Former Service Members* and General Counsel of the Department of Defense Memorandum, dated 20 January 2012, *Policy and Procedures Applicable to DoD and United States Coast Guard (USCG) Civilian Personnel Subject to Uniform Code of Military Justice (UCMJ) Jurisdiction in Time of Declared War or a Contingency Operation* (Attachment 2). This includes forwarding all reasonably available information regarding the investigation, the suspect's last known residence in the United States, and the reasoning in support of a UCMJ disposition. Potential Article 2(a)(10) cases also trigger special interest reporting requirements under paragraph 13.8 and must be immediately reported to AFLOA/JAJM.

2.12.4.2. Non-GCMCA Notification Requirements. Commanders who are not GCMCAs shall, before initiating any UCMJ disposition under RCMs 306-308 or 401-406, forward expeditiously all available information regarding the alleged misconduct that is potentially subject to this jurisdiction to the first GCMCA in the chain of command that is attached or assigned to a geographic combatant command.

2.12.4.3. GCMCA Notification Requirements. GCMCAs assigned or attached to a geographic combatant command shall notify in writing (including by e-mail or facsimile) their respective geographic CCDR of their intended disposition by court-martial or NJP over persons subject to Article 2(a)(10).

2.12.4.4. Geographic CCDR Notification Requirements. Before any commander prefers court-martial charges or before a commander authorized by paragraph 2.12.1.1 offers NJP based on Article 2(a)(10), and regardless of whether the suspected offense may also be an offense under federal criminal laws, the geographic CCDR shall first provide notice of the case in writing (including by e-mail or facsimile) in accordance with the procedures established in DoD Instruction 5525.11 and the General Counsel's

memorandum dated 20 January 2012, through DoD channels so that DoJ may be afforded the opportunity to pursue federal criminal prosecution.

2.12.4.5. DoJ-DoD Notification Requirements. After DoD's formal notification to DoJ, DoJ is to expeditiously (but in no case longer than 14 calendar days absent an extension) notify DoD whether it intends to exercise jurisdiction over the case. If DoJ elects to exercise jurisdiction over the case, authority to convene a court-martial or administer NJP is withheld. If DoJ does not exercise jurisdiction or terminates prosecution, or if permission to proceed is granted by SECDEF or his designee, UCMJ action may be initiated. DoD Instruction 5525.11 and the General Counsel's memorandum dated 20 January 2012.

2.12.5. Court-Martial Rights and Procedures. The MCM ensures a fair trial and due process of law for all persons tried before a properly constituted court-martial. The following clarifications will assist all parties with interpreting the MCM and applicable regulations.

2.12.5.1. Military Defense Counsel. An accused under Article 2(a)(10) has the same rights to counsel as a military accused subject to the requirements prescribed in the Military Defense Counsel Charter, including the right to be represented by a detailed military defense counsel, the right to request an individual military defense counsel, and the right to be represented by a civilian defense counsel at no expense to the government.

2.12.5.2. Court Members. Only commissioned officers on active duty are eligible to serve on a court-martial for the trial of any accused under Article 2(a)(10). A convening authority may, but is not required to, consider rank equivalencies by comparing military and civilian pay tables when selecting officer members for an accused who holds a federal civilian position. An accused under Article 2(a)(10) does not have the right to request enlisted court members.

2.12.5.3. Punishments. Subject to the limitations of the MCM, a court-martial may adjudge only the following punishments for an accused under Article 2(a)(10): reprimand, fine, restriction to specified limits, confinement, and death.

Chapter 3

MILITARY MAGISTRATES, PRETRIAL RESTRAINT, AND PREFERRAL

Section 3A—Military Magistrates

3.1. Military Magistrate Program.

3.1.1. Appointment of Magistrate (MRE 315(d)(2)). The commander of the lowest organizational level having command over an Air Force installation, who is either an SPCMCA or GCMCA, or the installation commander at Air Force Reserve Command (AFRC) bases and stations, may appoint a maximum of four officers with judicial temperament to serve as military magistrates for that installation. For installations, such as joint bases, comprised of multiple geographically separated locations, a maximum of four officers may be appointed as magistrates for each geographically separated location. If unique circumstances exist that warrant the appointment of more than four magistrates, permission to appoint additional magistrates must be obtained from the GCMCA and approved by AFLOA/JAJM. Appoint magistrates in writing by name, not position, and specify the installation over which the magistrates may exercise authority.

3.1.2. Qualifications. A military magistrate should be an officer serving in the grade of lieutenant colonel or above. The appointment of any magistrate in the rank of major or below may only be made by, or with the concurrence of, the GCMCA exercising jurisdiction over the installation. Chaplains, SJA office personnel, Air Force Office of Special Investigations (AFOSI) and Security Forces (SF) members, and court-martial convening authorities may not serve as military magistrates. Officers appointed at AFRC installations must be serving a period of inactive duty training or active duty to perform magistrate duties.

3.1.3. Authority. A military magistrate issues search and seizure, and apprehension authorizations based upon probable cause. If more than one magistrate is appointed for an installation or location, each exercises concurrent authority with the others and with the installation commander. The commander need not be unavailable for a magistrate to exercise this authority.

3.1.4. Non-Air Force Military Installations. The Air Force commander who is either a SPCMCA or GCMCA for a military installation where the installation commander is not an Air Force commander may appoint an officer with judicial temperament to serve as a military magistrate for matters involving Air Force personnel on the installation. A military magistrate appointed under this paragraph is authorized to issue search and seizure and apprehension authorizations, based on probable cause, involving Air Force personnel at non-Air Force military installations to the extent the commander appointing the military magistrate has control over the place where the property or person to be searched is situated or found, or over the person to be apprehended. MRE 315(d)(1). This military magistrate exercises concurrent authority with the commander who appointed him or her.

3.1.5. SJA Duties. The SJA for the commander appointing military magistrates should ensure the military magistrates are briefed on their duties at the time of their appointment and whenever necessary thereafter.

Section 3B—Pretrial Confinement and Restraint

3.2. Pretrial Confinement (RCM 305). An authorized person must determine if there is probable cause to order pretrial confinement. Once the member is placed in pretrial confinement, additional steps must occur to determine if it is appropriate to continue pretrial confinement: a 48-hour probable cause determination, a 72-hour commander's decision and memorandum, and a pretrial confinement review (within 7 days). Normally, offenses to be disposed of by an SCM do not warrant pretrial confinement. NOTE: Imposition of pretrial confinement or restraint will trigger the speedy trial clock under RCM 707.

3.2.1. Probable Cause for Pretrial Confinement. No person may be ordered into pretrial confinement except for probable cause. Probable cause to order pretrial confinement exists when there is a reasonable belief that an offense triable by court-martial has been committed, the person confined committed it, and confinement is required by the circumstances. Additional matters to consider include the person's background and character, the details of the offense, and the matters in the Discussion following RCM 305(h)(2)(B). The person who directs confinement need not conduct a detailed analysis of the circumstances before physically detaining the person if time does not permit. See RCM 305(d).

3.2.2. 48-Hour Probable Cause Determination. Within 48 hours of the imposition of confinement under military control, a neutral and detached officer must review the adequacy of probable cause to continue pretrial confinement. RCM 305(i)(1); *Gerstein v. Pugh*, 420 U.S. 103, 124-25 (1975); *County of Riverside v. McLaughlin*, 500 U.S. 44, 45 (S.Ct. 1991). See format at Figure 3.1. If the determination is not made within 48 hours, the government may have to establish the existence of a *bona fide* emergency or other extraordinary circumstances. The determination should be in writing and included in the Record of Trial (ROT).

3.2.2.1. Include in the ROT any documentation regarding a determination of probable cause made by civilian authorities prior to transfer of the member to military authorities. When a military member is transferred from civilian confinement to military control, authorities must still conduct a 48-hour probable cause determination.

3.2.2.2. Factors to consider in determining whether an officer is neutral and detached include whether the officer is the formal accuser on the charge sheet, is the officer who ordered the accused into confinement, or is directly or particularly involved in the command's law enforcement functions. *United States v. Rexroat*, 38 M.J. 292, 298 (C.M.A. 1993); *United States v. Lynch*, 13 M.J. 394, 397 (C.M.A. 1982).

3.2.2.3. The Pretrial Confinement Review in paragraph 3.2.4 will satisfy the 48-hour probable cause determination if the Pretrial Confinement Review memorandum is completed within 48 hours of the imposition of confinement.

3.2.3. 72-Hour Commander's Decision and Memorandum. A commander shall decide whether to continue pretrial confinement not later than 72 hours after the commander orders a military member into pretrial confinement, or after receipt of a report that a member of the commander's unit or organization has been confined. The commander must address the requirements for confinement in RCM 305(h)(2)(B) and should consider the factors in the Discussion to that section. If the commander decides to continue pretrial confinement, he or she must prepare a written memorandum in accordance with RCM 305(h)(2)(C). The

memorandum is then forwarded to the Pretrial Confinement Review Officer (PCRO), through the SJA and SPCMCA. If court-martial results, the commander's memorandum must be included in the ROT. Figure 3.2. provides a sample format.

3.2.3.1. The 72-hour commander's decision will satisfy the 48-hour probable cause determination only if the commander is neutral and detached and acts within 48 hours of the imposition of confinement. RCM 305(h)(2)(A). See Figure 3.2.

3.2.4. Pretrial Confinement Review (PCR), (RCM 305(i)(2)). Within 7 calendar days of the imposition of pretrial confinement under military control (the day placed in confinement counts as day 1 and the date of review shall count as one day), the PCRO must review the probable cause determination and make a decision about the necessity for continued pretrial confinement. *United States v. McCants*, 39 M.J. 91, 93 (C.M.A. 1994) (quoting RCM 305(i)(1)).

3.2.4.1. Appointment of PCROs, (RCM 305(i)(2)). The SPCMCA appoints, by letter, a reasonable number of mature officers to serve as PCROs. Chaplains, SJA office personnel, AFOSI and SF members, and court-martial convening authorities may not serve as a PCRO. Military magistrates may also be appointed as PCROs. When the situation warrants, a PCRO from another military service may be appointed. Similarly, an otherwise qualified Air Force member may serve as a PCRO for another military service. Except in unusual circumstances, a magistrate should not serve as the PCRO if he or she otherwise acted upon the same case in any capacity.

3.2.4.2. The PCRO must review the commander's decision to continue pretrial confinement satisfying the 72-hour requirement. The PCRO should consider any matters submitted by the pretrial confinee.

3.2.4.2.1. The PCR may satisfy the 48-hour probable cause determination requirement if the PCR memorandum is completed within 48 hours of the imposition of confinement. In such cases, the PCR memorandum must specifically state when the probable cause determination was made.

3.2.4.3. The PCRO conducts a hearing at which the pretrial confinee and defense counsel shall be allowed to appear and make a statement before the PCRO, if practicable. Defense counsel may also represent their client at the hearing via telephone or videoteleconference technology. A government representative, usually a judge advocate, may also make a statement, if practicable. Although the PCR is not an adversarial proceeding, the PCRO may exercise his or her discretion by allowing the pretrial confinee, defense counsel or government representative to present evidence and cross-examine witnesses. The PCRO must complete a written summary of the relevant testimony of any witnesses, including information elicited by defense counsel. The only rules of evidence that apply are MRE 302, MRE 305 and Section V of the Military Rules of Evidence concerning Privileges.

3.2.4.3.1. Provided custody classification does not dictate a distinctive uniform, a pretrial confinee must be allowed to wear an Air Force duty uniform for the PCR rather than civilian confinement attire. See AFI 31-205, *The Air Force Corrections System*, paragraph 7.1.5.

3.2.4.3.2. The pretrial confinee and/or defense counsel may present evidence related to confinement conditions in apparent violation of Article 12 or Article 13, UCMJ. If such evidence is presented, the PCRO shall summarize the evidence in the PCRO memorandum and inform the SJA. The SJA shall review the evidence pertaining to allegedly illegal confinement conditions and work with the member's commander and the local Security Forces Commander or other confinement officials to remedy the situation as necessary.

3.2.4.4. Upon completion of the PCR, the PCRO shall approve continued confinement or order immediate release. To continue pretrial confinement, the PCRO must find the requirements of RCM 305(h)(2)(B) have been proven by a preponderance of the evidence to continue pretrial confinement. If the requirements of RCM 305(h)(2)(B) have not been proven, the PCRO must order immediate release of the pretrial confinee. The PCRO may not impose conditions on release, but may recommend the commander impose a less severe form of pretrial restraint. If the PCRO orders release, a commander may impose any alternative lesser form of pretrial restraint authorized by RCM 304(a)(1) through (3).

3.2.4.5. Within 24 hours of making the pretrial confinement decision, the PCRO must complete a memorandum of the PCRO's conclusions and the findings on which they are based. A copy of all documents and summaries of all oral statements considered by the PCRO must be attached to the memorandum. The memorandum with attachments shall be provided to the SPCMCA, the SPCMCA's SJA, the confinement officer, the pretrial confinee and the pretrial confinee's defense counsel. Figure 3.3 provides a sample format for the PCRO's memorandum.

3.2.5. Pretrial Restraint Upon Release From Confinement. A commander may impose any alternative lesser form of pretrial restraint authorized by RCM 304(a)(1) through (3), if release is ordered by the PCRO. Re-confinement after release is limited to circumstances provided in RCM 305(l). *United States v. Mahoney*, 36 M.J. 679 (A.F.C.M.R. 1992) (dictum). The requirements of this chapter apply to a member upon imposition of re-confinement.

3.2.6. Pretrial Restraint as Suicide Prevention. Preventing an accused from committing suicide is not valid as the sole basis for ordering the accused into or continuing pretrial confinement. A distinction shall be drawn between an accused that is a threat to him or herself and an accused that is either a threat to flee the jurisdiction to avoid prosecution or is a threat to commit a serious offense. The latter may be placed in pretrial confinement in accordance with RCM 305(h)(2)(B). The former should be referred to mental health practitioners for evaluation and treatment and, if necessary, involuntary commitment in a mental health facility. *United States v. Doane*, 54 M.J. 978, 982 (A.F. Ct. Crim. App. 2001).

3.2.7. Pretrial Determination of Mental Competence. A convening authority may determine the place and condition of pretrial detention, including confinement in a civilian facility, for the purpose of evaluating the competency of the accused, subject to review by a military judge for abuse of discretion. The conditions may not be more harsh than necessary to ensure the accused's presence at trial. The facility must be capable of rendering the necessary competency evaluations and providing necessary care and treatment of the accused. Article 13, UCMJ; RCM 706, 909; *Short v. Chambers*, 33 M.J. 49, 52 (C.M.A. 1991); 18 U.S.C. § 4241.

3.2.8. SJA Duties. SJAs must ensure confinement personnel advise pretrial confinees in accordance with RCM 305(e). SJAs must ensure PCROs are briefed on their duties when appointed, and updated as appropriate thereafter. SJAs must ensure alleged victims are notified of a confinee's pretrial confinement and release from pretrial confinement. Consult AFI 51-703, if a member is confined at the request of foreign host nation authorities.

Section 3C—Preferral of Charges (RCM 307)

3.3. Considerations Prior to Preferral of Charges.

3.3.1. Accuser is Senior to the Convening Authority. Consult RCM 504(c)(2) and (3) when the accuser is senior in rank to the convening authority.

3.3.2. Authority To Proceed in Cases Involving an Accused with Special Access. Do not take action on personnel who hold or have held access to Single Integrated Operation Plan-Extremely Sensitive Information (SIOP-ESI), Sensitive Compartmented Information (SCI), research and development (R&D) special access program, AFOSI special access program, or other special access program information until the appropriate special access program office approves. Legal offices ensure compliance with AFI 31-501, *Personnel Security Program Management*. In accordance with AFI 31-501, paragraph 8.9, commanders must submit a written request to the appropriate special access program functional office for permission to proceed with further processing before initiating action against military members that could lead to a discharge. The legal office must also ensure a copy of the commander's written request is sent to AFLOA/JAJM. Apply security classification according to message contents and send through classified channels as required. In accordance with AFI 31-501, paragraph 8.9.8, if a commander contemplates a general or special court-martial, processing of the case may proceed with preferral of charges and completion of the investigation required by Article 32, UCMJ, together with collateral actions required under Article 32. Under no circumstances may the charges be referred to trial until the appropriate action office grants authority to proceed. It is recommended that authority to proceed be sought before preferral and as soon as possible due to the length of time it takes to process these requests.

3.3.3. Preferral in Lengthy Absence Cases. Effective 14 November 1986, summary court-martial convening authorities (SCMCAs) are no longer required to receipt for charges alleging either desertion or AWOL in order to toll the statute of limitations. Article 43, UCMJ. Therefore, where an unauthorized absence began after 14 November 1986, preferral and receipt for charges is not required to toll the statute of limitations. For all lengthy absence cases for which charges were preferred on or before 14 November 1986 where the member has not yet returned to military control, preferred charges, receipted for by the SCMCA are still required to toll the limitations period. The servicing SJA should obtain a written delay from the appropriate convening authority to stop the running of the clock under the RCM 707 speedy trial rule. Documentation of approved delays shall be attached to the charge sheet in the member's personnel records before sending the records to the Air Force Personnel Center. AFI 36-2911, *Desertion and Unauthorized Absence*. Charges for desertion or an unauthorized absence, either of which began before 14 November 1986, where there was no preferral and receipt of charges, are not viable.

3.3.4. Extension Beyond Expiration of Term of Service (ETS). Airmen may be retained beyond their ETS in anticipation of the preferral of charges. If there is sufficient time, the SJA must notify the FSS Career Development Section in writing. If time does not permit written notification, written confirmation of the verbal notice should be provided to the FSS within five duty days. Contact FSS Career Development Section for the current format of the written notice and request and ensure the written notice and request is sent to AFPC/DPSOS for final action. *See* AFI 36-3208, *Administrative Separation of Airmen*. *See also, Webb v. United States,* 67 M.J. 765 (A.F. Ct. Crim. App. 2009).

3.3.5. Accused With Prior Adjudged Punitive Discharge. If an accused has an approved, but unexecuted, prior punitive discharge, the SJA for the SPCMCA over the accused shall immediately notify AFLOA/JAJM concerning preferral of new charges, with information copies sent to the appropriate GCMCA and MAJCOM SJAs. This notice enables AFLOA/JAJM to ensure that the execution of the previous punitive discharge does not occur, providing continuing court-martial jurisdiction over the accused.

3.3.6. Recoupment. If an accused received education assistance, special pay, or bonus money and faces separation or discharge before completion of the agreed-upon period of active duty, notice of recoupment should be given when court-martial charges are preferred in accordance with 10 U.S.C. § 2005(g), or 37 U.S.C. § 303a(e). The member should sign a statement of understanding regarding recoupment as shown in Figure 3.5. This notice is included in the ROT with pretrial allied papers in accordance with AFMAN 51-203, *Records of Trial*, Figure 4.1, paragraph 20.

3.4. Charge Sheet Preparation.

3.4.1. Charge Sheet. Prepare charges and specifications on the DD Form 458, *Charge Sheet*. The *Charge Sheet* should be prepared by inputting the data into AMJAMS and printing out the electronic version of the DD Form 458. Information in AMJAMS should be reflected as follows:

3.4.2. Blocks 1, 2, 3 and 4. Autofill information in AMJAMS from AFPC and ensure its accuracy. Make pen and ink changes to the charge sheet to reflect any change in the accused's grade prior to arraignment by lining through and keeping the information legible. Initial any changes.

3.4.3. Block 5. Enter the accused's assigned organization under the Duty Status tab in AMJAMS. The address should reflect the base name, state and zip. Ensure the correct pull down is selected for your MAJCOM. At squadron level, enter "111th Civil Engineer Squadron," not "111th Civil Engineering Squadron Section." For members of the Reserve and ANG serving on extended active duty, use the organization to which they are attached for active duty.

3.4.4. Block 6. The accused's current service is the date the current enlistment began for enlisted personnel or the Total Active Federal Military Service Date (TAFMSD) for officers. Extensions do not change the current enlistment date. This information can be found in the accused's personnel records or in the record review listing prepared by the servicing personnel office. Double check the Reports on Individual Personnel (RIPs) against the information autofilled from AFPC.

3.4.5. Block 7. The accused's current pay per month will be entered automatically, this will need to be changed if AFPC lists the incorrect rank. If it changes prior to arraignment, correct it with a pen and ink change and initial.

3.4.6. Blocks 8 and 9. Include any form of restraint, including restraint by civil authorities at the request of the Air Force, by adding the pretrial restraint folder under the pretrial information in AMJAMS. An example of this is when a member in an AWOL or deserter status is apprehended pursuant to a DD Form 553, *Deserter/Absentee Wanted by the Armed Forces*, by civilian police and incarcerated or detained until Air Force officials take custody of the accused.

3.4.7. Charges and Specifications. Consult RCM 307 and refer to the sample specifications in the MCM, Part IV, and the Military Judge's Benchbook, DA Pamphlet 27-9. AMJAMS will auto-fill the charge and specification indicators automatically. When alleging Article 134 offenses, ensure the specification alleges the terminal element, as required by *United States v. Fosler*, 70 M.J. 225 (C.A.A.F. 2011). Additionally, use caution when reviewing lesser included offenses (LIOs) listed in the MCM, Part IV, to ensure the LIOs comport with the elements test set forth in *United States v. Jones*, 68 M.J. 465 (C.A.A.F. 2010).

3.4.7.1. Format. Type the words "CHARGE" and "ADDITIONAL CHARGE" in all capital letters. "Specification" includes upper and lower case letters. Where more than one charge or specification is alleged, charges are numbered with Roman numerals (e.g., I, II, III) and specifications with Arabic numbers (e.g., 1, 2, 3). A single charge or specification is not numbered.

3.4.7.2. Additional Charges. When additional charges are preferred, add "Additional Charges Preferred." AMJAMS will label the charges as ADDITIONAL CHARGES. If charges are preferred after preferral of additional charges, add another "Additional Charges Preferred" folder in AMJAMS. AMJAMS will label each new set of charges with written numbers (e.g., SECOND ADDITIONAL CHARGES, THIRD ADDITIONAL CHARGES).

3.4.7.3. Identification of the Accused. In the specifications, identify the accused by present grade, followed by the grade on the date of the alleged offense, if different. Use all capital letters. Do not include the MAJCOM. List known aliases. For example. "In that TECHNICAL SERGEANT ADAM J. SMITH, United States Air Force, then MASTER SERGEANT ADAM J. SMITH, alias CAPTAIN JAY J. SMITH, United States Air Force, 401st Maintenance Squadron, did, . . ." NOTE: Change the accused's rank from the time of the allegation only if pertinent to the offense charged. RCM 307(c)(3), Discussion.

3.4.7.4. Identification of Victim. If the alleged victim is identified in the specification, do not put the victim's name or grade in all capital letters. Do not substitute initials for the name of child or sex offense victims, as is required on court-martial orders and the Report of Result of Trial. See paragraph 10.7 of this instruction.

3.4.7.5. Pleading Check Cases. Where a check or other instrument appears regular in all respects, the contents need not be pled verbatim. In such cases, consider using the model specifications provided in the Military Judges' Benchbook, DA Pamphlet 27-9 or the

sample specifications provided at Figure 3.4. If in doubt, plead the check verbatim, but include only the portions applicable at the time of the offense.

3.5. Forwarding Charges (RCM 401). The commander forwards the charges to the convening authority by attaching an indorsement (Figure 3.6) to the DD Form 458. Attach a personal data sheet on the accused (Figure 3.7) and a copy of the report of investigation or other evidence supporting the charges. Documents forwarded should be redacted to remove any Privacy Act information not relevant to the charges prior to forwarding to the convening authority for consideration on disposition of the charges. The commander signs and dates the indorsement when preferring charges or when forwarding charges preferred by another. Address the indorsement to the officer exercising SPCMCA over the accused. If additional charges are later added, forward them with a new indorsement.

3.6. Receipt for Charges (RCM 403). A judge advocate may receipt for charges on behalf of the SPCMCA if the convening authority delegates that authority. If delegated, receive the charges "FOR THE COMMANDER."

3.7. Discovery. SJAs and trial counsel are strongly encouraged to provide discovery to defense counsel as soon as practicable. This may be prior to the preferral of charges.

3.7.1. At the time charges are preferred, the trial counsel should, as a minimum, provide defense counsel the following matters:

3.7.1.1. A copy of DD Form 458;

3.7.1.2. A copy of the commander's indorsement to the DD Form 458 with all attachments; and

3.7.1.3. A copy of any report of investigation and any signed or sworn statements relating to the offense charged, unless the government claims that the documents, or portions thereof, are protected from release, or disclosure will have an adverse impact on an ongoing or proposed law enforcement investigation.

3.7.2. When stating that certain documents are protected from release, or that certain discoverable documents should be redacted before being provided to defense counsel, trial counsel should distinguish between rules pertaining to discovery and rules pertaining to the release of information to a third party (such as the Freedom of Information Act or Privacy Act). Trial counsel should maintain an unredacted copy of any redacted items provided to defense in the event unredacted items must later be provided to defense.

3.7.2.1. Releasing Privacy Act Material to Military Defense Counsel. When releasing Privacy Act material to military defense counsel, trial counsel should redact non-discoverable Privacy Act information regarding individuals other than the accused. An example of this would be social security numbers of individuals providing urinalysis samples, which are listed in an otherwise discoverable document, but which have no relevance to the case. When Privacy Act material is not redacted in discovery material, defense counsel should take appropriate steps to guard against further release of this information outside of defense personnel involved in the case.

3.7.2.2. Releasing Privacy Act Material to Civilian Defense Counsel. When releasing Privacy Act material to civilian defense counsel, trial counsel should redact non-discoverable Privacy Act information regarding individuals other than the accused. An

example of this would be social security numbers of individuals providing urinalysis samples, which are listed in an otherwise discoverable document, but which have no relevance to the case. Additionally, when Privacy Act material is not redacted in discovery material, trial counsel should obtain a signed statement from the civilian defense counsel stating the defense counsel agrees not to release Privacy Act information to others not involved with the defense of the case, using the format set forth at Figure 3.8.

3.7.3. Defense counsel will be provided the opportunity to inspect items of physical evidence upon request and when reasonably available at the time charges are preferred or within a reasonable time thereafter.

3.7.4. Be aware there are special rules with regard to the handling of evidence of child pornography. When there is evidence of child pornography refer to 42 U.S.C. § 16911, et seq., commonly known as "The Adam Walsh Act" and 18 U.S.C. § 3509, with regard to discovery in child pornography cases. Coordinate the review of all evidence of child pornography with the AFOSI.

3.7.5. These provisions are not intended to create any new substantive rights to discovery beyond those contained in the Rules for Courts-Martial (RCM). After referral of charges to trial, discovery shall be made by both trial and defense counsel in accordance with the RCM.

Figure 3.1. Sample Probable Cause Determination Memorandum.

(Date)

MEMORANDUM FOR (JA Office)
(Squadron CC)
PCRO
IN TURN

FROM: _____/CC
(Street Address)
(Base, State, and Postal Code)

SUBJECT: Probable Cause Determination - (GRADE, NAME)

1. In accordance with RCM 305(i)(1), I, being a neutral and detached officer acting within 48 hours of imposition of confinement under military control, find adequate probable cause that the following offense(s) triable by court-martial [(was)(were)] committed and that (GRADE, NAME) committed [(it)(them)]:

Article	Date of Offense	Description of Offense
a. _____	_____	_____
b. _____	_____	_____

2. Second, I have reasonable grounds to believe continued pretrial confinement is necessary because it is foreseeable that the confinee will not appear at [trial, pretrial hearing, or investigation,] and/or will engage in serious criminal misconduct. Finally, I have reasonable grounds to believe less severe forms of restraint are inadequate.

(Neutral and Detached Officer's Signature)
(NAME), (Grade), USAF
(Duty Title)

Figure 3.2. Sample Commander's Pretrial Confinement Memorandum.

(Date)

MEMORANDUM FOR (JA Office)
(Convening Authority)
PCRO
IN TURN

FROM: (Squadron CC)
(Street Address)
(Base, State, and Postal Code)

SUBJECT: Pretrial Confinement of (Grade)(Name)

1. In accordance with RCM 305(h)(2), I approve the continued pretrial confinement of (GRADE, NAME, UNIT).

2. Background Information:

a. Personal Data:

(1) Age:
(2) AFSC: (number and job description)
(3) Total Service to Date:
(4) DEROS:
(5) Marital Status: (also include whether spouse is in local area)
(6) Number of Children (if any):

b. Prior Disciplinary Action:

(1) Previous Convictions: (include type of court, date, charges on which member convicted, and punishment)
(2) Previous Nonjudicial Punishment: (include date, description of offense(s), and punishment imposed)
(3) Other Disciplinary Actions:

3. I conclude the requirements for pretrial confinement in RCM 305(h)(2)(B) are met. First, I have reasonable grounds to believe the following offense(s) triable by court-martial [(was)(were)] committed and the confinee committed [(it)(them)]:

Article	Date of Offense	Description of Offense
a. _____	_____	_____
b. _____	_____	_____

The attached documents support these conclusions. Second, I have reasonable grounds to believe continued pretrial confinement is necessary because it is foreseeable that the confinee will not appear at [trial, pretrial hearing, or investigation], and/or will engage in serious criminal misconduct. Finally, I have reasonable grounds to believe less severe forms of restraint are inadequate.

4. Specific reasons supporting my conclusions that the requirements for continued pretrial confinement in RCM 305(h)(2)(B) are met include: [State reasons. Consider the factors enumerated in the Discussion to RCM 305(h)(2)(B).]

5. [OPTIONAL: *If the commander is neutral and detached and this memorandum is completed within 48 hours of imposition of confinement, add the following sentence if this memorandum is intended to also satisfy the 48-hour probable cause determination required by RCM 305(i)(1)*: Finally, in accordance with RCM 305(i)(1), I, being a neutral and detached officer acting within 48 hours of imposition of confinement under military control, find adequate probable cause that the offense(s) in paragraph 2 [(was)(were)] committed and that the confinee committed [(it)(them)]].

[6. *See Section 13G of this instruction for reporting guidance when a member of the USAF is a national of a foreign country and not a citizen or national of the United States*.]

(NAME), (Grade), USAF
(Squadron Commander Duty Title)

__ Attachments:
1.
2.

Figure 3.3. Sample Memorandum of PCRO's Review of Pretrial Confinement.

(Date)

MEMORANDUM FOR (CONVENING AUTHORITY)

FROM: Pretrial Confinement Review Officer

SUBJECT: Pretrial Confinement Review - (Grade, name, and organization of confinee)

1. PRELIMINARY MATTERS. Pursuant to AFI 51-201, *Administration of Military Justice*, Chapter 3, Sections A and B, and R.C.M. 305, I was appointed a (pretrial confinement review officer)(military magistrate with authority to review pretrial confinement orders) on (*date*) by

(*name and position of commander*). The case of the above named confinee was referred to me by (*name of appropriate commander*) at (*hours*) on (*date*) at (*place*). At the beginning of the hearing, I advised the accused of his/her Article 31 rights, rights to counsel, and rights to make a statement and present evidence at the hearing.

2. OFFENSES ALLEGED. (*Name of Confinee*) is alleged to have committed the following offense(s):

a. (*Summarize each offense. "Legal" language is not necessary, but give the date, place, and general description of each offense including facts which indicate seriousness, such as value of property allegedly stolen or destroyed, or the extent of personal injury allegedly inflicted or threatened, etc.*).

b. ……..

3. ENTRY INTO CONFINEMENT. The confinee was placed into pretrial confinement at (*name and location of confinement facility*) on (*date*), pursuant to the order of (*Name, rank and organization of the member who ordered the confinee into confinement*). (*Attach the confinement order to this report*).

4. DEFENSE PARTICIPATION. (*Name of confinee*) and his/her counsel, (*Name of military/civilian counsel*), (*were*) (*were not*) present during the hearing. (*If not present, state why not*). (*If present*: The confinee and counsel (*presented*) (*did not wish to present*) evidence at the hearing.

5. EVIDENCE. The evidence presented during the hearing included the following:

a. (*Summarize the evidence available and attach relevant documents such as OSI or SF Reports, sworn statements, pictures of physical evidence, or statements of the accused. Also, indicate whether the accused or counsel claimed any violations of Articles 12 or 13, summarizing the evidence and attaching documents related to such matter*).

b. ……..

6. FINDINGS: After considering the evidence (summarized above) and the attached documents, I (*do*) (*do not*) find by a preponderance of the evidence that the confinee committed the offense(s) for which he/she is held. In addition, I (*do*) (*do not*) find continued pretrial confinement is required under the criteria set forth under R.C.M. 305(h)(2)(B) for the following reasons:

a. (*List the factual findings that support your decision. The R.C.M 305(h)(2)(B) criteria, that must be addressed, are 1) an offense triable by a court-martial has been committed; 2) the confinee committed it; 3) confinement is necessary because it is foreseeable that: (a) the confinee will not appear at trial, pretrial hearing, or investigation, or (b) the confinee will engage in serious criminal misconduct; and, 4) less severe forms of restraint are inadequate. When conducting your analysis, consider and apply the additional factors enumerated in paragraph 2.2 of the Pretrial Confinement Guide found on the AFLOA/JAJM website.*).

b. ……

7. DECISION. In accordance with the above findings, (*name of confinee*) will be (*continued in pretrial confinement pending trial*) (*released from pretrial confinement*). (*Recommendations for lesser forms of pretrial restraint, if any, should be addressed in a separate paragraph 8 below* - see *Section I, paragraph 2, of the Pretrial Confinement Guide for options*).

8. RECOMMENDATION. (If applicable, add this paragraph to set forth your recommendation and reasons for lesser forms of pretrial restraint).

(NAME), (Grade), USAF
Organization
Pretrial Confinement Review Officer

3 Attachments:
1. Letter of Appointment
2. Confinement Order
3. Evidence

Figure 3.4. Sample Specifications in Check Cases.

SAMPLE SPECIFICATION FORMS--CHECK CASES

I. MCM, paragraph 49f(1) (For the procurement of any article or thing of value, with intent to defraud):

A. Specification Form:

In that_____ , United States Air Force, (unit), did, (at), [on or about _____, 20__ ,] [on divers occasions, between on or about _____, 20__ , and on or about _____, 20__ ,] with intent to defraud and for the procurement of [lawful currency](and)(or) [(an article)(a thing) of value], wrongfully and unlawfully [(make)(draw)(utter)(deliver) to _____ ,] a certain (check/checks)(draft/drafts)(money order/money orders) for the payment of cash in the (total) amount of _____, dated _____, 20__ , drawn upon the _____ Bank, made payable to the order of _____, and signed , then knowing that [(he)(she) ( )], the (maker)(drawer) thereof, did not or would not have sufficient funds in or credit with said bank for the payment of said (check/checks)(draft/drafts) (money order/money orders) in full upon (its)(their) presentment.

EXAMPLES:

(1) In that AIRMAN JOHN DOE, United States Air Force, 330th Training Maintenance Squadron, did, at Keesler Air Force Base, Mississippi, on or about 1 November 2010, with intent to defraud and for the procurement of lawful currency, wrongfully and unlawfully utter to the Army Air Force Exchange Service a certain check for the payment of money in the amount of $50.00, dated, 1 November 2010, drawn upon the First National Bank of Goldsboro, made payable to the Army Air Force Exchange Service, and signed John Doe, then knowing that he, the maker thereof, did not or would not have sufficient funds in or credit with said bank for the payment of said check in full upon its presentment.

(2) In that CAPTAIN JANE DOE, United States Air Force, Headquarters, 11th Wing, did, at Washington, D.C., on or about 10 June 2011, with intent to defraud and for procurement of a Ford automobile, wrongfully and unlawfully make a certain check for the payment of money in the amount of $1,500.00, dated 10 June 2011, drawn upon the National Bank of Anacostia, made payable to Anacostia Ford, and signed Jane Doe, then knowing that she, the maker thereof, did not or would not have sufficient funds in or credit with said bank for the payment of said check in full upon its presentment.

(3) In that AIRMAN JOHN DOE, United States Air Force, Headquarters, 52d Fighter Wing, did, at Spangdahlem Air Base, Germany, on or about 12 March 2011, with intent to defraud and for

the procurement of lawful German currency, wrongfully and unlawfully utter to the Noncommissioned Officers Open Mess a certain check for the payment of money in the amount of $20.00, dated 12 March 2011, drawn upon the First City Bank, made payable to Cash, and signed John Doe, then knowing that he, the maker thereof, did not or would not have sufficient funds in or credit with said bank for the payment of said check in full upon its presentment.

B. Specification Form:

In that _____, United States Air Force, (unit), did, (at) (on board), [on or about _____, 20__,] [on divers occasions, between on or about _____, 20__, and on or about _____, 20__,] with intent to defraud and for the procurement of [lawful currency] (and)(or) [(_____)(an article)(a thing) of value], wrongfully and unlawfully [(make)(draw)] [(utter)(deliver)] to _____, certain (checks)(drafts)(money orders) for the payment of money drawn upon the _____ Bank, as follows:

[DATE] [CHECK #] [AMOUNT]

List checks

of a (total) amount of _____, and signed _____, then knowing that [(he)(she)(_____)], the (maker)(drawer) thereof, did not or would not have sufficient funds in or credit with said bank for the payment of said (checks)(drafts)(money orders) in full upon (its) (their) presentment.

EXAMPLE:

(1) In that AIRMAN JOHN DOE, United States Air Force, 4th Wing, did, at or near Seymour Johnson Air Force Base, North Carolina, on divers occasions between on or about 12 November 2010 and on or about 15 December 2010, with intent to defraud and for the procurement of lawful currency, wrongfully and unlawfully utter to Bob's Cafe, certain checks for the payment of money, drawn upon the First National Bank of Goldsboro, as follows:

Date	Check #	Amount
08 Dec 10	102	$123.45
11 Dec 10	104	150.00
15 Dec 10	105	23.00
03 Dec 10	115	20.00
12 Nov 10	120	183.55

of a total amount of $500.00, and signed John Doe, then knowing that he, the maker thereof, did not or would not have sufficient funds in or credit with said bank for the payment of said checks in full upon their presentment.

II. MCM, paragraph 49f(2) (For the payment of any past due obligation, or for any other purpose, with intent to deceive):

A. Specification Form:
In that _____, United States Air Force, (unit), did, (at) _____, on or about _____, 20__, with intent to deceive and [(for) payment of a past due obligation, to wit: _____)(for the payment of_____)], wrongfully and unlawfully [(make)(draw)] and [(utter)(deliver)to _____], a certain (check)(draft)(money order) for the payment of money in the amount of _____, dated _____, 20__, drawn upon the _____ Bank, made payable to the order of _____, and signed _____, then knowing that (he)(she)(_____), the [(maker)(drawer)] thereof, did not or would not have sufficient funds in or credit with said bank for the payment of said (check)(draft)(money order) in full upon its presentment.

EXAMPLES:
(1) In that CAPTAIN JANE DOE, United States Air Force, Headquarters, Fifth Air Force, did, at Okinawa, Japan, on or about 7 February 2011, with intent to deceive and for the payment of a past due obligation, to wit: a personal loan, wrongfully and unlawfully deliver to the American Express Bank a certain check for the payment of money in the amount of $140.00, dated 7 February 2011, drawn upon the Bank of America, made payable to American Express Bank and signed John Doe, then knowing that John Doe, the maker thereof, did not or would not have sufficient funds in, or credit with, said bank for the payment of said check in full upon its presentment.

NOTE: This is a sample of passing a check made by another person, with intent to deceive and knowing that the check would not be honored.

(2) In that AIRMAN JOHN DOE, United States Air Force, 30th Space Wing, did, at Vandenberg Air Force Base, California, on or about 27 August 2011, with intent to deceive and for the payment of a past due obligation, to wit: a bill for electric service, wrongfully and unlawfully utter to the California Electric Cooperative a certain check for the payment of money in the amount of $27.15, dated 27 August 2011, drawn upon the National Bank of Fort Sam Houston, made payable to the California Electric Cooperative, and signed John Doe, then knowing that he, the maker thereof, did not or would not have sufficient funds in or credit with said bank for the payment of said check in full upon its presentment.

(3) In that CAPTAIN JANE DOE, United States Air Force, 9th Wing, did at Beale Air Force Base, California, on divers occasions, between on or about 1 April 2011 and on or about 6 May

2011, with intent to defraud and for the procurement of lawful currency or things of value, wrongfully and unlawfully utter to the Beale Officers' Open Mess, drafts for the payment of money, and things of value, for a total amount of $642.25, more or less, drawn upon the Sierra Central Credit Union, made payable to Beale Officers' Open Mess, and signed Jane Doe, then knowing that she, the drawer thereof, did not or would not have sufficient funds in or credit with said credit union for the payment of said draft in full upon its presentment.

III. MCM, paragraph 68f (Check, worthless, making and uttering--by dishonorably failing to maintain funds):

A. Specification Form:

In that _____, United States Air Force, (unit), did, (at)_____, on or about _____, 20__, [(make)(draw)] [utter to] _____ a certain [(check)(draft)] in the amount of _____, dated _____, 20__, drawn upon the _____ Bank, made payable to the order of _____, and signed _____, [(for the purchase of _____)(in payment of a debt)(for the purpose of _____)], and did thereafter dishonorably fail to (place)(maintain) sufficient funds in said bank for payment of said check in full upon its presentment for payment, which conduct was, under the circumstances, [(prejudicial to good order and discipline)(of a nature to bring discredit upon the armed forces)].

EXAMPLE:

In that AIRMAN JANE DOE, United States Air Force, 2853rd Air Base Group, did, at San Antonio, Texas, on or about 10 May 2011, utter to San Antonio Jewelry, a certain check in the amount of $215.99, dated 10 May 2011, drawn upon the National Bank of El Paso, made payable to San Antonio Jewelry, and signed Jane Doe, for the purpose of obtaining a watch, and did thereafter dishonorably fail to maintain sufficient funds in said bank for the payment of said check in full upon its presentment, which conduct was, under the circumstances, of a nature to bring discredit upon the armed forces.

Figure 3.5. Sample Statement of Understanding Regarding Recoupment of Education Assistance, Special Pay, or Bonuses.

STATEMENT OF UNDERSTANDING REGARDING RECOUPMENT OF EDUCATION ASSISTANCE, SPECIAL PAY, OR BONUSES

I understand that the Air Force may be entitled to recoup a portion of education assistance, special pay, or bonus money which I received, if any, if I separate before completing the period of active duty I agreed to serve. I understand this recoupment applies regardless of whether I voluntarily separate or I am involuntarily discharged. I further understand: (1) the recoupment in all cases is an amount that bears the same ratio to the total amount or cost provided to me, as the unserved portion of active duty bears to the total period of active duty I agreed to serve; and

(2) that if I dispute that I am indebted for educational assistance, a board or other authority will make findings and recommendations concerning the validity of the indebtedness.

Signed this ____ day of _____ 20__.
Signature: _____
Typed Name: _____

Figure 3.6. Sample Commander's Indorsement.

1st Ind, DD Form 458, Charge Sheet, dated _____, (Grade), (Name), (Unit), (Base), (State Abbreviation)

FROM: (Squadron CC)

MEMORANDUM FOR: (SPCMCA)

[*Briefly describe the accused's character of service prior to the date of the offense(s) charged. Include comments relating to duty performance, attitude, amenability to discipline, and rehabilitation potential*.] I recommend the charges be referred to trial by (summary) (special) (general) court-martial. The [(security forces' report) (AFOSI report of investigation) (other evidence)] is attached and supports the charge(s). [*If applicable, insert*: (The accused was offered and declined nonjudicial punishment.) (The victim(s) and witness(es) have been informed of the preferral of charges.)] Due to the (severity) (nature) of the charges, I (do) (do not) believe retention on active duty is appropriate if (he) (she) is convicted. The accused (is) (is not) subject to the restrictions identified in AFI 31-501, *Personnel Security Program Management*, paragraph 8.9. [A written request for permission to proceed with further processing of this case has been forwarded to the appropriate special access office.] [*If applicable:* The accused is a citizen of _____ and not a national or citizen of the United States. AF/JAO has been informed of this action.]

(NAME), (Grade), USAF
(Squadron CC Duty Title)

2 Attachments:
1. Personal Data Sheet
2. (Report of Investigation) (List any other documents)

Figure 3.7. Personal Data Sheet.

PERSONAL DATA SHEET

DATE PREPARED:

NAME OF ACCUSED:

ORGANIZATION:

GRADE:

SSAN:

DATE OF RANK:

PAY GRADE:

DATE OF BIRTH:

TAFMSD:

LENGTH OF SERVICE: *(See Note 1)*

AFSC:

MILITARY TEST SCORES:

BASIC PAY:

HARDSHIP DUTY PAY:

INITIAL DATE OF CURRENT SERVICE:

HOSTILE FIRE PAY:

TERM OF CURRENT SERVICE:

IMMINENT DANGER PAY:

PRIOR SERVICE: *(See Note 2)*

SPECIAL PAY AND BONUSES:

OVERSEAS SERVICE (OCONUS): *(See Note 3)*

COMBAT SERVICE: *(See Note 4)*

NATURE OF PRETRIAL RESTRAINT: *(See Note 5)*

MARITAL STATUS:

NO. OF DEPENDENTS:

NO. OF PREVIOUS COURT-MARTIAL CONVICTIONS:

NO. OF PREVIOUS ARTICLE 15 ACTIONS:

AWARDS AND DECORATIONS:

NOTES:

1. List in years and months (*e.g.* 2 years, 3 months. Lost time: 8 days). Exclude and identify lost time as calculated by personnel records (i.e., prior adjudged confinement, AWOL or periods of desertion, etc.) Lost time does not include pre-trial confinement. See AFI 36-2134, *Air Force Duty Status Program*, Chapter 3 and AFI 36-2604, *Service Dates and Dates of Rank*.
2. Include all prior enlistments or periods of service, regardless of whether there was a break in service.
3. Identify service for which credit for overseas service was awarded per AFI 36-2110. Include dates and locations.
4. Identify service for which the member was awarded "special pay for duty subject to hostile fire or imminent danger" per DoD 7000.14-R, *DoD Financial Management Regulation*, Volume

7A, Chapter 10. Include dates and locations.
5. Include type of restraint (*see* RCM 304(a)), date imposed, location, and number of days. Include restraint by civil authorities at the behest of the Air Force.

Figure 3.8. Civilian Defense Counsel Agreement Not to Release Privacy Act Information.

Agreement Not to Release Privacy Act Information

As part of the discovery process, I am in receipt of material covered under the Privacy Act of 1974, under 5 U.S.C. § 552a. I hereby agree that I will not release Privacy Act material to anyone outside of defense personnel working on the case of *United States v.* _____.

(signature)

_____ _____

Civilian Defense Counsel Date

Chapter 4

FORWARDING AND DISPOSITION OF CHARGES

Section 4A—Article 32, UCMJ, Investigations

4.1. Article 32, UCMJ, Investigations (RCM 404(e), 405, 406(b)(2), 601(d)).

4.1.1. Requirements for an Article 32 Investigation. Before any charge(s) or specification(s) may be referred to a GCM for trial, a thorough and impartial investigation into the matters set forth in the charge(s) and specification(s) must be made.

4.1.2. Investigating Officer (IO).

4.1.2.1. Appointment. The convening authority directs an Article 32 investigation by personally appointing the IO in writing. See sample appointment letter at Figure 4.1. All documents provided to the IO before the investigation must be listed as attachments. The charge sheet and the written evidence, which form the basis for the charge, should be attached to the IO Appointment Letter. Normally these documents are the same as those attached to the commander's indorsement to the charge sheet. The IO is not required to consider this evidence in the investigation. The IO ensures a copy of the Appointment Letter is provided to the accused before the Article 32 investigation begins.

4.1.2.2. Qualification of the IO. Unless precluded by military necessity or other compelling circumstance, the IO should be senior in rank to the accused. An IO must either be a designated judge advocate or hold the grade of major or higher. If the IO is not a judge advocate, a judge advocate should be appointed to assist the IO. An IO may be a reserve judge advocate on active duty or performing inactive duty training. ANG judge advocates must be on Title 10 orders to serve as an IO. The accuser may not act as IO. The IO must be impartial. Before appointing an officer to serve as an IO, the convening authority should consider the appointment in the context of the officer's normally assigned duties and assess whether the IO's impartiality could be questioned based on his/her relationship with the case, the parties, and the base legal office.

4.1.3. Counsel.

4.1.3.1. Government Representative. The convening authority may personally detail, or authorize the servicing SJA to detail, a government representative as counsel to represent the United States. RCM 405(d)(3). Both the detail of a government representative and the authorization to allow the SJA to detail a government representative may be verbal or in writing.

4.1.3.2. Counsel for the Accused. The accused is entitled to be represented by military defense counsel certified under Article 27(b) and sworn under Article 42(a), UCMJ. RCM 405(d)(2). The accused may also be represented by civilian defense counsel; however, civilian defense counsel must be provided at no expense to the government. RCM 405(d)(2)(C). Civilian defense counsel must take an oath to perform his or her duties faithfully when representing an accused. The IO will administer this oath. The accused may represent himself/herself, but this right is not absolute. *United States v. Bramel*, 29 M.J. 958 (A.C.M.R.), aff'd, 32 M.J. 3 (C.M.A. 1990).

4.1.4. Delays and Resulting Speedy Trial Issues. The convening authority may approve a delay of the Article 32 investigation submitted by either party. The period of time of such delay shall be excluded when determining whether the period in RCM 707(a) has run. Prior to referral, the convening authority may delegate the authority to grant continuances to an Article 32 investigating officer. See RCM 707(a)(1) Discussion. Thus, when an IO has been delegated authority to grant delays, the period covered by the delay is excludable from the 120-day period under RCM 707(c). See also *United States v. Lazauskas*, 62 M.J. 39 (C.A.A.F. 2005).

4.1.5. Preliminary actions by the IO. The IO is responsible for an inquiry into the truth of the matter set forth in the charge(s), consideration of the form of the charge(s), and a recommendation for a disposition that takes into account the interests of justice and discipline. Therefore, the IO must review the charge sheet. The IO should also review the evidence which forms the basis for the charge(s), and any other documents attached to the IO Appointment Letter. The IO reviews the evidence to ascertain what will be necessary to conduct a thorough and impartial investigation. The IO may also contact the government representative, if any, and the defense counsel to discuss administrative matters, including setting the date and time for the formal hearing.

4.1.6. Witnesses.

4.1.6.1. Availability of Witnesses. The IO must determine whether witnesses are reasonably available. The "100 miles of the situs" rule found in RCM 405(g)(1)(A) is not a per se rule of unavailability. The IO must conduct a balancing test to determine reasonable availability. RCM 405(g), Discussion.

4.1.6.2. Arranging for Witnesses. If the IO considers a witness available, the IO requests the witness' presence. Although the IO may contact witnesses to arrange for their presence at the Article 32 investigation, the IO may not discuss the substance of their testimony. The IO may delegate to the government representative the responsibility to arrange for the presence of witnesses the IO considers reasonably available.

4.1.6.2.1. Military Witnesses. The IO arranges for the presence of military witnesses directly or through the witness' commander. Before the commander determines a military witness is not reasonably available, the commander should consider the balancing test factors in RCM 405(g), Discussion, and provide the reasons for his decision to the IO, to be included in the IO report. If the commander does not put the reasons in writing, the IO must make a memorandum for record detailing the commander's reasons and include it in the report.

4.1.6.2.2. Civilian Witnesses. The IO may invite civilian witnesses to attend. The IO does not generally have subpoena power over persons (See paragraph 6.4). Therefore, if the witness refuses to testify, the witness is not reasonably available.

4.1.7. Conducting the Investigation.

4.1.7.1. At the beginning of the investigation, the IO must inform the accused of the matters in RCM 405(f) and listed on the DD Form 457, Investigating Officer's Report, Item 10.

4.1.7.2. IOs should consider all testimony and evidence that is relevant, not cumulative, and reasonably available. RCM 405(g)(1). IOs must become familiar with the rules on alternatives to testimony and evidence in RCM 405(g)(4) and (5). See RCM 405(g)(1)(B) and 405(i) (applying MREs to Article 32 investigations).

4.1.7.2.1. Procedure for Taking Testimony. All testimony, except that of the accused, is required to be taken under oath. RCM 405(h)(1)(A), Discussion. The accused may make a sworn or unsworn statement. The IO has discretion over the manner in which testimony is taken. The IO may personally question witnesses and/or allow the government representative to conduct the questioning. The IO must allow the defense counsel to question witnesses and should allow the defense wide latitude in cross-examination. Keep in mind the application of MRE 303, prohibiting degrading questions, and MRE 412, prohibiting questions regarding the alleged victim's past sexual behavior or any perceived predisposition (see paragraph 4.1.7.7 et al.). An IO who suspects a witness of an offense should advise the witness of his or her rights under Article 31, UCMJ.

4.1.7.2.2. Reducing Testimony to Writing. The IO is responsible for including all testimony in the report. Summarized testimony should be written in the first person. The witnesses should sign and swear to the truth of their summarized testimony, unless this would unduly delay completion of the investigation. If the witness reviews and signs the summarized testimony in the United States, use this language above the witness' signature block: "I declare under penalty of perjury that the foregoing is true and correct. Executed on (date)." If outside the United States, use: "I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on (date)." 28 U.S.C. § 1746. The IO need not be present for a witness to sign their summarized testimony. If the witness is not available to sign their summarized testimony, the IO should swear that the summary is accurate. The IO should consider, when practicable, giving counsel for each side an opportunity to review the summarized testimony prior to providing the summarized testimony to the witness for signature.

4.1.7.3. Reports of Investigation (ROI). AFOSI and Security Forces ROIs contain documents that are evidence, alternatives to evidence or alternatives to testimony. RCM 405(g)(4),(5). For example, a sworn statement by a witness is an alternative to testimony. RCM 405(g)(4)(A)(i),(B)(i). The narrative portion of an ROI is usually an "unsworn statement describing the evidence" as that term is used in RCM 405(g)(5)(A)(v). Also, photographs or photocopies of physical evidence in ROIs are usually unauthenticated copies, photographs or reproduction of similar accuracy of the evidence. RCM 405(g)(5)(A)(ii) and (B)(ii). IOs are discouraged from considering ROIs in their entirety. In order to consider an ROI, IOs must look at each part of the ROI and determine whether it is evidence or an alternative to testimony. If he or she determines it is evidence or an alternative to testimony, the IO must also determine whether the witness or evidence is reasonably available and apply the rules in RCM 405(g)(4) and (5). The IO should note in the report what parts of the ROI were considered and why. An investigator familiar with the matters in the ROI may testify over defense objection about both unavailable evidence and his or her participation in the investigation, including relating hearsay.

RCM 404(g)(5)(B)(i). Witnesses whose statements appear in the ROI may adopt their statements as part of their testimony.

4.1.7.4. Accused's Statements. An accused is not considered a witness for purposes of RCM 405. Therefore, a witness may testify about statements the accused made to the witness if relevant, not cumulative and not otherwise prohibited by RCM 405(i). Similarly, a written statement by the accused is evidence.

4.1.7.5. Argument. Because an accused may present anything in defense, extenuation and mitigation, and make a statement in any form, the IO may allow the accused or counsel, on behalf of the accused, to make a brief argument, if requested. RCM 405(f)(11), (12).

4.1.7.6. Objections (RCM 405(h)(2)).

4.1.7.6.1. The following are potential bases for objections:

4.1.7.6.1.1. Violations of MRE 301 - 303, 305, 412 and Section V.

4.1.7.6.1.2. Failure to comply with the procedural requirements of RCM 405.

4.1.7.6.1.3. A determination that a witness or evidence is not reasonably available. RCM 405(g)(2)(D).

4.1.7.6.2. IOs are required to note objections in their reports. RCM 405(h)(2). The IO may require counsel to put objections in writing before noting them in the report. The IO may also set a time limit for filing objections.

4.1.8. Tape Recordings and Verbatim Transcripts. Tape recordings of witness testimony and any verbatim transcripts at an Article 32 investigation are permitted only with the advance written approval of the SJA for the convening authority that directed the investigation. When considering such requests, SJAs should consider the likelihood the witness will be unavailable or refuse to testify at a later trial, whether the testimony of an important witness is best evaluated by reviewing the verbatim testimony, and the discovery interest of the accused. Court reporter availability or non-availability is not a proper consideration and cannot be the basis for denial of this request. If approved, all tape recordings or stenographic notes, which could be subject to release under the Jencks Act, 18 U.S.C. § 3500, or RCM 914, must be retained by the servicing SJA's office until the case is completed.

4.1.9. Open Proceedings. Ordinarily, Article 32 investigations are open to the public. All efforts to keep the investigation open should be explored before closing the investigation. See *San Antonio Express News v. Morrow*, 44 M.J. 706 (A.F. Ct. of Crim. App. 1996).

4.1.9.1. Closing the Proceedings. Access by spectators to all or part of the proceeding may be restricted or foreclosed at the discretion of the convening authority that directed the investigation or the IO. Article 32 investigations are public hearings and should remain open to the public whenever possible. When an overriding interest exists that outweighs the value of an open investigation, the hearing may be closed to spectators. Any closure must be narrowly tailored to achieve the overriding interest that justified the closure. RCM 405(h)(3). The convening authority directing the investigation may retain sole authority over a decision to open or close an Article 32 investigation by giving the IO procedural instructions at the time of appointment or at any time thereafter. RCM 405(c).

4.1.9.1.1. Specific Reasons. If the hearing is closed, the convening authority or IO ordering it closed should articulate specific, substantial reasons, in writing, for closure. These reasons should be attached to the IO's report of investigation. Such reasons ordinarily will be only those circumstances under which a court-martial may be closed. MRE 412(c) (evidence of a victim's prior sexual conduct); MRE 505 (classified information); MRE 506 (government privilege). RCM 405(h)(3). Make every effort to close only those portions of the investigation that are clearly justified and keep the remaining portions of the investigation open.

4.1.9.1.2. Reopening a Closed Investigation. A convening authority may open an Article 32 investigation an IO has closed. Prior to issuing procedural instructions to reopen an investigation, the convening authority must consider the IO's written reasons for closing the investigation.

4.1.9.2. Potential Witnesses. It is within the IO's discretion to exclude potential witnesses.

4.1.10. Media. See Section 13D for issues dealing with the news media.

4.1.11. Investigating Uncharged Misconduct. If evidence received at an Article 32 investigation indicates the accused committed uncharged misconduct, the IO may investigate the subject matter of such offense and make a recommendation as to its disposition prior to preferral of charges on that offense. The IO should ensure the accused is present at the investigation, is informed of the nature of each uncharged offense investigated, and is afforded the right to counsel, cross-examination and presentation of evidence. The IO will identify compliance with the guidance in this paragraph in the IO's Report of Investigation. If the uncharged misconduct is subsequently charged, consult RCM 405(b) as to the need for further investigation. Article 32(d), UCMJ.

4.1.12. Drafting the IO's Report of Investigation. The IO prepares a report using DD Form 457, Investigating Officer's Report, with supplemental pages, if necessary. See RCM 405(j)(2) and MCM, Appendix 5, for what must be included in the IO report. The report must clearly state what evidence the IO considered. The standard of proof is whether reasonable grounds exist to believe that the accused committed the offense(s) alleged, not whether the government has presented a *prima facie* case. RCM 405(j)(2)(H). Reasonable grounds exist when the evidence convinces a reasonable, prudent person there is probable cause to believe a crime was committed and the accused committed it. A finding that reasonable grounds exist does not require a recommendation of trial by court-martial.

4.1.13. Assembly of the IO Report.

4.1.13.1. The IO report is the first attachment to the IO Appointment Letter.

4.1.13.2. The IO report includes the DD Form 457, its supplemental pages, and exhibits. Exhibits include the charge sheet, summarized or verbatim testimony, and other evidence, whether or not considered.

4.1.14. Distribution of the Report.

4.1.14.1. The IO should deliver the report through the convening authority's SJA to the convening authority who directed the Article 32 investigation. The SJA ensures

photocopies of the report are made and delivered to the convening authority. The process should be described in the IO Appointment Letter. RCM 405(j)(3).

4.1.14.2. The convening authority that directed the investigation, or the SJA on behalf of the convening authority, shall promptly cause a copy of the report to be served on both the accused and accused's counsel. RCM 405(j)(3). Upon delivery, the accused and the accused's counsel shall sign receipts of service, showing the date and time of service. Append the receipts as attachments to the IO Appointment Letter.

4.1.15. Objections to the IO Report. Any objections to the report must be submitted to the convening authority that directed the investigation within 5 days of receipt of the report by the accused and counsel, whichever is later. The day the report is delivered is not counted in calculating the 5-day period. RCM 103(9); 405(j)(4). The convening authority, upon receipt, may direct the investigation be reopened or take other action, as appropriate. However, this does not prohibit a convening authority from referring charges to trial or taking other action within the 5-day period. RCM 405(j)(4).

4.1.15.1. If timely objections are received after the convening authority has taken action on the report, the convening authority may reconsider the prior action taken in light of the objections received. If the report has been forwarded to a superior court-martial convening authority for disposition in accordance with paragraph 4.1.16 below, forward the objections to that convening authority by the most expeditious means so that the objections may receive appropriate consideration.

4.1.15.2. Objections not received in a timely manner are waived. However, relief from the waiver may be granted for good cause shown. RCM 405(k).

4.1.15.3. Append objections as attachments to the IO Appointment Letter.

4.1.16. Forwarding the Article 32 Report of Investigation to a Superior Convening Authority. If the convening authority who directed the investigation decides to forward the Article 32 report to a superior court-martial convening authority for disposition, the convening authority who directed the investigation prepares a forwarding letter which includes a recommendation for disposition of the charges. This letter is forwarded to the superior court-martial convening authority, through the superior convening authority's SJA, and must include the following documents as attachments:

4.1.16.1. The Charge Sheet,

4.1.16.2. The commander's indorsement to the charge sheet, and

4.1.16.3. The IO Appointment Letter with attachments (including the IO Report, accused and defense counsel receipts and any objections).

4.1.17. If the superior convening authority needs to detail members to a court-martial to try the case, forward a list of court member nominees with *Credit* data. *United States v. Credit*, 2 M.J. 631 (A.F.C.M.R. 1976); RCM 912. A list of court member nominees may not be required if the case will ultimately be referred to a court-martial previously impaneled to try cases (i.e., a standing panel to try cases that may arise in a specified period).

Section 4B—Courts of Inquiry

4.2. Courts of Inquiry (Article 135, UCMJ; MCM, Part I, Para. 2(b)(3)).

4.2.1. General. A court of inquiry is one of several investigative methods available to ascertain the facts of a matter of importance to the Air Force. Only a GCMCA may convene a court of inquiry. Do not use a court of inquiry when statute or regulation otherwise provides specific investigative procedures for a matter. Do not use a court of inquiry in place of an Article 32 investigation, unless deemed necessary to produce evidence not otherwise reasonably available. If, however, a court of inquiry previously investigated the subject matter of an offense, and the requirements of RCM 405(b) are met, an Article 32 investigation may not be necessary.

4.2.2. Members of the Court of Inquiry. A court of inquiry shall consist of three or more commissioned officers. The senior member is the president. All members should be senior to any person whose conduct is the subject of an inquiry.

4.2.3. Counsel for the Court of Inquiry. The convening authority appoints a judge advocate certified under Article 27(b), UCMJ, as legal advisor for the court of inquiry. The counsel assists the court of inquiry in matters of law, presenting evidence and keeping the record.

4.2.4. Party to the Court of Inquiry. Designate any person subject to the UCMJ whose conduct is subject to inquiry as a party to the court of inquiry. Any person designated as a party shall be given due notice and has the right to be present, to be represented by counsel, to cross-examine witnesses and to introduce evidence.

4.2.5. Counsel for Parties. A party to the court of inquiry is entitled to representation by a defense counsel certified under Article 27(b), UCMJ. A party may request individual military defense counsel, subject to the rules of reasonable availability applicable to trials by court-martial. Any party may retain a civilian counsel at no expense to the government. See paragraph 5.3.

4.2.6. Convening Order. Use the sample format in Figure 4.2 to convene a court of inquiry. The order appoints the members and counsel for the court of inquiry, states the subject of inquiry, designates known parties, and directs a report of findings of facts on the issues involved. If the convening authority desires conclusions and recommendations, include this in the order. The convening order should set the time and place of the court of inquiry. The convening order is provided to the parties and counsel.

4.2.7. Reporters. A qualified court reporter records the proceedings and testimony, and prepares a record of the proceedings for authentication by the president. If the record of the proceedings is to be used as a substitute for an Article 32 investigation, it must comply with the requirements of RCM 405(j). See also AFMAN 51-203, paragraph 16.13.5.

4.2.8. Challenges. Members of a court of inquiry may be challenged by a party, but only for cause stated to the court. The president of the court, with advice from the counsel for the court of inquiry, rules on challenges.

4.2.9. Oaths. The members, counsel, reporter and interpreter take an oath or affirmation to faithfully perform their duties. Article 135(e), UCMJ. The president or counsel for the court of inquiry may administer oaths. Article 136, UCMJ.

4.2.10. Procedures and Rules of Evidence. The rules of evidence and procedure that apply to an Article 32 investigation apply to a court of inquiry.

4.2.11. Witnesses. The president of the court may issue subpoenas for civilian witnesses. RCM 703(e)(2)(C). All witnesses testifying before a court of inquiry do so under oath or affirmation. Members of the court of inquiry, the counsel to the court of inquiry and the counsel to a party may examine all witnesses. A party cannot be compelled to testify, but may testify under oath subject to cross-examination or make an unsworn statement.

4.2.12. Written Report by the Court of Inquiry. The court of inquiry makes findings of fact, but may not make conclusions and recommendations, unless required to do so by the convening authority. Dissenting views are authorized.

4.2.13. Record of the Court of Inquiry. Each court shall keep a record of its proceedings. Authenticate the record in accordance with Article 135(h), UCMJ. The president forwards the authenticated record to the convening authority, who obtains a legal review from the servicing SJA. The legal review includes a summary of the proceedings, a determination of the legal sufficiency of the proceedings, and a recommended action.

4.2.14. Revision. The convening authority may reconvene the court of inquiry and direct it to take additional action the convening authority deems necessary.

Section 4C—Depositions (RCM 702)

4.3. Counsel. The rules governing qualification of counsel who may perform duties before courts-martial apply to counsel representing the parties at a deposition. The deposition should affirmatively indicate the qualifications of counsel. See Figure 4.4.

4.4. Recording and Authentication.

4.4.1. Written Depositions. Record and authenticate depositions taken on written interrogatories using a DD Form 456, *Interrogatories and Depositions*. Do not use the DD Form 456 for oral depositions.

4.4.2. Oral Deposition. Conduct oral depositions in accordance with the procedures in RCM 702(g)(1). Figure 4.4 provides a sample format for conducting and transcribing the proceeding. Record and transcribe oral depositions verbatim, noting the times and dates of the opening, closing, recesses and adjournment. An oral deposition may be recorded by a reporter or other means, including videotape. RCM 702(g)(3). The deposition officer is the custodian for the record of deposition.

4.4.2.1. If the deposition is recorded, the transcriber shall certify the transcription is true and accurate. See Figure 4.5. The deposition officer must authenticate the record of deposition. See Figure 4.6. The certification and authentication shall be the last pages of the deposition.

4.4.2.2. For depositions recorded by other means, a written transcript is not required unless the convening authority or military judge directs one. RCM 702(g)(3). However, the record of deposition, whether it is a videotape, audiotape or sound film, must still be authenticated by the deposition officer. The authentication is attached to the recording. A sample format for the authentication of a videotaped deposition is at Figure 4.7.

Section 4D—Referral and Disposition

4.5. Pretrial Advice (Article 34, UCMJ; RCM 406).

4.5.1. SJA's Advice. A person other than the SJA may prepare the advice, but the SJA is, unless disqualified, responsible for it and must personally sign it. An assistant performing the duties of the SJA, in the absence of, or because of the disqualification of the SJA, signs "Acting as the Staff Judge Advocate." The SJA's advice is required for all GCMs and is optional for SPCMs and SCMs.

4.5.2. Mandatory Contents. The pretrial advice must include the conclusions and recommendation enumerated in RCM 406(b). The pretrial advice must also address the following matters, when applicable:

4.5.2.1. Capital Cases. In a case referred as capital, the pretrial advice must specify the aggravating circumstances relied upon and provide the convening authority with conclusions as to whether capital referral is warranted based on the analysis as set forth in RCM 1004(b)(4). In a case where the death penalty is authorized, but not mandatory, and the convening authority decides to refer the case as capital, the referral should include special instructions stating the case is to be tried as a capital case. RCM 201(f)(1)(A)(iii); RCM 1004(b)(1)(A).

4.5.3. Format and Length. Pretrial advice need not contain any underlying analysis or rationale for the conclusions contained in it. In addition, lengthy summaries of evidence, detailed explanations of elements of offenses, and extensive discussions of possible defenses are not required. See sample format for pretrial advice at Figure 4.8.

4.6. Forwarding of Pretrial Advice. The charge sheet, the commander's indorsement, forwarding letters or other indorsements, and, if applicable, the investigating officer's appointment letter with attachments (including the report of investigation, receipts of report and any objections) should be forwarded with the pretrial advice to the convening authority. If the Article 32 investigation is waived, forward the accused's waiver. If an Article 32 investigation is not conducted, forward the documentary evidence that the SJA relied upon to conclude the charges and specifications are warranted, such as investigative reports, witness statements and other documents containing relevant information. If the convening authority needs to detail members to a court-martial to try the forwarded case, forward appropriate documentation for court-member selection. See paragraph 4.1.17.

4.7. Referral of Charges to Courts-Martial (RCM 601). The convening authority must sign either the referral section on the DD Form 458, Charge Sheet, or another document reflecting the intention to refer charges to trial. Such other documents may include concurrence with an SJA's pretrial advice recommendation to refer the case to trial by a specified court-martial.

4.7.1. Completing the Referral Block on Charge Sheet. The designation of the convening authority on the charge sheet should be the same as on the convening order. Use the date the convening authority referred the charges. If the convening authority personally signs the referral, strike out "by ... Command or Order … of...," and include the convening authority's signature block. If the convening authority delegated authority to sign the referral block on the charge sheet to a judge advocate, the judge advocate signs the referral "FOR THE COMMANDER."

4.7.1.1. Include special instructions in the referral block when appropriate. RCM 601(e). For example, when additional charges are referred, include the following: "To be tried

with the original (charge) (charges), dated [date of preferral of original charge(s)]." Also, when a case is referred as a capital case, include the following: "To be tried as a capital case."

4.7.1.2. The SPCMCA SJA must have the accused's records examined to ascertain the accused's nationality no later than twenty four hours after referral, even if a claim of foreign nationality has not been made. See paragraph 13.10.3. Comply with the reporting requirements of paragraph 13.10.1.

4.7.2. Dismissing Charges (RCM 401(c)(1)). If the convening authority determines some of the charges and/or specifications will be dismissed instead of referred to court-martial, the dismissed charges and/or specifications should be lined out, and the dismissal dated and initialed (e.g., "Dismissed on 15 Sep 11, [initials]"). This may be accomplished by the convening authority, a judge advocate authorized to sign referrals on the convening authority's behalf, or the trial counsel at the direction of the convening authority. The remaining charges should be renumbered if necessary. If no charges remain, the referral must be withdrawn. See paragraph 8.2.

4.7.3. Disqualification of Convening Authority (RCM 601(c)). An accuser may not refer charges to a general or special court-martial. Further, a convening authority is disqualified if he or she has "an interest other than an official interest in the prosecution of the accused." Article 1(9), UCMJ.

4.7.3.1. If the SPCMCA is disqualified, forward the case to the GCMCA. If the GCMCA is disqualified, the MAJCOM commander determines who shall act as the GCMCA. If there is not an appropriate commander exercising GCMCA within the command, the MAJCOM SJA requests AFLOA/JAJM assistance in the designation of a commander to serve as the GCMCA.

4.8. Withdrawing Referred Charges (RCM 604). Reference paragraph 8.2 for withdrawing referred charges.

4.9. Re-referring Charges. After charges have been referred to trial, it may become necessary to refer them again on the same charge sheet. Use the following procedures for re-referring charges in rehearings and other cases, including withdrawn charges:

4.9.1. New Referral. The new referral must be documented in the same format as that on page 2 of the charge sheet, following the rules in paragraph 4.7. The new referral may be accomplished by typing the appropriate language on bond paper or by using the referral section from page 2 of another DD Form 458. When completed, cut out and attach the new referral section to the charge sheet by stapling it immediately above the original referral section. Never remove or obliterate a prior referral. If a third or subsequent referral is necessary, attach it in the same way as the second.

4.9.2. Special Instructions for Rehearings. When a case has been referred for a rehearing (whether in full, for a limited purpose, or for a new trial), incorporate the appropriate instructions in the referral section. RCM 810. For example, in a rehearing on sentence only, include the special instruction: "For a rehearing on sentence only, as ordered by General Court-Martial Order No. 17, Headquarters, 18 AF, dated 4 June 2011, as to the charge and specification of which the accused was found guilty and affirmed by the Air Force Court of Criminal Appeals' decision, dated 10 May 2011," or a similar instruction.

4.10. Notification of Referral of Later Charges in Pending Cases.

4.10.1. Notify AFLOA/JAJM. If charges are referred to trial against a person who is the accused in a case under review under Articles 66, 67, 67a or 69, UCMJ, the headquarters referring the new charges to trial must notify AFLOA/JAJM by the most expeditious means available (e.g., facsimile or e-mail). Identify the case currently under review by providing the accused's full name, rank, and social security number, along with the case's ACM (the number assigned by AFLOA/JAJM Appellate Records), if available. Also provide the nature of the new charges, including the date referred, type of court-martial, anticipated date of trial, a brief statement of facts of the case, and any other information which might affect disposition of the current review concerning the case.

4.10.2. Follow-Up Messages. Send follow-up messages to advise when trial is completed (including the result), if the charges are withdrawn, or if there are other significant developments which may affect disposition of the case currently under review.

4.11. Arraignment and Pleas at Article 39(a) Session. When a UCMJ, Article 39(a) session is conducted by the military judge before assembly, the arraignment may be held and the plea of the accused may be accepted at that time by the military judge. In addition, the military judge may enter findings of guilty on an accepted plea of guilty at that time.

4.12. Docketing. USAF/JAT shall establish docketing procedures. Rules 2.1 through 2.5 of the *Uniform Rules of Practice Before Air Force Courts-Martial* (Attachment 4) contain current docketing procedures.

Figure 4.1. Appointment of Investigating Officer.

MEMORANDUM FOR (*Rank and Full Name of Investigating Officer*)

FROM: _____/CC

SUBJECT: Appointment of Investigating Officer

1. You are hereby appointed as an Investigating Officer pursuant to Article 32, UCMJ, to investigate the attached charge(s) and specification(s) against (*accused's name, rank, unit, and base*). This investigation is to be your primary duty until completed or until you are relieved.

2. In conducting your investigation, comply with the provisions of Articles 31 and 32, UCMJ; RCM 405; and AFI 51-201, Chapter 4, Section 4A. You should review each of these references before beginning your investigation. You are expected to prepare a summary of testimony as soon as practicable after a witness has testified. A verbatim transcript of the testimony of a witness may only be prepared if approved by my Staff Judge Advocate.

3. You (are) (are not) delegated authority under RCM 707(c)(1) to act upon requests for continuance or delay submitted by either party. [*Your decision granting a continuance must be in writing and attached to your report.* (*See paragraph 4.1.4.*)]

4. Use DD Form 457, Investigating Officer's Report, to prepare your report and recommendations. Submit your original report to me within eight days of the hearing's

conclusion through my Staff Judge Advocate. Annotate all delay requests, whether granted or not, in your report and fully explain any delay in submitting your report beyond eight days.

5. My Staff Judge Advocate will provide any assistance and support you require. [*He/She may be contacted at (XXX)XXX-XXXX*].

(SPCMCA Signature Block)
Commander

3 Attachments:
1. Charge Sheet
2. (evidence provided to the IO)
3. (other documents provided to the IO)

Figure 4.2. Convening Order for Court of Inquiry.

DEPARTMENT OF THE AIR FORCE
HEADQUARTERS 20TH FIGHTER WING
TYNDALL AFB, FLORIDA 32403

SPECIAL ORDER AA-1 15 April 2011

A court of inquiry is hereby convened. It will proceed at 0730 hrs on 20 April 2011 in the Tyndall AFB courtroom. The court will be constituted as follows:

MEMBERS

COLONEL ALLEN L. GARRET, PRES	325 MDSS	AETC	THIS STATION
COLONEL GERALD F. SMITH	325 LSS	AETC	THIS STATION
COLONEL JEFFREY A. SINGLETON	325 SFS	AETC	THIS STATION
COUNSEL FOR COURT			
LT COL JOHN F. MILLER	325 FW	AETC	THIS STATION
COUNSEL FOR KNOWN PARTY			
MAJ HELEN M. GREGORY	USAF JUDICIARY	AFLOA	THIS STATION
KNOWN PARTY			
LT COL EDWARD J. SCHMIDT	325 CES	AETC	THIS STATION

The court of inquiry is appointed to review the facts and circumstances (*describe the matter to be investigated). (The court may name other parties in addition to the named party*.) Further, the court is to (*make findings of fact, express opinions and submit recommendations) (include only a factual summary of the matter being investigated*.) AUTHORITY: AFI 51-201.

ALLEN S. CURTIS
Brigadier General, USAF
Commander

FOR THE COMMANDER

ROBIN B. DUFFY, Colonel, USAF
Staff Judge Advocate

DISTRIBUTION
- 1 Ea Individual
- 1 Ea Orgn
- 15-325 FW/JA

Figure 4.3. Appointment of Deposition Officer.

MEMORANDUM FOR (*Rank and Full Name of Deposition Officer*)

FROM: _____/CC

SUBJECT: Appointment of Deposition Officer

1. You are hereby appointed as Deposition Officer pursuant to Article 49(c), UCMJ, to conduct a deposition of (*name and address of witness(es) to be deposed*).

2. You must read and comply with the provisions of Article 49, UCMJ; RCM 702; and AFI 51-201, Chapter 4, Section 4C. [You are hereby authorized to record the deposition by (a reporter) (videotape) (audiotape) (other means).] Use DD Form 456 for written depositions. Upon completion of the record of the deposition, you must authenticate it and forward it to me.

3. [(*My Staff Judge Advocate)* (*Name of other Staff Judge Advocate*)] will provide any assistance and support you require. [(He)(She)] may be contacted at [(XXX) XXX-XXXX].

(Signature Block)
Commander

Attachment:
Request for Deposition

Figure 4.4. Sample Format for Oral Deposition Transcript.

UNITED STATES	)	
	)	
v.	)	DEPOSITION
	)	
A1C JOHN J. DOE	)	
3rd Services Squadron	)	
Elmendorf AFB, AK	)	

DO: The proceedings will now come to order at (time, date and place). These proceedings are being recorded by [(a reporter)(audiotape)(videotape)] pursuant to Rule for Court-Martial 702(g)(3).

DO: The persons present are: (Name), Deposing Officer (DO); (Name), Trial Counsel (TC); (Name), Defense Counsel (DC); (Name), Accused (AC); (Name), [(Reporter)(Video Recorder Operator)]; and (name), Witness, whose address is (address).

DO: Counsel (and the reporter) [(has/have)] been previously sworn.

DO: The purpose of this proceeding is to take the deposition of (Witness), to be used in evidence in the case of the United States versus (name of accused). Charges were preferred against the accused on (date) and referred to trial on (date), by order of (convening authority). Authority to take the deposition is vested in me, (Name), as Deposing Officer, by order of (convening authority) by letter dated (date), a copy of which shall be inserted in the record of this deposition as Exhibit 1. I am a judge advocate certified according to Article 27(b), UCMJ.

DO: (Name), a judge advocate certified according to Article 27(b), UCMJ, will represent the government in the taking of the deposition of (Witness).

DO: Now I will advise the accused of his rights to counsel. (Advise accused of right to counsel under RCM 506). Do you understand your rights to counsel?

ACC: _____.

DO: Do you wish to be represented by (defense counsel) in this deposition?

ACC: _____.

DO: At this time, defense counsel please state your qualifications.

DC: I am a judge advocate certified according to Article 27(b), UCMJ.

DO: I will advise the accused and counsel for the government that objections, including the grounds for such objections, shall be stated at the time of the taking of this deposition. All objections will be noted during the deposition and will be ruled upon at the time of the trial.

DO: (Administer the oath to the witness) DO: You may now examine the witness.

[EXAMINATION OF THE WITNESS BY TRIAL AND DEFENSE COUNSEL.]

DO: This deposition is concluded at _____ hours on _____, 20__.

Figure 4.5. Authentication of Deposition by a Transcriber.

AUTHENTICATION OF DEPOSITION
of
(*name of witness*)

In the Case of
UNITED STATES
v.
(*name of Accused*)

TRANSCRIBER'S CERTIFICATE

I certify that the foregoing transcript is an accurate translation of the machine, electronic or coded record of the deposition of the above-named witness [(I recorded) (was provided to me by (deposition officer)] on (*date*).

(Date) (Signature Block of Transcriber)

Figure 4.6. Authentication of Deposition by Deposition Officer.

AUTHENTICATION OF DEPOSITION
of
(*name of witness*)

In the Case of
UNITED STATES
v.
(*name of Accused*)

DEPOSITION OFFICER'S CERTIFICATE

In my capacity as deposition officer and custodian of the foregoing transcript, and in accordance with Rule for Court-Martial 702(f)(8), I certify that the above deposition was duly taken by me and recorded by a reporter ([sworn by me] [previously sworn]) in the presence of the accused

and his/her counsel, and that the above-named witness, having been duly sworn by me, gave the testimony in the foregoing transcript. I further certify that the foregoing transcript is a true and accurate account of the testimony of the above-named witness.

(Date) (Signature Block of Deposition Officer)

Figure 4.7. Authentication of Videotaped Deposition.

AUTHENTICATION OF DEPOSITION
of
(*Typed name of witness*)

In the Case of
UNITED STATES
v.
(*Typed name of Accused*)

In my capacity as deposition officer and custodian of the attached record, and in accordance with Rule for Court-Martial 702(f)(8), I certify that the above deposition was duly taken by me in the presence of the accused and (his/her) counsel. I further certify that I caused the deposition to be recorded by ([videotape] [audiotape] [other means]) on (date), that the above-named witness was duly sworn by me and provided the testimony recorded on the ([videotape] [audiotape] [other means]), and that the ([videotape] [audiotape] [other means]) is a true, accurate, and verbatim account of the testimony of the above-named witness. The ([videotape] [audiotape] [other means]) referenced herein is labeled "Deposition of (Witness)" and is dated (date). The order appointing me as deposition officer and authorizing recording of the testimony of this witness is attached hereto.

(Date) (Signature Block of Deposition Officer)

Figure 4.8. Sample Pretrial Advice.

MEMORANDUM FOR _____/CC

FROM: _____/JA

SUBJECT: Pretrial Advice – *United States v. Rank and Name*, (SSN), Unit and Base

1. The accused is charged with three specifications of making 19 worthless checks with the intent to defraud, in violation of Article 123a, UCMJ. (The charge was preferred on 15 May 2011, investigated under Article 32, UCMJ, on 16 and 17 May 2011, and forwarded by the investigating officer on 22 May 2011 with a recommendation for referral to trial by general court-martial.) *OR* (The charge was preferred on 15 May 2011. On 25 May 2011, the accused

submitted a waiver to his/her right to an investigation under Article 32, UCMJ.) The commander (SPCMCA) forwarded the charge on 2 June 2011 with a recommendation for trial by general court-martial.

2. Pursuant to Rule for Court-Martial 406 and Article 34, UCMJ, I provide you the following advice:

a. The charge and specifications are generally in proper form. [*If applicable, add the following for minor amendments*: A minor amendment to specification 2 should be made:

The specification should be amended at check 147 to reflect, "pay to the order of AFO-147," vice "Air Force Commissary."]

b. The charge and specifications [*if applicable, insert*: "as amended,"] (*allege offenses under the UCMJ*).

c. The charge and specifications are warranted by the evidence contained in the [(Article 32 report) (documents listed below as attachments)].

d. The accused is on active duty in the United States Air Force. I am satisfied a court-martial would have jurisdiction over the accused and the offenses charged.

[NOTE: If applicable, include information on an accused's outstanding combat or overseas record and, in capital cases, address aggravating circumstances. *See* paragraph 4.5.2.]

3. I recommend you refer the charge and specifications (*if applicable, insert*: "as amended,") to trial by general court-martial.

(*Name), (Grade*), USAF
Staff Judge Advocate

6 Attachments:
1. Charge Sheet
2. Commander's Indorsement with attachments
3. Forwarding letter(s)
4. Investigating Officer Appointment Letter *OR* Waiver of Article 32 Investigation
5. Article 32 Report (*Identify the documentary evidence, Receipts for Report supporting the charges and specifications*)
6. Defense Objections (*if applicable*)

Chapter 5

COURT-MARTIAL COMPOSITION AND PERSONNEL, REPORTERS, AND CONVENING COURTS-MARTIAL

Section 5A—Composition and Personnel

5.1. Detail of Military Judges (RCM 503(b)).

5.1.1. Chief Trial Judge. The Judge Advocate General's designee for detail of military judges to courts-martial within the Air Force is the Chief Trial Judge, USAF Trial Judiciary HQ USAF/JAT.

5.1.2. Detailing Military Judges. The Chief Trial Judge, USAF Trial Judiciary, details military judges to SPCMs and GCMs. The Chief Trial Judge may delegate this authority to any person assigned as an Air Force military judge. A military judge with the authority to detail military judges may detail himself or herself as military judge to a court-martial. Orders detailing military judges may be oral or written. Include written orders, if any, in the ROT. Announce on the Record the authority detailing the military judge.

5.1.2.1. A military judge from another U.S. Armed Force may be detailed to Air Force courts-martial according to the other Armed Force's regulations applicable to military judges and with the approval of TJAG.

5.1.2.2. TJAG has authority to make Air Force military judges available for detail to trials convened by another U.S. Armed Force.

5.2. Summary Court-Martial (SCM) (RCM 1301; 1302).

5.2.1. Detailing SCMs. A SCM is detailed by a convening order. The convening order is a special order prepared in accordance with RCM 504(d) signed by the convening authority. For qualifications of a SCM, see RCM 1301(a). See sample summary courts-martial convening order at Figure 5.4.

5.2.1.1. All summary courts-martial are constituted by special orders that are numbered consecutively on a fiscal year basis, starting with the number 1, and using an AC-series letter prefix (see paragraph 5.11.2).

5.2.1.2. When generating the convening order, use the following single paragraph as a model for the convening authority's signature in an appropriately formatted AC-series special order: "Pursuant to authority contained in Special Order A-###, Department of the Air Force, dated, _____, a summary court is hereby convened. I have reviewed the charge sheet and evidence in the case of *United States v. John H. Doe*. It may proceed at Vandenberg AFB, California, to try such persons as may be properly brought before it. Lt Col Will I. Judge, 30 SW/DO, is detailed as the summary court-martial officer. Using a separate order still requires Block 14 of the charge sheet to be completed and signed by the convening authority or properly designated judge advocate per paragraph 4.7.1. (See paragraphs 5.11.1 and 5.11.2 for format and additional content.)

5.2.2. Reservists as SCMs. A reservist on active duty who is a commissioned officer may serve as an SCM under RCM 1301. Reservists on inactive duty for training (IDTs) are not

on active duty and cannot serve as an SCM. ANG officers who are serving on active duty in federal service may serve as SCMs under RCM 1301.

5.2.3. Selection of Officers. The SCM must be impartial. Before appointing an officer to serve as a SCM, the convening authority should consider the appointment in the context of the officer's normally assigned duties and assess whether the SCM's impartiality could be questioned based on his or her relationship with the case, the parties, and the base legal office.

5.3. Detail of Counsel (RCM 503(c)).

5.3.1. Procedure.

5.3.1.1. The Chief, Trial Defense Division has the authority to detail a Chief Senior Defense Counsel (CSDC), Senior Defense Counsel (SDC), or Area Defense Counsel (ADC) to any court-martial and may delegate such authority as prescribed in the Military Defense Counsel Charter.

5.3.1.2. When requested by the SDC in the region where a court-martial is to be held, the SDC may detail an ADC from a base within that SDC's region as defense counsel to a court-martial outside that region, with the concurrence of the Chief, Trial Defense Division, or a CSDC.

5.3.1.3. A CSDC may detail any ADC or SDC as defense counsel to any court-martial. The Chief, Trial Defense Division, retains the authority to override such detailing decisions.

5.3.1.4. The Chief, Trial Defense Division, may detail any ADC, SDC, or CSDC as defense counsel to any court-martial.

5.3.1.5. An SJA, Chief Senior Trial Counsel (CSTC), Senior Trial Counsel (STC), or the Chief or Deputy Chief, Government Trial and Appellate Counsel Division (AFLOA/JAJG), may detail trial counsel or assistant trial counsel to any court-martial. The order detailing trial counsel may be oral, written, or in message form. Announce orders detailing counsel orally on the record at trial. Attach written or message orders, if any, to the ROT.

5.3.1.6. RCM 503(c)(3) and other Armed Forces' regulations govern detailing counsel from other Armed Forces to Air Force courts-martial.

5.3.1.7. The Chief, Military Justice Division (AFLOA/JAJM), is TJAG's designee with authority to make Air Force counsel, with the exception of those assigned to AFLOA/JAJD, available for detail to trials convened by another Armed Force. AFLOA/JAJD exercises this authority over ADCs and SDCs.

5.3.2. Qualifications.

5.3.2.1. General Court-Martial. Attorneys detailed as trial counsel, defense counsel, or associate defense counsel for a GCM must be certified according to Article 27(b), UCMJ, and AFI 51-103, *Designation and Certification of Judge Advocates*. Any person detailed as assistant trial counsel or assistant defense counsel must be designated as a judge advocate under 10 U.S.C. § 8067(g) and AFI 51-103. If the trial counsel is qualified to

act as counsel before a GCM, the defense counsel must be a person similarly qualified. Article 27(c)(2), UCMJ.

5.3.2.2. Special Court-Martial. Attorneys detailed as defense counsel for a SPCM must be certified according to Article 27(b), UCMJ and AFI 51-103. Any person detailed as trial counsel, assistant trial counsel, or assistant defense counsel for a SPCM must be designated as a judge advocate under 10 U.S.C. § 8067(g) and AFI 51-103.

5.3.2.2.1. If, because of physical conditions or military exigencies, an accused is not afforded the opportunity to be represented by defense counsel certified according to Article 27(b), UCMJ, the convening authority must make a detailed written statement, to be included in the ROT, stating why counsel with such qualifications could not be obtained. Article 27(c)(1), UCMJ.

5.3.2.3. Summary Court-Martial. An accused facing trial by SCM may request representation by a military defense counsel, but is not entitled to military defense counsel certified according to Article 27(b), UCMJ. RCM 1301(e). Civilian counsel provided by the accused and qualified under RCM 502(d)(3) shall be permitted to represent the accused at the summary court-martial if such appearance will not unreasonably delay the proceedings and if military exigencies do not preclude it. RCM 1301(e). An attorney who has been designated a judge advocate under 10 U.S.C. §8067(g) and AFI 51-103 may be detailed to represent the Government.

5.3.2.4. Air Reserve Component Members. The requirements of certification and designation set out in 5.3.2.1 through 5.3.2.3 apply to reserve component judge advocates. Only those reservists assigned as senior trial or senior defense counsel may be certified annually. Other reserve component judge advocates are certified according to AFI 51-103. Reserve component judge advocates must be on active duty or performing inactive duty training to be detailed as trial counsel or military defense counsel, and they must be in Title 10 status at all times when performing trial duties. See paragraph 5.4.5 for guidance on reserve component judge advocates performing individual military defense counsel (IMDC) duties.

5.3.2.5. Civilian Counsel (RCM 502(d)(3)). When a civilian counsel represents an accused at a court-martial, include the counsel's qualifications to serve as defense counsel on the record. Include information about the civilian counsel's bar membership and standing.

5.3.3. Disqualifications (Articles 26(d) and 27(a), UCMJ; RCM 502(d)(4)). An IO for an Article 32, UCMJ, investigation may never serve as a member of the prosecution or as military judge in the same case. A judge advocate who served as the accuser or IO for the Article 32, UCMJ, investigation cannot perform any other duty in connection with the trial of the same case, except as defense counsel at the specific request of an accused after being fully informed of the individual's prior involvement in the case.

5.4. Requests for Individual Military Defense Counsel (RCM 502(d)(3) and 506(b)). An accused may request representation by an IMDC in an Article 32 investigation or at a court-martial. The requested counsel represents the accused, if reasonably available. The right to request an IMDC does not extend to representation for actions under Article 15, UCMJ.

5.4.1. Format of IMDC Requests. An IMDC request must be in writing and signed by the accused or detailed counsel and shall include the following, as applicable:

5.4.1.1. The date of the Article 32 investigation or trial;

5.4.1.2. Any special qualifications of the requested counsel relevant to the case;

5.4.1.3. Whether the accused is represented by other counsel (not the requested counsel) and, if so, the name of that counsel;

5.4.1.4. Whether the accused has entered into an attorney-client relationship with the requested counsel concerning the charges being investigated or tried, (including any statement required by 5.4.4);

5.4.1.5. In the case of a requested counsel presently unavailable, whether the counsel is expected to be available before the Article 32 investigation or trial; and,

5.4.1.6. A statement acknowledging the accused's understanding that, if the IMDC request is granted, the detailed defense counsel may be excused from further participation in the case at the sole discretion of the detailing authority.

5.4.2. Non-Availability of Certain Counsel. In addition to those persons listed in RCM 506(b)(1), the following persons are not ordinarily reasonably available to serve as IMDC because of the nature of their duties, positions, or geographic locations:

5.4.2.1. Medical Legal Consultants and Advisors;

5.4.2.2. Attorneys in the National Capital Region assigned to the Air Force Legal Operations Agency, excluding any individual detailed to perform duties as a SDC or ADC;

5.4.2.3. Attorneys attending an Air Force Institute of Technology (AFIT) sponsored program such as an LL.M (Master of Laws) program;

5.4.2.4. Attorneys assigned or attached to the Air Force Office of Special Investigations (AFOSI);

5.4.2.5. Attorneys detailed to perform duties as a STC. Detailed trial and assistant trial counsel in the same or an allied case;

5.4.2.6. Staff Judge Advocates, and for commands having a GCMCA, Deputy Staff Judge Advocates.

5.4.3. Reasonably Available. A counsel is "reasonably available" if not considered unavailable by the terms of the MCM or this instruction, and the appropriate approval authority determines the requested counsel can perform the duties of IMDC without unreasonable expense or detriment to the United States and without unreasonable delay in the proceedings. In determining the reasonable availability of a counsel, the approval authority may consider the following:

5.4.3.1. The duties, workload, and assignment status of the requested counsel;

5.4.3.2. The experience level, duties, and workload of the military counsel already detailed to represent the accused;

5.4.3.3. The nature and complexity of the charges and legal issues involved in the case;

5.4.3.4. Whether a certified assistant trial counsel is detailed to the case;

5.4.3.5. The workload of the office to which the requested counsel is assigned and the availability of personnel to meet those demands;

5.4.3.6. The distance from the expected site of the proceedings; and

5.4.3.7. Whether requested counsel is likely to be a necessary witness at trial or is otherwise conflicted from representing the accused under the *Air Force Rules of Professional Conduct* or *Air Force Standards for Criminal Justice*.

5.4.4. Exception: Attorney-Client Relationship. When an attorney-client relationship exists, as determined by the approval authority, exceptions to non-availability based upon assignment to a position identified in RCM 506(b)(1) and paragraph 5.4.2 should ordinarily be granted. An attorney-client relationship exists when, at the time of the accused's IMDC request, the accused and the requested attorney had a bilateral understanding as to the nature of services to be provided in the case, and the requested attorney was actively engaged in the preparation and pretrial strategy of the case. *United States v. Spriggs*, 52 M.J. 235 (C.A.A.F. 2000). A statement claiming the attorney-client relationship signed by the requested attorney and accused must accompany the IMDC request (see paragraph 5.4.1.4). The statement must provide an overview of the relationship.

5.4.5. IMDC Requests for Air Reserve Component (ARC) Attorneys. Only ARC attorneys on extended Title 10 active duty tours can be requested. The reasonable availability of ARC attorneys is assessed in the context of RCM 506(b)(1) and paragraph 5.4.2; i.e., the restrictions apply to the active and reserve components alike. ARC attorneys must be in Title 10 status at all times when performing as an IMDC. Requests for ARC attorneys are processed IAW paragraph 5.4.7.

5.4.6. Processing IMDC Requests for ADCs and SDCs.

5.4.6.1. IMDC requests for ADCs and SDCs are forwarded through defense channels to the appropriate approval authority as follows:

5.4.6.1.1. The Chief, Trial Defense Division has the authority to act on any IMDC request for any CSDCs, SDCs, or ADCs and may delegate such authority as prescribed in the Military Defense Counsel Charter.

5.4.6.1.2. The Chief, Trial Defense Division, or a CSDC determines the availability of SDCs and takes action on IMDC requests for SDCs. However, the Chief, Trial Defense Division, may override a CSDC's decision to grant an IMDC request.

5.4.6.1.3. The Chief, Trial Defense Division, determines the availability of a CSDC and takes action on IMDC requests for the CSDC.

5.4.6.2. An accused may appeal the disapproval of an IMDC request to the Chief, Trial Defense Division, whose decision is final. There is no appeal from an IMDC request initially disapproved by the Chief, Trial Defense Division.

5.4.7. Processing IMDC Requests for Other Counsel. IMDC requests for all other counsel (not addressed in paragraph 5.4.6.) are forwarded to the convening authority through the trial counsel, if any. RCM 506(b)(2). Because the Trial Defense Division is responsible for defense services throughout the Air Force, it is incumbent upon those IMDCs who are not

assigned to JAJD to notify the Chief, Trial Defense Division, of their association with a case as soon as practicable. These IMDCs should also keep the regional SDC informed about the progress of the case. Additionally, the IMDC must coordinate in advance any anticipated expenditure of JAJD funds for travel or other reasons.

5.4.7.1. Disposition when Counsel is Not Reasonably Available. If the requested counsel is not reasonably available for a reason identified in RCM 506(b)(1) or paragraph 5.4.2, and the accused does not assert an attorney-client relationship, the convening authority denies the request and notifies the accused.

5.4.7.2. Disposition when Counsel May Be Available. If the requested counsel appears to be reasonably available (i.e., not apparently unavailable IAW RCM 506(b)(1) or paragraph 5.4.2), the convening authority forwards the request to the appropriate approving authority identified below. The approving authority evaluates availability (see paragraph 5.4.3), decides whether to grant the request, and informs the forwarding convening authority of the decision and the reasons for the decision. The convening authority notifies the accused of the decision.

5.4.7.2.1. Attorneys Assigned to AFLOA or HQ Air Force. Send requests for attorneys in the Civil Law and Litigation Directorate (AFLOA/JAC), Air Force Judiciary Directorate (AFLOA/JAJ), Legal Information Services Directorate (AFLOA/JAS), AFJAGS or HQ Air Force directorates to the respective director or division chief. Requests for ADCs and SDCs shall be forwarded in accordance with paragraph 5.4.6.

5.4.7.2.2. LL.M. Students. Send requests for attorneys in an LL.M. program to the Director, Professional Development Division, HQ USAF/JAX.

5.4.7.2.3. Staff Judge Advocates. Send requests for staff judge advocates to the SJA's commander.

5.4.7.2.4. All Others. Send requests for all other attorneys to the requested counsel's SJA, supervising officer, or commander.

5.4.8. Appeals. The accused may request review of a disapproved IMDC request by the next higher level of supervision of the officer who denied the request. Appeals shall be forwarded to the convening authority through the trial counsel.

5.4.8.1. If the convening authority originally denied the request, and declines to grant the request on appeal, forward the appeal to the convening authority's superior officer for review and decision. The final decision is returned to the convening authority, who notifies the accused. There is no appeal from an IMDC request initially disapproved by a MAJCOM commander or higher authority.

5.4.8.2. If an approval authority originally denied the request, the appeal is forwarded by the convening authority to that approval authority. If the approval authority declines to grant the request on appeal, he or she forwards the appeal to the approval authority's superior officer for review and decision. The Deputy Judge Advocate General (DJAG) reviews denials by Directors of AFLOA/JAJ, AFLOA/JAC, AFLOA/JAS, AFJAGS or by HQ USAF directorate chiefs. There is no review of denials made by the DJAG. The

final decision is returned to the convening authority, who notifies the accused of the decision.

5.4.8.3. A military judge may, for good cause, determine that a particular IMDC is reasonably available, notwithstanding any provision of this instruction.

5.5. Oaths (Article 136, UCMJ; RCM 807).

5.5.1. One-Time Oath. Military judges certified according to Article 26(b), UCMJ, military counsel, certified according to Article 27(b), UCMJ, and court reporters may take a one-time oath.

5.5.1.1. Procedure for One-Time Oath. Any person authorized by Article 136, UCMJ, may administer the one-time oath. The person administering the oath completes a certificate indicating the place and date the oath was administered. The oath contains the typed name, signature, and qualifications of the person administering the oath. Give a copy to the person taking the oath.

5.5.1.1.1. For military judges, send the original and one copy to HQ USAF/JAX. Use the following oath: "I (name of military judge), do (swear) (affirm) that I will faithfully and impartially perform the duties of military judge in any proceeding under the Uniform Code of Military Justice to which I am detailed to perform such duties, (so help me God)."

5.5.1.1.2. For military counsel, send the original and one copy to HQ USAF/JAX. Use the following oath: "I [name of military counsel], do (swear) (affirm) that I will faithfully perform the duties of counsel in any proceeding under the Uniform Code of Military Justice to which I am detailed to perform such duties or in any court-martial in which I am to perform duties of individual defense counsel, (so help me God)."

5.5.1.1.3. For court reporters, give the original to the reporter and file one copy in the office where the individual is assigned. If the individual transfers to another Air Force legal office, forward a copy of the oath to the receiving SJA. Use the following oath: "I (name of reporter), do (swear) (affirm) that I will faithfully perform the duties of (reporter) in any proceeding under the Uniform Code of Military Justice to which I am detailed, (so help me God)."

5.5.2. Court Members. Swear in court members for each court-martial to which they are detailed. The trial counsel administers the oath.

5.5.3. Interpreters. In a GCM or SPCM, the trial counsel or military judge administers an oath to the interpreter. In other proceedings, a person authorized by Article 136, UCMJ, administers the oath (e.g., summary court-martial officer, deposition officer, investigating officer). The oath must be included in the record of the proceeding. An interpreter is properly sworn after an affirmative response to the following oath: "Do you, [name of interpreter], (swear) (affirm) that you will faithfully perform the duties of interpreter in this proceeding, (so help you God)?"

5.6. Defense Investigative Support. Defense requests for investigative support will be made in writing to the servicing SJA, who will forward the request along with a recommendation to the convening authority. If the convening authority grants the request and investigative resources

are available within the convening authority's command that would satisfy the needs of the defense, other than AFOSI investigators, the convening authority appoints an investigator.

5.6.1. If the convening authority concludes that appointment of an AFOSI special agent is necessary under the circumstances, the convening authority will inform the local AFOSI detachment commander. The AFOSI detachment commander will forward the request through command channels for a determination of whether or not investigative resources exist to support the defense request. If HQ AFOSI/CC agrees that appointment of a special agent is appropriate and an agent is available, he or she will appoint one. The HQ AFOSI/CC is the decision authority for appointment of AFOSI agents as defense investigators, except in the extraordinary case where a trial judge specifically mandates the appointment of an AFOSI special agent. In all cases, the convening authority will provide the funding IAW 51-201, Figure 6.8, Note 6. See *United States v. Pomarleau*, 57 MJ 351 (CMA 2002). Contact HQ AFOSI/JA with any questions regarding this policy or its application including provisions that apply to the conduct of AFOSI special agents who have been assigned to provide defense investigative support.

Section 5B—Court Reporters

5.7. General Information.

5.7.1. Duties. The primary role of the Air Force court reporter is to report, transcribe, and assemble court-martial records, Article 32, UCMJ, investigations, and other proceedings, as required. The reporter is neutral and should not express personal opinions about the case being reported. Reporters are normally detailed to all Air Force GCMs and SPCMs. The reporter records everything that is said or done verbatim, from the initial Article 39(a) session until the court adjourns and maintains the reporter's notes and recordings according to the Air Force Records Disposition Standards. As determined by the SJA, reporters assist counsel for both sides, hearing officers, and the military judge in preparing and marking documents associated with proceedings under the UCMJ. Upon the prior approval of the military judge, court reporters may authenticate records of trial (ROT) in SPCMs, including acquittals, not involving a bad conduct discharge (BCD). When authenticating the ROT, use the page provided for in the DD Form 490, Record of Trial, package, delete the words "military judge" and substitute the words "court reporter."

5.7.2. Detailing Court Reporters. The Air Force court reporter program is managed by the Director, USAF Judiciary. Requests for support, other than expeditionary court reporting requirements and mishap investigation boards, will be sent directly from the requesting office to the Director for assignment. Following assignment, SJAs detail court reporters to perform the functions specified in Article 28, UCMJ, and RCM 502(3)(b), and any other duties for which they are needed (RCM 501(c)). Requests for expeditionary court reporting requirements and mishap investigation boards will be sent to the Director from the Command requesting support.

5.7.3. Methods of Reporting. Digital recording will be used as the primary method of recording. Court reporters must use both a primary and backup system to ensure a record can be accurately prepared.

5.8. Enlisted Court Reporters. The primary role of the enlisted court reporter is to fulfill the expeditionary court reporting requirement and support mishap investigation boards. They also report and transcribe courts-martial, administrative discharge boards, Article 32 hearings, depositions, and other proceedings as the expeditionary mission allows.

Section 5C—Detailing and Excusing Members (RCM 501, 502(a), 503(a) and 505); Convening Orders (RCM 504)

5.9. Detailing Members. Convening authorities detail the best qualified persons for courts-martial in accordance with the criteria in Article 25(d), UCMJ. Enough members should be detailed so that, after challenges, a GCM will be comprised of at least five members and a SPCM will be comprised of at least three members. Convening authorities may detail members under their command or others made available by their commander. When detailing court members, convening authorities may consider nominees submitted by subordinate commanders. For courts involving Reservists, convening authorities should consider detailing Reserve members who meet the qualifications in Article 25, UCMJ and RCM 502. The SJA must guard against unlawful command influence or the appearance of such in the court member selection process, which includes ensuring no involvement by trial counsel or assistant trial counsel. When advising the convening authority on court member selection, the SJA reiterates the Article 25(d), UCMJ, criteria. The SJA may prepare a list of proposed nominees. If such a list is used, the SJA also informs the convening authority that he or she may consider persons on the nomination list as well as any other eligible person subject to his or her command or others made available by their commanders. The SJA maintains all documents submitted to the convening authority.

5.9.1. Enlisted Members (RCM 503(a)(2)). If an enlisted accused requests that enlisted members serve as court members, the convening authority details enlisted members, following the guidance in this section. The convening authority should detail enough enlisted members so that, after challenges, the court will be comprised of at least one-third enlisted members. If officer members have already been detailed, the convening authority may replace officer members with enlisted members, or may detail enlisted members without excusing officer members. If the membership of the court falls below one-third enlisted members, the convening authority must detail additional enlisted members.

5.10. Changing or Excusing Detailed Members. Before the court-martial is assembled, the convening authority may excuse members or change the members of a court-martial without showing cause. The convening authority may delegate to the servicing SJA or other principal assistant the authority to excuse individual members of a court-martial before a court is assembled. No more than one-third of the members may be excused by anyone other than the convening authority. RCM 505(c).

5.11. Special Orders Convening Courts-Martial.

5.11.1. Generally. Prepare convening orders in accordance with RCM 504, 1302, and this chapter. Authenticate convening orders according to this instruction. Cite the current Department of the Air Force Special Order or other document authorizing the commander to convene courts (Figure 5.1). Convening orders can be amended. To reflect changes in court members, except when members are excused without replacement, amend the original order (Figure 5.2). If excusal of a member without replacement is not reduced to writing, the excusal must be announced on the record. Generally, issue no more than two amendments to

the original order. If it is necessary to further amend the convening order, do not issue a new amending order; instead, publish a new order convening a court-martial with a savings clause that transfers all cases in which the court has not yet been assembled to the new order (Figure 5.3). Ensure all amendments to a convening order and all convening orders with a savings clause cite all prior orders. Give a copy of all convening orders and amendments to convening orders to the military judge and include in all copies of the ROT.

5.11.2. Numbering Convening Orders. Orders convening courts-martial are special orders that are numbered consecutively on a fiscal year basis, starting with number 1. The number shall follow an A-series letter prefix. AFI 33-328, *Administrative Orders*, Table 2.1, Rule 17. Use an A letter prefix for GCMs, an AB letter prefix for SPCMs, and an AC letter prefix for SCMs (see paragraph 5.2 for additional guidance on convening SCMs).

5.11.3. Identification of Members. Special orders convening a court-martial should contain the name, rank, and unit of all persons detailed. Do not include personal information, i.e. social security number. If a detailed member is not under the command of the convening authority, ensure the special order clearly indicates that the member has been detailed with the concurrence of the member's commander. See Figure 5.1.

5.11.4. Members of Same Squadron. An enlisted court member may not be from the same unit as the accused. This limitation refers to the organization to which the individuals are assigned and does not apply to entities to which they are attached for administrative purposes. In no event does this limitation refer to an organization larger than a squadron or comparable organization.

Figure 5.1. Sample Convening Order.

(Special Order A-1 dated 8 November 2010, was the last Special Order of this headquarters published in FY 11) OR (There were no Special Orders published in FY 11.)

DEPARTMENT OF THE AIR FORCE
HEADQUARTERS, 14TH AIR FORCE (AFSPC)
VANDENBERG AFB, CA 93437-6285

SPECIAL ORDER 3 Sep 2011
A-1

Figure 5.2. Sample Amendment to Convening Orders.

DEPARTMENT OF THE AIR FORCE
HEADQUARTERS, 14TH AIR FORCE (AFSPC)
VANDENBERG AFB, CA 93437-6285

SPECIAL ORDER 17 Dec 2011
A-3

The following members are detailed to the general court-martial convened by Special Order A-1, this headquarters, dated 3 September 2011, vice MAJOR DON F. WARREN, and SECOND LIEUTENANT WILLIAM RHODES, relieved.

CHIEF MASTER SERGEANT BOB L. GRAYSON	30 CES	AFSPC	THIS STATION
MASTER SERGEANT J.W. JONES	30 MSS	AFSPC	THIS STATION
STAFF SERGEANT JOHN SMITH	30 CS	AFSPC	THIS STATION

RICHARD T. EARLY
Major General, USAF
Commander

FOR THE COMMANDER

CHARLES W. THOMAS, Colonel, USAF
Staff Judge Advocate

DISTRIBUTION
- 1 Ea Individual
- 1 Ea Orgn
- 15-14 AF/JA

SO A-3

Figure 5.3. Sample Special Court-Martial Convening Order with a Savings Clause.

DEPARTMENT OF THE AIR FORCE
HEADQUARTERS, 30TH SPACE WING (AFSPC)
VANDENBERG AFB, CA 93437-6261

SPECIAL ORDER 20 Apr 2011
AB-6

Pursuant to authority contained in Special Order A###, Department of the Air Force, dated _____, a special court-martial is hereby convened. It may proceed at Vandenberg AFB, CA, to try such persons as may be properly brought before it. The court will be constituted as follows:

MEMBERS

LIEUTENANT COLONEL JOHN E. JONES	30 CES	AFSPC	THIS STATION
MAJOR SUSAN D. SMITH	30 CS	AFSPC	THIS STATION
**MAJOR DON F. WARREN	DET 9 SMC	AFSPC	THIS STATION
FIRST LIEUTENANT SID J. PORTER	30 MDG	AFSPC	THIS STATION
SECOND LIEUTENANT WILLIAM RHODES	30 OSS	AFSPC	THIS STATION

**With concurrence of commander concerned.

All cases referred to the special court-martial convened by Special Order AB-2, this headquarters, dated 16 April 2011, as amended by Special Order AB-3, this headquarters, dated 17 April 2011, and Special Order AB-5, dated 19 April 2011, in which the court has not yet been assembled, will be brought to trial before the court hereby convened.

JOSEPH A. HART, Colonel, USAF
Commander

FOR THE COMMANDER

CHARLES W. HOGAN, Lt Col, USAF
Staff Judge Advocate

DISTRIBUTION
- 1 Ea Individual
- 1 Ea Orgn
- 15-30 SW/JA

SO AB-6

Figure 5.4. Sample Summary Courts-Martial Convening Order.

DEPARTMENT OF THE AIR FORCE
HEADQUARTERS, 30TH SPACE WING (AFSPC)
VANDENBERG AFB, CA 93437-6261

SPECIAL ORDER 20 Apr 2011
AC-3

Pursuant to authority contained in Special Order A-###, Department of the Air Force, dated, -_____, a summary court is hereby convened. I have reviewed the charge sheet and evidence in the case of *United States v. John H. Doe*. It may proceed at Vandenberg AFB, California, to try such persons as may be properly brought before it. Lt Col Will I. Judge, 30 SW/DO, is detailed as the summary court-martial officer.

I. EMMA COMMANDER, Colonel, USAF
Commander

DISTRIBUTION
1 – SCM Officer
1 – 30 SW/JA

SO AC-3

Chapter 6

TRAVEL FUNDING, WITNESS PRODUCTION, AND IMMUNITY

Section 6A—Travel Funding

6.1. Funding Authorities. AFI 65-601, Volume 1, *Budget Guidance and Procedures*, (hereinafter "AFI 65-601v1"), Table 10.2, prescribes the travel funding authorities for persons required for investigations and courts-martial. AFI 65-601v1 is controlling; however, the travel funding table is reprinted at Figure 6.8. Additional procedural guidelines are distributed by AFLOA/JAJM through the Central Witness Funding Guide to Witness Travel.

6.2. AFLOA Central Travel Funding. AFLOA/JAJM centrally funds and manages travel for persons identified in AFI 65-601v1, Table 10.2, for travel required for Article 32 investigations and courts-martial. Witnesses will be funded for Article 32 investigations and courts-martial based on their status as determined by Figure 6.8 (See paragraph 6.2.2.1). AFLOA/JAJM does not fund travel for other matters related to UCMJ proceedings, such as travel to and from depositions and administrative actions. AFLOA/JAJM does not fund trial preparation days. If a court-martial or Article 32 investigation is conducted within active duty channels for a Category A or B Reservist, the applicable active duty convening authority prescribed in Figure 6.8 is responsible for witness travel costs.

6.2.1. Requesting AFLOA Central Travel Funds. RCM 703(c) governs the initial determination of whether to produce a witness. Once the determination is made to require the presence of a person whose travel may be funded by AFLOA/JAJM, including a witness required by the military judge, the SJA requests travel funds electronically through the Witness Funding Management System (WFMS). WFMS tracks all requests submitted by legal offices and is currently the sole method for requesting central witness funding. This system provides an up-to-date status on each request. In addition, the system has bulletin and e-mail capability that allows AFLOA/JAJM's Central Witness Funding (CWF) branch to provide essential information to field legal offices.

6.2.1.1. All requests should be sent electronically through WFMS to AFLOA/JAJM at least 10 calendar days before the requested person is required to travel. Requests not received in a timely manner may require the convening authority to provide the initial funding. Use the WFMS link on FLITE at **https://aflsa.jag.af.mil/flite/training/jaguar/wfms/wfms_home.php**.

6.2.2. The requester will need a FLITE ID and password, or a CAC card and PIN to log into the database. All personnel assigned to the requesting legal office can create a request in WFMS. Creating a request includes supplying the initial information in WFMS and forwarding the request to a local WFMS manager for approval. The SJA, the Chief of Military Justice and the NCOIC of Military Justice are appointed as local WFMS managers. WFMS managers have the ability to reset permissions and ensure the correct WFMS managers are posted at all times. Only WFMS managers can approve, cancel, and forward the initial request to AFLOA/JAJM. AFLOA/JAJM will not know a request has been generated until the local WFMS manager approves and forwards the request to AFLOA/JAJM. WFMS will not allow a WFMS manager to approve and forward an initial

funding request he or she created. WFMS managers are responsible for managing the status of witnesses until the witness voucher has been paid, expert fees are paid, if applicable, and all orders and vouchers have been provided to AFLOA/JAJM. WFMS managers will ensure all fields on the CWF request, constructive travel worksheet, and if required, the memoranda of understanding (*See Figure 6.1*) are completed prior to forwarding the request to AFLOA/JAJM. After approval by the local WFMS manager, the request will be forwarded to CWF for review.

6.2.2.1. All requests received through WFMS are assumed to be approved by the appropriate authority for witness production. AFLOA/JAJM does not determine whether a witness will or will not be produced for the proceeding. Witness production and witness funding are two separate processes, and AFLOA/JAJM only determines whether or not the witness will be centrally funded. A witness that is not funded by AFLOA/JAJM may still need to be funded by the Convening Authority. Therefore, funding may be approved or denied without regard to whether the witness is required to be produced. The requesting office will be notified through WFMS regarding central funding approval or denial.

6.2.2.2. Per Diem Rates for Centrally Funded Witnesses will be determined based on the Joint Federal Travel Regulations, Volume 1. If lodging is not available and either a non-availability number or a non-availability letter is provided, or there is a letter from the requesting legal office stating a dining facility is not operable, then full rate per diem is authorized.

6.2.2.2.1. Military witnesses will be briefed that each day where adequate government quarters are available on the installation to which the member is assigned TDY, the dining facility/mess is available for all three meals on the installation, and the member is not traveling, then the government meal rate (GMR) is directed (JFTR, Vol 1, para U4151).

6.2.2.2.2. Military witnesses will be briefed that each day where adequate government quarters are available on the installation to which the member is assigned TDY, the dining facility/mess is available for one meal on the installation, and the member is not traveling, then the proportional meal rate (PMR) is directed (JFTR, Vol 1, para U4151).

6.2.2.3. The requesting legal office is responsible for ensuring all TDY arrangements are completed in a timely manner (flight reservations, billeting, transportation, et cetera.) AFLOA/JAJM is responsible for funding the witness to travel from their current location (PDS, leave, or AOR) to the base where the proceeding is being conducted. It is the base legal office's responsibility to ensure the witness is transported to and from court, meals, and the lodging facility or hotel.

6.2.2.3.1. AFLOA/JAJM considers funding rental vehicles in accordance with the Joint Federal Travel Regulation, paragraph U3415 Special Conveyance Use. It states, "An order-issuing official may authorize/approve a special conveyance when advantageous to the Government. Travelers' personal preference or minor inconvenience shall not be the basis for authorizing/approving special conveyance use." If disapproved by AFLOA/JAJM, the convening authority may choose to personally fund a rental vehicle from a separate fund cite.

6.2.2.4. The finance office associated with AFLOA/JAJM will not process a manual DD Form 1610 or DD Form 1351-1. The requesting legal office is responsible for obtaining Defense Travel System (DTS) access for the witness.

6.2.3. Fund Cite Authorizations and Travel Itinerary. AFLOA/JAJM furnishes procedural instructions through e-mail for AFLOA/JAJM funded travel.

6.2.3.1. AFLOA/JAJM does not fund trial preparation and will only fund a witness to arrive the night prior to the start of the proceeding. A witness may begin traveling one day prior to the start of the proceeding for stateside travel, or two days prior to the start of the proceeding for travel to or from an overseas location. The convening authority may choose to personally fund trial preparation days from a separate fund cite. Justification is required for witnesses requiring more than five temporary duty days for stateside travel, and seven temporary duty days for overseas travel.

6.2.3.2. Obtain prior approval from AFLOA/JAJM for any deviations to the travel itinerary, or the organization approving such deviation may be responsible for the additional costs. Witnesses subject to recall should remain in the local area until released to avoid travel itinerary deviations.

6.2.3.3. The requesting legal office's WFMS manager must notify AFLOA/JAJM immediately when the presence of a centrally funded witness is no longer required.

6.2.4. Expert Witnesses. AFLOA/JAJM only funds expert witnesses involved in urinalysis cases (See Figure 6.8). In cases involving an expert urinalysis witness, the SJA for the requesting legal office must also certify the attendance and testimony of the expert witness in writing before payment of expert or inconvenience fees can be made.

6.2.4.1. Experts in Urinalysis Cases. AFLOA/JAJM centrally funds experts (forensic experts, e.g., chemists, toxicologists, qualified physicians) approved by a convening authority to testify at courts-martial relating to urinalysis testing. Follow the instructions above and include the witness fee per day, travel costs, and per diem. The request must include a statement of the convening authority's approval of the expert and the amount of compensation. Before requesting funding for a non-government civilian expert witness, trial counsel must first ascertain the non-availability of the forensic urinalysis experts at the Air Force Drug Testing Laboratory, Lackland AFB, Texas, or any other expert under contract with the Air Force. SJAs should obtain written agreements with non-government civilian expert witnesses fixing their rate of compensation and reimbursement for expenses. A sample agreement is provided at Figure 6.2. For additional requirements, see paragraph 6.4.5.

6.2.4.2. Fee Limits. AFLOA/JAJM funding for urinalysis expert witness fees is limited to $1,000 per day, with a maximum of $4,000 per witness, per case for in-court testimony only. Expert witness fees paid by AFLOA/JAJM will not include payment for days devoted to travel, trial preparation, or consultation. Any agreement to pay amounts exceeding AFLOA/JAJM's limits is not binding on AFLOA/JAJM and will result in the convening authority paying the difference. The SJA must certify the attendance and testimony of expert witnesses before payment of expert fees can be made.

6.2.4.3. Inconvenience Fees. AFLOA/JAJM may fund up to $500 per expert witness, per case, for inconvenience or cancellation fees for prior approved urinalysis experts.

Inconvenience fees not approved in advance by AFLOA/JAJM will not be paid from central witness funds. Payment will not be considered appropriate unless a written agreement provided for inconvenience or cancellation fees at the time the witness' services were contracted. In every case, there must be a showing of actual inconvenience and financial loss to the witness, and cancellation within five days of the authorized travel date. In order to demonstrate actual inconvenience and financial loss, more than a mere cancellation is required. Expert witnesses are expected to mitigate any financial loss caused by a cancellation.

6.2.5. Consultants. Central witness funds are to be used for expert witnesses, not consultants. The convening authority is responsible for payment of consultant services and fees. The funding request constitutes a representation the witness is expected to testify at the trial. However, should AFLOA/JAJM approve and fund an expert witness who does not testify at trial, the funding authorization for the travel expenses will not be revoked.

Section 6B—Witness Production

6.3. Military Witnesses. Provide notice to the witness and their commander of the time, place, and date the witness's presence is required, and request the commander issue any necessary orders to the witness. RCM 703(e)(1).

6.4. Civilian Witnesses. A civilian may be compelled to appear as a witness before a court-martial, military commission, court of inquiry, or any other military court or board, or before any military or civil officer designated to take a deposition to be read in evidence before such a court, commission, or board if they have been duly issued a subpoena in accordance with Article 47, UCMJ and RCM 703. Except as provided in paragraphs 6.4.4, 6.4.5, and 6.4.6, use DD Form 453, Subpoena, and DD Form 453-1, Travel Order, to obtain the presence of civilian witnesses and to authorize reimbursement for their travel expenses. Mark through any inapplicable and/or outdated dollar amounts in parentheses on DD Form 453-1 and insert the applicable dollar amounts in the space provided. DTS may be used to generate and process the DD Form 453-1 and DD Form 1351-2, Travel Voucher or Subvoucher. RCM 703(e)(2) Discussion.

6.4.1. Informal Service for Willing Witnesses. When a civilian witness will appear voluntarily and a subpoena is issued, informal service of process by mail, including arrangements for travel and advance travel pay, is authorized. Figure 6.3. is a sample letter to accomplish informal service. RCM 703(e)(2)(D), Discussion.

6.4.2. Formal Service for Unwilling Witnesses. If a witness is unwilling to attend the court-martial voluntarily, serve the subpoena personally on the witness and tender travel orders and prescribed fees. RCM 703(e)(2)(D) and Discussion. Appropriate fees and mileage must be paid or tendered, (until such time RCM 703 is amended to reflect the changes made to Article 47, UCMJ by the *FY 2012 National Defense Authorization Act*, effective 31 December 2011), when serving the subpoena to meet the threshold requirement for requesting a Warrant of Attachment and subject the witness to federal prosecution under Article 47, UCMJ. Consult with the base Accounting & Finance Office (AFO) to determine the proper method of obtaining the necessary funds. The SJA or trial counsel may be designated as an accounting and finance certifying payment official in order to receive the witness travel funds for a personal service on the witness. In the alternative, the AFO may draft a check to the witness that accompanies the subpoena for service or attempted service

upon the witness. Serve the subpoena in person, either by the trial counsel or a designee when the witness is in the local area, or contact the SJA or commander of the military installation nearest the witness for assistance. Personal service may also be requested through the local law enforcement office or AFOSI detachment nearest the witness.

6.4.3. Failure to Appear. If the witness fails or refuses to appear, exhaust every reasonable means to secure live testimony. If necessary, use a DD Form 454, *Warrant of Attachment*, to compel the witness to appear or produce evidence. See RCM 703(e)(2)(G), Discussion; *United States. v. Ortiz*, 35 M.J. 391 (CMA 1992). The witness may be prosecuted for failure to comply.

6.4.3.1. Requirements for a Warrant of Attachment. A Warrant of Attachment may be issued only if in compliance with the provisions set out in RCM 703(e)(2)(G)(ii).

6.4.3.2. Processing a Warrant of Attachment.

6.4.3.2.1. In most cases, a Warrant of Attachment should be executed by the U.S. Marshals Service. Otherwise, anyone 18 years or older may execute a Warrant of Attachment. Military law enforcement may execute a Warrant of Attachment. However, military law enforcement should only be considered a last resort.

6.4.3.2.2. Provide the U.S. Marshals Service with the following:

6.4.3.2.2.1. A copy of the Warrant of Attachment;

6.4.3.2.2.2. A copy of the subpoena;

6.4.3.2.2.3. A copy of the certificate of service or receipt;

6.4.3.2.2.4. An affidavit indicating that appropriate fees and mileage were tendered to the witness where applicable, or that the witness was provided a means for reimbursement for fees and mileage;

6.4.3.2.2.5. The dollar amount, and reasons that witness is material and why it is believed the witness refuses or willfully neglects to appear;

6.4.3.2.2.6. A Military Interdepartmental Purchase Request (MIPR) number. (*See paragraph 6.4.3.4.*).

6.4.3.2.3. The U.S. Marshals Service General Counsel's Office will review the Warrant of Attachment and determine the appropriate executing office. As this process can take some time, trial counsel or the Government representative should consider requesting relief pursuant to RCM 707(c) if applicable.

6.4.3.2.4. If the U.S. Marshals Service is executing the Warrant of Attachment, it will make travel, lodging, and housing arrangements for the escorts and witness as appropriate. Otherwise, the Government is responsible for making travel, lodging and housing arrangements for the escorts and witness.

6.4.3.2.5. Only such non-deadly force as is necessary to bring the witness to the proceeding is authorized.

6.4.3.3. Escorting and Detaining a Civilian Witness. Once a Warrant of Attachment is executed, the civilian witness must be under escort or otherwise accounted for at all

times. Escort and housing of a civilian witness ceases once a determination is made by the authority issuing the warrant that the witness is no longer needed for the proceeding.

6.4.3.3.1. If the U.S. Marshals Service or other civilian law enforcement agency did not execute the Warrant of Attachment, a civilian witness must be accompanied by a minimum of two escorts at all times. Armed escorts should be used as a last resort and only if absolutely necessary.

6.4.3.3.2. If it is necessary to house a civilian witness prior to the proceeding and the U.S. Marshals Service or other civilian law enforcement agency did not execute the Warrant of Attachment, coordinate with the U.S. Marshals Service to arrange for housing of the witness in the nearest available civilian detention facility. Every effort should be made to minimize the amount of time a civilian witness is housed in a civilian detention facility. Never house a civilian witness in a military confinement facility.

6.4.3.4. Funding. The funding authority responsible for funding the travel of the witness pursuant to Figure 6.8 is also responsible for funding the travel of personnel necessary to effect the execution of the Warrant of Attachment and escort the witness to the location specified in the subpoena. If detention of the witness is required, either at the location the Warrant of Attachment is executed or at the location specified in the subpoena, the funding authority responsible for funding the travel of the witness is also responsible for fees charged by the facility detaining the witness. If the entity executing the Warrant of Attachment is another Federal agency, such as the U.S. Marshals Service, funding will be accomplished through a MIPR.

6.4.4. Subpoena Limitations. A civilian witness may not be subpoenaed to testify at a court-martial outside the United States or at an Article 32, UCMJ, hearing. However, a *subpoena duces tecum* (for documents) may be duly issued in accordance with Article 47, UCMJ and RCM 703, when RCM 703 is changed to reflect the amendments to Article 47, UCMJ, for an investigation pursuant to Article 32 (b), UCMJ. Issue Invitational Travel Orders (Figure 6.4) to a civilian witness who voluntarily agrees to appear at such proceedings. Joint Federal Travel Regulations (JFTR), Vol. 2, Appendix E. A sample letter to accompany the Invitational Travel Order is at Figure 6.3.

6.4.5. Civilian Expert Witnesses for Urinalysis Cases (not employees of the United States). When a party determines government employment of a civilian expert witness is necessary, the party shall submit a written request to the convening authority, with notice to the opposing party, to authorize the employment and fix the expert's compensation. RCM 703(d). The terms of employment in approved requests should be memorialized in a Memorandum of Agreement for Expert Witnesses. See sample at Figure 6.2 Use Invitational Travel Orders (Figure 6.4) to authorize travel of civilian experts and to notify them of billeting and travel arrangements. The finance office associated with AFLOA/JAJM will not process a manual DD Form 1610 or DD Form 1351-1. The requesting legal office is responsible for obtaining DTS access for the witness.

6.4.6. Civilians Employed by the United States. Civilian employees of the United States can be required to testify incident to their employment with appropriate travel orders issued for this purpose. A subpoena is not required. For DoD civilian employees requested as witnesses, the appropriate travel order is the DD Form 1610, Request and Authorization for

TDY Travel of DoD Personnel. For non-DoD federal civilian employees providing testimony incident to their employment, the employee's agency will prepare the appropriate travel order. Do not use Invitational Travel Orders for federal civilian employees, contractors or Non-Appropriated Fund employees.

6.4.7. Subpoenas to the Media. Air Force policy requires the exercise of due care when issuing subpoenas to media organizations to avoid unnecessary imposition on the news gathering process and thereby protecting the media's First Amendment role.

6.4.7.1. Prior to issuing a subpoena to a member of the news media, trial counsel will consult with the SPCMCA SJA. The SPCMCA SJA will forward a request to the GCMCA SJA addressing the following points:

6.4.7.1.1. That all reasonable attempts were made to obtain the information sought from alternative sources;

6.4.7.1.2. That all reasonable alternative investigative steps were taken to obtain the information sought;

6.4.7.1.3. The results of negotiations with the media. Negotiations should make clear the government's needs in the particular case and its willingness to respond to particular concerns of the media;

6.4.7.1.4. That reasonable grounds exist to conclude, based on information obtained from other sources, that a crime has occurred and that the information sought is essential to the case; and,

6.4.7.1.5. That to the extent possible, the subpoena is directed at material information regarding a limited subject matter, will cover a reasonably limited period of time, and will avoid requiring production of a large volume of unpublished material.

6.4.7.2. The GCMCA SJA will approve or disapprove the issuance of the subpoena. The SPCMCA SJA will immediately file a Special Interest Report (SIR) IAW paragraph 13.8 of this instruction.

6.4.7.3. In the event exigent circumstances prevent prior consultation with the GCMCA SJA, a trial counsel may only issue a subpoena with the SPCMCA SJA's approval. In that case, the SJA will immediately inform the GCMCA SJA, MAJCOM SJA, and AFLOA/JAJM by e-mail of the issuance of the subpoena and the exigent circumstances that precluded prior consultation.

6.4.7.4. The principles set forth in this guidance are not intended to create or recognize any legally enforceable right in any person.

6.4.8. Rates for Civilian Witnesses.

6.4.8.1. Civilians Employed by the United States. When summoned as a witness, a civilian in the employ of the government shall be paid as authorized by the JTR, Vol. 2 (for DoD civilian employees) or by the Federal Travel Regulation, 41 C.F.R. Subtitle F (for non-DoD civilian employees).

6.4.8.2. Civilians Not Employed by the United States. Pay fees and allowances authorized under 28 U.S.C. § 1821 (per diem, mileage, subsistence). JTR, Vol. 2, paragraph C4562 and Appendix E.

6.4.9. Processing Travel Vouchers. The requesting legal office shall ensure travelers promptly prepare and submit travel vouchers to AFLOA/JAJM as applicable. If AFLOA/JAJM does not have access to the member's DTS account, all paid vouchers should be e-mailed to CWF within 5 days of completion. All DTS users will accomplish their vouchers through DTS and it is the base's responsibility to ensure AFLOA/JAJM promptly receives a copy of the paid DTS voucher. If a witness does not file a voucher within 30 days of the initial travel date, the orders will automatically be revoked.

6.4.9.1. If a military witness files a voucher 30 days after the initial travel date, the travel voucher will be returned as "no order on file" and a letter from his/her commander will be required to explain why the voucher was not filed in a timely manner.

6.4.9.2. If a civilian witness files a voucher 30 days after the initial travel date, the travel voucher will be returned as "no order on file" and a letter may be required to explain why the voucher was not filed in a timely manner.

6.4.9.3. If an accused is adjudged confinement, ensure the travel voucher is filed prior to entering confinement. Failure to file the travel voucher prior to entering confinement will require the member's unit to make arrangements for the confined member to file the voucher.

6.4.10. Processing Expert Fee Vouchers. Use the SF 1034, *Public Voucher for Purchases and Services Other than Personal* or SF 1164, *Claim for Reimbursement for Expenditures on Official Business*. The SJA with administrative responsibility for the proceeding in which the expert witness testified ensures the expert witness prepares and submits the appropriate forms to the finance office servicing the base where the court convened; however, Centrally Funded Witnesses' forms are sent to AFLOA/JAJM for processing. Before AFLOA/JAJM pays for a civilian expert witness, the SJA must certify the dates of attendance and any scheduled witness fees (expert testimony, inconvenience, etc.). (See paragraph 6.2.4 and Figure 6.7).

6.5. Special Witness Production Issues.

6.5.1. Foreign Area Clearance and Passport Applications. Allow appropriate time for the processing of foreign area clearances when witnesses must travel to courts-martial convened outside the United States. (DoD Directive 4500.54E, *DoD Foreign Clearance Program (FCP)*). Ensure the prospective witness has a passport or applies for one. The responsible SJA may request that the base nearest the requested witness process the passport application or the witness can personally process the passport application. The State Department will normally process a passport application without the normal fee if the orders expressly provide for it. Contact the nearest Passport Office for further guidance.

6.5.2. AFOSI. Submit requests for AFOSI agents to the AFOSI detachment to which the agent is assigned. Submit requests for threatened Airmen and confidential sources to the local AFOSI detachment. A threatened airman is a person who has had "threats of bodily harm or death" made against the airman and the threats must be "of such severity that military and civilian authorities are unable to provide the family's continued safety." See Attachment 12, AFI 36-2110. Only AFOSI may contact another installation to request threatened Airmen and confidential sources.

6.5.3. Deployed Witness. Normally, requests to return a deployed witness will be routed through the Combatant Command's Service Component's legal office. For example, for

USAF witnesses, AFCENT/JA will coordinate request with USCENTCOM, 17 AF/JA will coordinate requests with USAFRICOM, et cetera. Additionally, contact AFLOA/JAJM in cases requiring the use of central witness funding.

Section 6C—Immunity

6.6. Grants of Immunity (RCM 704 & MRE 301(c)). Only a GCMCA possesses the authority to grant immunity to witnesses. All grants of immunity must be in writing and attached to the ROT as an allied paper. Figure 6.6 is a sample grant of immunity and order to testify. Grants of immunity should include language stating the immunity grant takes effect on the date the witness receives a copy of it. When another GCMCA retains ADCON over the witness to be immunized, prior coordination with that retaining GCMCA is recommended.

6.6.1. Witnesses Not Subject to UCMJ. The GCMCA may disapprove immunity requests for witnesses not subject to the UCMJ without DoJ coordination. However, the GCMCA may approve such requests only after receiving authorization from the Attorney General of the United States or other authority designated under 18 U.S.C. § 6004. Prepare requests for DoJ authorization in accordance with paragraph 6.6.4.

6.6.2. Witnesses Who May Be Considered for Federal Prosecution. If DoJ has an interest in investigating and prosecuting a witness suspected of criminal activity pursuant to DoD Directive 5525.7, *Implementation of the Memorandum of Understanding Between the Department of Justice and the Department of Defense Relating to the Investigation and Prosecution of Certain Crimes* (found in the Manual for Courts Martial, Appendix 3), prepare the immunity request according to paragraph 6.6.4, regardless of whether the witness is subject to the UCMJ.

6.6.3. National Security Cases. Process immunity requests for witnesses suspected of criminal activity involving national security, as specified in paragraph 13.8.2.3, according to paragraph 6.6.4, regardless of whether the witness is subject to the UCMJ. AFLOA/JAJM is responsible for coordinating such cases with the DoJ and other interested United States agencies. NOTE: Complete the additional reporting and processing requirements specified in paragraph 13.8 for national security cases independent of immunity authorization requests.

6.6.4. Requests for DoJ Authorization. In cases requiring DoJ authorization, the SJA administering the court-martial initiates the request for DoJ authorization. When the GCMCA indicates in a memorandum the intent to grant immunity, the GCMCA SJA forwards the request with written endorsement, preferably by e-mail, directly to AFLOA/JAJM, with information copies to the MAJCOM SJA. Forward requests 30 days in advance of the date the witness is expected to testify. Consider requesting a delay pursuant to RCM 707(c)(1) while authorization is pending. Include the following information in the request:

6.6.4.1. Case name and nature of the proceeding for which requesting immunity;

6.6.4.2. Nature of the charges against the accused and anticipated date of the proceeding;

6.6.4.3. Name, social security number, date and place of birth, and address of the witness;

6.6.4.4. The witness' military status and organization, if any;

6.6.4.5. Whether the defense or prosecution requested the immunity;

6.6.4.6. Name, grade, organization, and mailing address of the GCMCA who will grant the immunity after receiving DoJ authorization and a statement that the GCMCA supports the immunity request. (Note: Immunity is not actually granted until approved by the GCMCA after receiving DoJ authorization.);

6.6.4.7. An explanation of why immunity is necessary, including whether any state or Federal charges are pending against the witness and a description of those charges, if any;

6.6.4.8. Whether the witness is currently incarcerated and, if so, the location, cause, and length of incarceration;

6.6.4.9. A summary of the witness' expected testimony;

6.6.4.10. Factual basis for believing the witness will assert the privilege against self-incrimination, including the nature of the offenses in which the witness may be incriminated;

6.6.4.11. The likelihood of the witness testifying, should immunity be granted;

6.6.4.12. Name, title, address and telephone number of the representative from the local State's Attorney's Office and United States Attorney's Office with whom trial counsel coordinated the request. Include information on whether the representative supports or opposes the request.

6.6.5. Preliminary Discussions of Immunity. Judge advocates and investigators must be exceedingly careful in discussing the possibility of immunity with anyone involved in an investigation or potential prosecution. Avoid creating a perceived expectation of immunity that may be unfounded. The best practice is to first coordinate potential grants of immunity with the convening authority, and when appropriate, DoJ.

Figure 6.1. Sample Memorandum of Understanding for Central Witness Funding.

MEMORANDUM OF UNDERSTANDING
Central Witness Funding

This memorandum certifies that the Defense Travel System (DTS) approving official and requested witness (traveler) agree to the responsibilities identified below. Before a fund cite authorization letter is issued **both** parties must agree to these requirements by signing this memorandum of understanding and returning it to AFLOA/JAJM. The signed document should be returned to the host legal office so they may upload it with their Witness Funding Management System request.

If you do not have access to DTS, contact the requesting base legal office for further instructions.

Witness Responsibilities

- Provide AFLOA/JAJM a copy of the travel order and expense estimate immediately
- Complete travel voucher within 5 days of return from TDY
- Provide AFLOA/JAJM a copy of all receipts and a draft voucher before it is finalized in DTS

- Provide AFLOA/JAJM a copy of the paid travel voucher immediately upon completion

Approving Official Responsibilities

- Follow the guidelines of the fund cite letter submitted by AFLOA/JAJM—AFLOA/JAJM may not be funding the entire TDY expense
- Ensure the witness complies with the witness responsibilities listed above
- Ensure this form has your correct name, phone number, and e-mail address
- Only approve payments for travel and expenses as outlined in the fund cite authorization letter provided by AFLOA/JAJM
- The resource advisor is responsible for overpayments charged to the AFLOA/JAJM fund cite.

Witness:	**DTS Approving Official:**
Printed Name: _____	**Printed Name:** _____
Rank/Grade: _____	**Rank/Grade:** _____
Signature: _____	**Signature:** _____
Phone: _____	**Phone:** _____
Email: _____	**Email:** _____

For questions regarding this form, please contact the host legal office at (phone number).

Figure 6.2. Sample Memorandum of Agreement for Employment of Civilian Expert Witness.

MEMORANDUM OF AGREEMENT
FOR
EMPLOYMENT OF CIVILIAN EXPERT WITNESS

1. (Dr.)(Mr.)(Ms.) _____ is hereby retained as an expert witness to provide review, analysis, consultation, and testimony, as needed, in the court-martial case of *United States v.* _____, on behalf of the (government) (defense). The witness is an expert in the field of _____.

2. The expert witness agrees to provide the following services:

a. Review all documentation relevant to the area of expertise which pertains to the guilt or innocence of the accused, and which has been provided by the (trial counsel) (defense counsel).

b. Act as an expert technical consultant for the (government) (defense).

c. Assist the (trial counsel) (defense counsel) to prepare for the expert witness' in-court testimony, and to be available for a pretrial interview by opposing counsel.

d. Travel to the location of the trial on invitational travel orders and to testify on behalf of the (government) (defense), and, if requested by the (trial counsel) (defense counsel), to observe and evaluate the testimony of any expert witness for the opposing side.

e. Provide a copy of the expert's resume or curriculum vitae to the (trial counsel) (defense counsel).

f. Submit a Government travel voucher for payment, following the instructions provided, and accompanied by required documentation of travel, lodging, and other expenses.

g. Certify that the fee charged for expert services is no greater than the expert's normal professional rate.

3. The Government agrees to pay the expert witness, as follows:

a. Reimbursement for actual travel costs, either coach air travel or mileage, according to the Joint Federal Travel Regulations (JFTR).

b. Per diem for meals, and the lesser of actual cost of lodging or the government local lodging rate, including payment for all travel days, according to the JFTR.

c. A fee of $_____ per day for in-court testimony.
d. A fee of $_____ when professional advice and services are rendered, but no travel or in-court testimony is involved.

e. An inconvenience fee of up to $____ if the travel and testimony of the expert witness is canceled or rescheduled within 5 days prior to the expert's scheduled travel day. The witness is expected to reasonably mitigate any financial loss caused by cancellation. Consequently, this fee is to be reduced to the extent other gainful activities may be undertaken. The expert witness must provide written substantiation in the form of demonstrable actual inconvenience and financial loss to support payment of an inconvenience fee.

4. [*Optional: If the defense requested and the convening authority granted confidentiality to the expert, add*: Discussions between the expert witness and the defense counsel, the accused, and any member of the defense team regarding this case are confidential. However, if the expert witness is called as a witness by the defense, the content of those conversations may, subject to the Military Rules of Evidence, lose confidential status.]

5. Payment will be under DFAS-DE/Air Force Interim Guidance, *Procedures for Travel Accounting Operations*, July 2001, Section 5, Part U. [*If urinalysis expert, add*: Payment under this agreement has been approved by the Air Force Legal Operations Agency, Military Justice Division, AFLOA/JAJM. Payment will be made from the Air Force Central Travel Fund, up to a maximum of $_____ and in accordance with AFI 51-201 paragraph 6.2.4.3. The remaining

balance has been approved and will be paid by the court-martial convening authority in this case.]

Signed by the parties on the dates entered below:

_____ _____
Staff Judge Advocate (Date)
(or Trial Counsel)

_____ _____
Expert Witness (Date)

Figure 6.3. Sample Letter to Accompany Subpoena & Travel Order (Informal Service).

[Letterhead]
Date

Name of Trial Counsel
Office Symbol
Mailing Address
Base, State, Zip Code

Name of Witness
Mailing Address
City, State Zip Code

Dear (Mr.) (Mrs.) (Ms.)

Please find enclosed two copies of a subpoena, officially summoning you to the court-martial proceeding entitled *United States v.* _____. On the first copy, marked "copy 1," please sign your name on the line marked by the "X" and, next to your signature, insert the date you signed. Please mail "copy 1" back to me immediately in the enclosed self-addressed-stamped envelope. You should keep the subpoena marked "copy 2" for your records.

The trial is set to begin at (___ A.M./P.M., day, date). You will need to be present at [(that time) *or* (____ A.M./P.M., day, date)] and remain in the local area until formally excused by the military judge. Please come to the Legal Office, Building _____, Room _____, located at _____ Air Force Base, State. For your convenience, the enclosed maps show how to get to _____ Air Force Base and how to get around on base.

[*Optional*] The Government prepaid for your airline ticket so you can fly from _____ to _____, the airport nearest _____ Air Force Base. [(The airline tickets are enclosed.) *or* (Arrangements have been made for you to pick up your flight tickets and boarding

pass from the airline on the departure date. You will need to present appropriate identification at the airport to obtain these items.)] Please retain a copy of these documents and bring them with you. Your flight schedule is as follows:

	Place	Time	Day & Date	Airline
Depart:				
Arrive				
Depart:				
Arrive:				

[*Optional*] Since you are flying into _____ Airport, you will need transportation to the base. (*Give details of mode to get to base*, e.g., *private cab, government transportation*.) (*Explain reimbursement.*) While on base, we will provide you transportation.

[*Optional*] Your return flight arrangements can be made while you are on base.

[*Optional*] [(I made reservations for you to stay in the _____ quarters on base.) (I made reservations for you to stay off base because quarters on base are not available.)] Upon arrival, you should contact the billeting office at Building _____, located at _____. The billeting office will (assign you quarters) (give you directions to the off base accommodation). Since your accommodation may be some distance from the billeting office, you should have your transportation wait for you while you check in.

[*Optional*] While at _____ Air Force Base, you may eat at _____.

[*Optional*] Since you will be driving to _____ from your private residence and back in your private vehicle, you will be paid $0.__ per mile.

Enclosed you will find a check for $_____. This is an advance payment for your trip. You will be paid an attendance fee of $_____ per day. You will also be paid an allowance for food and lodging up to $_____ per day. You may submit a claim each day you are here, or you may send in your claim after you return home.

I hope the above information will assist you. Your testimony will be very important in this case. If you have any questions or if I can be of further assistance, please call me at (___)___-____.

Sincerely

(NAME), (Grade), USAF
Trial Counsel

7 Attachments:

1. Subpoena, DD Form 453 (2 copies)
2. Travel Order, DD Form 453-1
3. Self-addressed, Stamped Envelope
4. Advance Payment Check
5. Airline Tickets (*if applicable*)
6. Map of Area
7. Map of Base

[*SJA Note: Mark enclosed subpoenas as "copy 1" and "copy 2"*]

Figure 6.4. Sample Invitational Travel Order.

[*Letterhead*]

(Date)

INVITATIONAL TRAVEL ORDER NUMBER _____

DATE APPROVED: _____

FOR: MR. JONATHON H. SMITH
[*home address*]
[*and, if applicable, position or job title, employer and work address*]

You are invited to proceed from ([*home address*] [*work address*]) on [*date travel begins*] to arrive at [*place required*] by [*time required*] for the purpose of [*purpose of travel*, e.g., *testifying in the Article 32 investigation of A1C John Doe*] for approximately ___ days. Upon completion, you shall return to the point of origin.

You are authorized to travel by: ___Rail ___Commercial Air ___Military Aircraft ___Bus ___and/or Privately Owned Conveyance (*see below*)

___The order-issuing agent has arranged transportation.
___Transportation tickets are included with this order.
___Transportation tickets shall be provided at a later date.

(NOTE: PLEASE GUARD TRANPORTATION TICKETS CAREFULLY. If a transportation ticket in your possession is lost or stolen, you must immediately report it to [*name and phone number of POC at legal office*]. You must return unused transportation tickets with the travel claims.)

___To arrange transportation, call: (____) ____ - _____.

___You may arrange transportation. The following rules apply:

You must arrange your transportation with a travel office under contract with the U.S. Government when the travel office is authorized by contract to arrange transportation for travelers who are not Government employees. If you are in a foreign country, except for Canada and Mexico, you may use a travel office not under contract to the Government if ticketing cannot be secured from a branch office or general agent of an American-flag carrier. If you purchase transportation from a travel office not under contract to the Government, reimbursement is limited to the cost to the Government on a constructive basis for transportation that would have been arranged by a travel office under contract with the Government if available. If the contract between the Government and the travel office does not permit the travel office to arrange transportation for contractor/contractor employees or others who are not Government employees, reimbursement for transportation may not exceed coach class air accommodations unless otherwise permitted in the Joint Federal Travel Regulations (JFTR), paragraph C2204-A.

DoD policy in using regularly scheduled air transportation is:

(a) accommodations selected shall be the least costly service that permits satisfactory accomplishment of the mission of the traveler, and

(b) United States carriers must be used for all commercial foreign air transportation if service provided by those carriers is available; otherwise, reimbursement for the cost of transportation is not allowed.

___You are authorized to travel by Privately Owned Conveyance as advantageous to the Government. Reimbursement shall be at the rate of $0.___ per mile, plus the cost of necessary parking fees and bridge, ferry and tolls incurred, including per diem, while in travel status under this travel order.

___You are authorized to travel by Privately Owned Conveyance on a constructive basis. You would normally be authorized to travel by common carrier. Reimbursement shall be limited to the cost of travel by the usual mode of common carrier, including per diem.

Receipts: Ticket stubs are required to substantiate your transportation cost. Receipts are required for lodging. Receipts are required for all items of expense in an amount of $75 or more, plus any applicable tax.

___You are paid a per diem allowance to cover your expenses for lodging and meals and incidental expenses (M&IE). Room taxes at locations in the 50 states, District of Columbia, territories and possessions and the Commonwealths of Puerto Rico and Northern Mariana Islands

are reimbursed separately. Room taxes in foreign areas are included in the total lodging cost and are not reimbursed separately. While traveling in connection with the Invitational Travel Order, you are authorized a per diem equal to the daily amount you pay for lodging, plus a fixed amount for meals and incidental expenses (M&IE). That amount is limited to the applicable maximum amount prescribed on the Per Diem Committee homepage:
http://www.defensetravel.dod.mil/site/perdiem.cfm for the locality concerned. Even if your costs, particularly for lodging, are more than the applicable maximum per diem rate prescribed, only the maximum per diem rate is payable. (*See* the Joint Federal Travel Regulations (JFTR), Chapter 4, Part L, for applicable rules.)
Applicable per diem rates:
Locality:
Maximum Lodging Rate:
M&IE Rate:
Total Per Diem:

___You shall be paid an actual subsistence expense allowance (AEA) for lodging and a per diem for meals and incidental expenses (M&IE). You are required to itemize your lodging expenses only.

___You shall be paid an actual subsistence expense allowance (AEA) for lodging and meals and incidental expenses (M&IE). You must itemize all you subsistence expenses. Subsistence expenses include lodging; meals; fees and tips to waiters, bellboys, maids and porters; personal laundry, pressing and dry cleaning (*see* NOTE below); local transportation (including usual tips) between places of lodging, duty and where meals are taken; and other necessary expenses. You shall be reimbursed for the actual expenses incurred, but not to exceed the maximum amount authorized for the locality concerned. (*See* the Joint Federal Travel Regulations (JFTR), Chapter 4, Part M, for applicable rules.)

Applicable rates when AEA authorized:
Locality:
Maximum AEA:
Amount allowed for M&IE (if authorized on a per diem basis):

(NOTE: The cost you incur during travel (not after returning) for laundry/dry cleaning and pressing of clothing is a separately reimbursable expense in addition to per diem/AEA when travel is within CONUS and requires at least 4 consecutive nights lodging while on Government travel. There is no separate reimbursement for laundry/dry cleaning and pressing of clothing when travel is OCONUS. Those costs are part of the per diem/AEA when travel is OCONUS.)

The JTR is available at http://www.defensetravel.dod.mil/site/travelreg.cfm. Address any

inquiries regarding this travel order to [*name and phone number of POC at legal office*].

The travel authorized herein has been determined to be in the public interest, and is chargeable to: [*fund cite*].

FOR THE COMMANDER

[*typed name*]	[*typed name*]
Approving Official	Authenticating Official

Figure 6.5. Sample Letter to Civilian Witness for Article 32 Investigations/Overseas Travel.

[Letterhead]

Date

Name (*e.g.*, Trial Counsel, Investigating Officer)
Office Symbol
Mailing Address
Base, State, Zip Code

Name of Witness
Mailing Address
City, State Zip Code

Dear (Mr.) (Mrs.) (Ms.) (Grade) (Name)

This letter confirms our recent phone conversation about your participation as a witness in the [(Article 32 pretrial investigation) *or* (special) (general) court-martial] of (*Rank and Name of accused*). Enclosed are copies of invitational travel orders authorizing you to travel at government expense.

[*Optional*] The Government prepaid for your airline ticket so you can fly from _____ to _____, the airport nearest _____ Air Force Base. [(The airline tickets are enclosed.) *or* (Arrangements have been made for you to pick up your flight tickets and boarding pass from the airline on the departure date. You will need to present appropriate identification at the airport to obtain these items.)] Please retain a copy of these documents and bring them with you. Your flight schedule is as follows:

	Place	Time	Day & Date	Airline
Depart:				
Arrive				
Depart:				
Arrive:				

[*Optional*] Since you are flying into _____ Airport, you will need transportation to the base. (*Give details of mode to get to base,* e.g., *private cab, Government transportation. Explain reimbursement*.) While on base, we will provide you transportation.

[*Optional*] Your return flight arrangements can be made while you are on base.

[*Optional*] [(I have made reservations for you to stay in the _____ quarters on base.), or (I have made reservations for you to stay off base because quarters on base are not available.)]. Upon arrival, you should contact the billeting office at Building _____, located at _____. The billeting office will [(assign you quarters) (give you directions to the off base accommodations)]. Since your accommodations may be some distance from the billeting office, you should have your transportation wait for you while you check in.

[*Optional*] While at _____ Air Force Base, you may eat at _____.

[*Optional*] Since you will be driving to _____ from your private residence and back in your private vehicle, you will be paid $0.___ per mile.

Enclosed you will find a check for $_____. This is an advance payment for your trip. You will be paid an attendance fee of $_____ per day. You will also be paid an allowance for food and lodging up to $_____ per day. You may submit a claim each day you are here, or you may send in your claim after you return home.

I hope the above information will assist you. Your testimony will be very important in this case, and I appreciate your good citizenship in coming. If you have any questions or if I can be of further assistance, please call me at (___) ___-____.

Sincerely

(NAME), (Grade), USAF
(Investigating Officer)(Trial Counsel)

5 Attachments:
1. Invitational Travel Orders
2. Advance Fees
3. Airline Tickets (*if applicable*)
4. Map of Area
5. Map of Base

Figure 6.6. Sample Grant of Immunity and Order to Testify.

(Date)

MEMORANDUM FOR (Grade, Name, and Address of Witness)

FROM: (GCMCA Unit and Address)

SUBJECT: Grant of [Testimonial] [Transactional] Immunity [for witness not subject to the UCMJ and (Order to Testify)]

1. An investigation revealed you have knowledge of offenses allegedly committed by (rank, name, unit, and station of accused). The offenses in question involve (describe general nature of offenses pertaining to the witness' knowledge).

2. [*For witness subject to UCMJ where DoJ authorization was not required*] By authority vested in me in my capacity as a general court-martial convening authority, under Rule for Court-Martial 704(c)(1), Manual for Courts-Martial, United States,

2. [*For witness subject to UCMJ where DoJ authorization was required*] By authority vested in me in my capacity as a general court-martial convening authority, by Rule for Court-Martial 704(c)(1), Manual for Courts-Martial, United States, and by the Attorney General of the United States pursuant to 18 U.S.C. § 6004,

2. [*For witness not subject to UCMJ*] By authority vested in me in my capacity as a general court-martial convening authority, by Rule for Court-Martial 704(c)(2), Manual for Courts-Martial, United States, and by the Attorney General of the United States pursuant to 18 U.S.C. § 6004,

[*Continuation of paragraph 2*] I hereby grant you [(testimonial) *or* (transactional)] immunity and order you to answer any questions posed to you by investigators and counsel pertaining to, and to testify at any proceeding held pursuant to the Uniform Code of Military Justice (10 U.S.C. § 801, *et seq.*), concerning any offenses alleged against the military member identified above. This grant of immunity takes effect on the day you receive a copy of it. You will acknowledge receipt of this grant of immunity by signing the endorsement below.

3. [*For testimonial immunity (preferred)*] Under this immunity, your testimony and statements, as well as information directly or indirectly derived there from, may not be used against you in a later [(trial by court-martial) *or* (criminal proceeding conducted by any federal, state, or military authority)]. However, this immunity does not bar the use of your testimony, your statements, or information derived from them, in prosecuting you for perjury, giving a false statement, or otherwise failing to comply with this order to testify.

3. [*For transactional immunity*] Under this immunity, you may not be prosecuted for offenses to which your testimony relates. Specifically, [(you may not be tried by court-martial for offenses under Articles __ and __ of the Uniform Code of Military Justice.) *or* (you may not be tried by any federal, state, or military authority for criminal violations of {*list criminal offenses and statutory citation, if applicable*})]. However, this immunity does not bar the use of your testimony, your statements or information derived from them, in prosecuting you for perjury, giving a false statement, or otherwise failing to comply with this order to testify.

(NAME)
(Rank), USAF
Commander

1st Ind, (Grade and Name of Witness) (Date)

MEMORANDUM FOR (GCMCA)

I acknowledge receipt of this grant of immunity (time) on (date).

(NAME), (Grade), USAF

Figure 6.7. Sample Certification Memorandum for Civilian Expert Witnesses.

(Date)

MEMORANDUM FOR: AFLOA/JAJM

FROM: (JA Office)

SUBJECT: SJA Certification for Urinalysis Expert Witness / Inconvenience Fee

1. The following information is provided to prepare voucher for payment:

a. Invoice Number:

b. Payable to: Payee's name, address and phone number

c. SSN of Witness:

d. Fund Cite: (leave blank, AFLOA/JAJM will complete)

2. I certify the payment for entitlement of [(inconvenience) or (expert witness)] fees in the amount of $_____ (AFLOA/JAJM fees only, see paragraph 6.2.4.2 and 6.2.4.3) is in accordance with AFI 51-201, Chapter 6, paragraph 6.2.4.2.

3. [In-court testimony was provided on (date). Therefore, the expert is entitled to expert witness fees under AFI 51-201, Chapter 6.] or [The expert has visibly shown an actual monetary loss associated with this cancellation in that he/she _____. Therefore, the expert is entitled to the inconvenience fee under AFI 51-201, paragraph 6.2.4.3.]

(NAME) (Rank), USAF
Staff Judge Advocate

Figure 6.8. Funding for Travel Connected with Administrative Boards or Disciplinary Procedures.

RULE	A If the witness is	B and the type of travel is	C Then the travel is funded by
1	Involved in an Aircraft Accident Investigation		See paragraph 7.14. of AFI 65-601v1
2	Involved in an Administrative Board		Convening Authority
3	Accused	Inter-command	AFLOA/JAJM (*see* note 1)
4		Intra-command	Convening Authority (*see* note 1)
5	Military Judge		USAF Judiciary
6	Trial Counsel		Convening Authority (*see* note 2)
7	Defense Counsel		(*See* note 3)
8	Investigating Officer		Convening Authority (*see* note 2)
9	Individual Military Defense Counsel (IMDG)		(*See* notes 3 & 4)
10	Court Member		Convening Authority
11	DAF Civilian Employee	Inter-command	AFLOA/JAJM
12		Intra-command	Convening Authority
13	Other DoD Civilian Employee		Convening Authority
14	Member of other Service		Convening Authority (*see* note 5)
15	Civilian (non-DoD and non-federal)		Convening Authority
16	AF Active Duty Military	Inter-command	AFLOA/JAJM
17		Intra-command	Convening authority
18	Threatened Airman		(*See* note 6)
19	Confidential Source (AFOSI)		(*See* note 6)

20	AFOSI Agent		HQ AFOSI (*see* note 7)
21	Expert Witness (Urinalysis)		AFLOA/JAJM (*see* note 8)
22	Non-DoD federal civilian employees (FBI, USPS, etc.)		Convening Authority (Exception -- *see* note 9)
23	Reservist (Active Duty)	Intra-command	Convening Authority
24		Inter-command	AFLOA/JAJM
25	Reservist (Non-Active Duty)		Convening Authority
26	Government Representative		Convening Authority (*see* note 2)
27	ANG member		Convening Authority (*see* note 10)
28	Prisoner (appearing as witness)		(see note 11)
29	Prisoner Escort		Convening Authority (*see* note 11)

NOTES:

1. The JFTR, Volume 1, Chapter 7, Part O, covers travel of members for disciplinary action. The TDY orders for members traveling as an Accused must include a statement "member not entitled to per diem expenses in connection with disciplinary action."

2. Funding by USAF Judiciary circuit to which assigned **ONLY** for USAF Judiciary Members. The Convening Authority funds costs for other individuals.

3. The USAF Judiciary Circuit to which assigned when the attorney-client relationship was formed.

4. AFLOA/JAJM will fund if the IMDC is not assigned to the USAF Judiciary at the time the IMDC request is made and had no prior attorney-client relationship with the requestor on the matter in issue.

5. The JFTR, Volume 1, Paragraph U7060 directs that travel expenses of members summoned as witnesses shall be paid from funds of the requesting Service.

6. Submit requests through local AFOSI detachments. Fund according to the status of the person requested (e.g., AF Active Duty, Reservist, ANG, civilian, etc. as noted in the table).

7. AFOSI agents assigned as defense investigators to an accused and defense counsel are funded by the Convening Authority.

8. For expert witnesses in urinalysis cases, request AFLOA/JAJM funding in accordance with this publication. All fees in excess of AFLOA/JAJM established fee limits shall be paid by the convening authority. The Convening Authority funds civilian expert consultants and lab technicians in urinalysis cases.

9. Funding for testimony of Federal civilian employees belonging to non-DoD Agencies is a Convening Authority responsibility. However, if a non-DoD Federal civilian employee is being called to present testimony in a case that involves an activity in connection with which he or she is employed, funding from the employing agency may be possible. See 5 U.S.C. 5751 and 28 CFR, Part 21, Section 21.2(d). The Comptroller General has defined the extent to which the case must be related to the agency‘s activity as a condition to the agency‘s responsibility for payment in 23 Comp. Gen. 47, 49 (1943) which states, “the employing agency is required to pay….the traveling expenses incurred by the employee witness only where the information or facts ascertained by the employee as part of his official duties forms the basis of the case, or where the proceeding is predicated upon law that that agency is required to administer.” Funding from other agencies under 5 U.S.C. 5751 should only be sought in situations where the other agency‘s funding responsibility can be clearly established under the law. Furthermore, if the employing agency is not forthcoming with the funds, ultimate responsibility for funding to ensure the presence of necessary witnesses remains with the Convening Authority.

10. AFLOA/JAJM will fund ANG members who are in Title 10 status at the time travel is required if it involves intercommand travel between the Title 10 duty station and the location of the UCMJ proceeding.

11. The JFTR, Volume 1, Paragraph U7451 and AFI 31-205 cover funding of prisoners and prisoner escorts. The prisoner‘s travel will be funded according to the status of the prisoner (e.g., AF Active Duty, Reservist, ANG, civilian, etc. as noted in the table). The Convening Authority requesting the prisoner‘s appearance will provide escort funding.

Chapter 7

VICTIM AND WITNESS ASSISTANCE

Section 7A—Purpose and Objectives

7.1. Purpose. This chapter describes the Air Force Victim and Witness Assistance Program (VWAP), implements the Victim and Witness Protection Act of 1982 (42 U.S.C. §§ 10601-10605), the Crime Victims' Rights Act (18 U.S.C. § 3771), DoD Directive 1030.01, *Victim and Witness Assistance,* and DoD Instruction 1030.2, *Victim and Witness Assistance Procedures*. This chapter establishes responsibility for the VWAP at the Headquarters Air Force and subordinate levels. It provides guidance for the treatment of victims and witnesses of offenses under the UCMJ, and victims and witnesses of offenses under the jurisdiction of local, state, other federal, or foreign authorities during those stages of the criminal justice process conducted primarily by the Air Force. This chapter provides guidance for the protection and assistance of victims and witnesses, enhances their roles in the military criminal justice process, and preserves the constitutional rights of an accused. Figure 7.1 provides a list of VWAP responsibilities with the corresponding responsible base agencies. These provisions create no cause of action or defense in favor of any person arising out of a failure to comply with the VWAP. The VWAP places no limitations on the lawful prerogatives of Air Force personnel.

7.1.1. VWAP Council. Each installation Local Responsible Official (LRO) shall establish a VWAP Council, if the agencies below are present on the installation, to ensure victim and witness service providers follow an interdisciplinary approach. The following agencies or functions, when present on the installation, will designate a VWAP Council representative: Sexual Assault Response Coordinator (SARC), Family Advocacy Program, Security Forces, AFOSI, Surgeon General, the Airman and Family Readiness Center, installation chaplaincy, and Staff Judge Advocate. In addition, the LRO will appoint a squadron commander and a first sergeant to the VWAP Council and may appoint other representatives as appropriate. The LRO will chair the VWAP Council, which will meet, at a minimum, annually.

7.1.2. Application of the VWAP. The VWAP applies in all cases in which criminal conduct adversely affects victims or in which witnesses provide information regarding criminal activity if any portion of the investigation is conducted primarily by the DoD Components. Pay special attention to victims of serious, violent crime, but ensure all victims and witnesses of crime who suffer physical, financial, or emotional trauma receive the assistance and protection to which they are entitled. A victim or victims of an offense shall be identified at the earliest opportunity after the detection of a crime at which it may be done without interfering with an investigation. While various Air Force agencies have particular responsibility for the VWAP, the provision of victim and witness assistance is to be a coordinated effort among all agencies providing services to individuals.

7.2. Objectives. Within available resources and in accordance with applicable law, the following are objectives of the Air Force VWAP:

7.2.1. Mitigate the physical, psychological, and financial hardships suffered by victims and witnesses of offenses investigated by US Air Force authorities;

7.2.2. Foster cooperation of victims and witnesses within the military criminal justice system; and

7.2.3. Ensure best efforts are made to accord to victims of crime certain enumerated rights.

Section 7B—Definitions

7.3. Victim. A person who suffered direct physical, emotional, or financial harm as the result of an offense. An offense need not be proven in court for there to be a "victim" for purposes of VWAP. A person may be identified as a "victim" at the earliest opportunity after the detection of a crime. Victims include, but are not limited to:

7.3.1. All military members and their family members, and DoD civilian employees and their family members when stationed outside the continental United States;

7.3.2. When a victim is incompetent, incapacitated, deceased, or under 18 years of age, one of the following may represent the victim (in order of priority):

7.3.2.1. Spouse;

7.3.2.2. Legal guardian;

7.3.2.3. Parent;

7.3.2.4. Child;

7.3.2.5. Sibling;

7.3.2.6. Another family member; or

7.3.2.7. Another person designated by a court.

7.3.3. In the case of a victim that is an institutional entity, an authorized representative of the institutional entity.

7.4. Witness. A person who has information or evidence of a crime and provides that information or evidence to an Air Force official. When the witness is a minor the term includes an appropriate family member as discussed in 7.3.2. The term "witness" does not include a defense witness or an individual allegedly involved in a crime as a conspirator, accomplice, or principal.

7.5. Offense. An offense is a crime punishable under the UCMJ committed by a person subject to the UCMJ.

7.6. Responsible Official (RO). The Air Force official responsible for coordinating, implementing and managing the Air Force VWAP. The Judge Advocate General (TJAG) is the Air Force RO.

7.7. Local Responsible Official (LRO). The individual responsible for identifying victims and witnesses of crimes and providing the services required by the VWAP. Each installation commander or SPCMCA, as appropriate, is the LRO. LROs may delegate the LRO duties and responsibilities to the SJA. The delegation must be in writing and addressed to the base SJA by duty title rather than name. The SJA may further delegate the LRO duties and responsibilities in writing to a VWAP Coordinator while maintaining oversight and overall responsibility for the program. References in this chapter to the LRO include the SJA or VWAP Coordinator, if

delegated LRO duties and responsibilities, and other individuals tasked by the LRO to assist with the VWAP. See 2.4.1. when determining LROs for members of a stand-alone Air Reserve or Air Reserve Base.

7.8. VWAP Coordinator. The individual selected by the SJA to implement and manage the VWAP. Responsible for ensuring the accomplishment of required training by all local agencies. The VWAP Coordinator may also serve as victim liaison as appropriate under the circumstances of a particular case.

7.9. Victim Liaison. An individual appointed by the LRO or delegate, to assist a victim during the military justice process. The designation need not be in writing. The liaison may be a medical or mental health care provider, judge advocate, paralegal, or other person appropriate under the circumstances of a particular case. A liaison is responsible for making contact between victims and service agencies and arranging for those services, when appropriate. Communications between a liaison and a victim are not confidential or privileged (See MRE 513 regarding the privilege in judicial proceedings for communications between psychotherapists and patients).

7.10. Central Repository. A central organization for confinee information, charged with establishing procedures to ensure victims, who so elect, are notified of changes in confinee status. The USAF central repository is Headquarters Air Force Security Forces Center (HQ AFSFC/SFC), Corrections Division/VWAP Central Repository, 1517 Billy Mitchell Boulevard, Lackland AFB, TX 78236-0119. COMM: (210) 925-5607, Toll Free (877) 273-3098.

Section 7C—Victim's Rights

7.11. Victim's Rights. A victim has the following rights:

7.11.1. To be treated with fairness and respect for the victim's dignity and privacy;

7.11.2. To reasonable protection from a suspect or the accused;

7.11.3. To notification of all court-martial proceedings;

7.11.4. To be present at all public court-martial proceedings, unless the military judge determines the victim's testimony would be materially affected if the victim heard other testimony;

7.11.5. To confer with trial counsel in the case;

7.11.6. To appropriate restitution, when available;

7.11.7. To information about an accused's conviction, sentencing, confinement and release; and

7.11.8. To, at the discretion of the Secretary concerned, be afforded an opportunity to make a personal appearance at a Military Department clemency and parole board.

Section 7D—Services Provided to Victims and Witnesses

7.12. LRO Responsibilities to Victims. The LRO, or other officials designated in this chapter, shall:

7.12.1. Designate a victim liaison to assist individual victims when necessary.

7.12.2. Inform the victim of the place where the victim may receive emergency medical and social service, and when necessary provide appropriate assistance in securing the care;

7.12.3. Inform the victim of the availability of legal assistance in accordance with 10 U.S.C. § 1565b if they are otherwise eligible for legal assistance under AFI 51-504, *Legal Assistance, Notary, and Preventive Law Programs*.

7.12.4. Inform the victim of any restitution or other relief to which the victim may be entitled and how to obtain the relief.

7.12.4.1. Restitution may be available from, or offered by, an accused as a condition in the terms of a PTA, during the sentencing process, as a part of post-trial mitigation (RCM 1105), or as a term or condition of parole or clemency. SJAs provide information on possible restitution from local, state or federal crime victims' funds, including procedures for applying for such funds.

7.12.4.2. Inform victims that Article 139, UCMJ, may provide relief if the property loss or damage resulted from wrongful taking or willful damage by a member of the Armed Forces due to riotous, violent, or disorderly conduct. See Chapter 6, AFI 51-502, *Personnel and Government Recovery Claims*. Ensure an Article 139 investigation does not interfere with any criminal investigation or court-martial proceedings.

7.12.5. Inform victims of intra-familial abuse offenses of the availability of limited transitional compensation benefits, waiver of mandatory forfeitures, and possible entitlement to a portion of the active duty member's retirement benefits. See DoDI 1342.24.

7.12.6. Inform the victim of available public and private counseling, treatment and support programs.

7.12.7. Assist the victim in contacting agencies providing necessary services and relief.

7.12.8. Inform the victim concerning protection from intimidation or similar threats, and, if appropriate, arrange for the victim to receive reasonable protection from an accused and from individuals acting in concert with the accused. Instruct the victim to immediately report any intimidation, harassment or similar conduct to military or civilian authorities. See 18 U.S.C. §§ 1512 and 1513.

7.12.8.1. In cases where a victim's life, well-being or safety is jeopardized or threatened by participation in the military justice process, the LRO ensures immediate notification of appropriate law enforcement agencies. Air Force law enforcement agencies promptly take measures to provide protection for the victim, as allowed by jurisdictional restrictions. Assist victims in obtaining restraining orders or similar protections available from civilian agencies.

7.12.9. Provide the victim with the earliest possible notice of:

7.12.9.1. The status of the investigation of the crime, to the extent it will not interfere with the investigation and is appropriate;

7.12.9.2. The accused's pretrial status and any subsequent change in that status, including but not limited to, the accused being placed in pretrial confinement, being released from pretrial confinement, or escaping from pretrial confinement;

7.12.9.3. Preferral and referral of charges or a decision not to pursue prosecution;

7.12.9.4. A pretrial confinement hearing and/or Article 32 investigation, including introduction of any MRE 412, 513 or 514 evidence;

7.12.9.5. Notification of the scheduling, including changes and delays, of each court-martial proceeding the victim is entitled to or required to attend;

7.12.9.6. The acceptance of a guilty plea or announcement of findings; and

7.12.9.7. The sentence imposed, including the date on which the accused becomes eligible for release from confinement, or parole, if applicable.

7.12.10. During trial proceedings provide the victim with:

7.12.10.1. A waiting area removed from and out of the sight and hearing of the accused and defense witnesses; and

7.12.10.2. Appropriate assistance in obtaining available services such as transportation, parking, child care, lodging, and courtroom translators or interpreters.

7.12.11. If requested by the victim, take reasonable steps to inform the victim's employer of the reasons for the victim's absence from work. In appropriate cases, assist a victim subjected to serious financial strain directly resulting from a crime, or cooperation in the investigation or prosecution of an offense, in explaining reasons for financial strains to creditors. However, this does not entitle non-eligible victims to formal legal assistance, AFI 51-504, *Legal Assistance, Notary and Preventive Law Programs*.

7.12.12. Under ordinary circumstances, consult with the victim and obtain their view concerning:

7.12.12.1. Decisions not to prefer charges;

7.12.12.2. Dismissal of charges;

7.12.12.3. Pretrial restraint or confinement, particularly an accused's possible release from any pretrial restraint or confinement;

7.12.12.4. Pretrial agreement negotiations, including PTA terms;

7.12.12.5. Plea negotiations;

7.12.12.6. Discharge or resignation in lieu of trial by court-martial; and

7.12.12.7. Scheduling of judicial proceedings where the victim is required or entitled to attend.

7.12.13. Consultation may be limited when it could endanger the safety of the victim or a witness, jeopardize an ongoing investigation, disclose classified or privileged information, or unduly delay disposition of an offense. Although the victims' views should be considered, nothing in the VWAP limits the responsibility and authority of officials involved in the military justice process from taking any action deemed necessary in the interest of good order and discipline and the prevention of service-discrediting conduct.

7.12.14. After trial, provide the victim the earliest possible notice of:

7.12.14.1. Consideration of the accused by the SecAF Clemency and Parole Board for clemency or parole;

7.12.14.2. The escape, work release, furlough, or any other form of release from custody of the accused; or,

7.12.14.3. The death of the accused, if the accused dies while in custody.

7.12.15. Ensure that any property of the victim that is being held for evidentiary purposes be maintained in good condition and returned to the victim as soon as it is no longer needed or required to be retained by law. See Section 586 of Public Law 112-81, "National Defense Authorization Act for Fiscal Year 2012," December 16, 2011.

7.12.16. Victims of crimes punishable under Article 120, UCMJ, who testified during the proceedings of a special or general court-martial are entitled to a copy of the record of proceedings without charge as soon as the records are authenticated. See 9.7.1.

7.12.17. At the request of victims of crimes punishable under the remaining punitive articles (other than Article 120) of the UCMJ, provide the victim a copy of the record of trial, with appropriate Privacy Act redactions, after the convening authority has taken action.

7.13. Airman and Family Readiness Center (A&FRC) Responsibilities to Crime Victims. The A&FRC maintains information on available treatment, counseling, and support programs, acting as the focal point between victims and those programs. The A&FRC chief or a designee works with other installation agencies to identify victims' needs and determine appropriate forms of assistance and resources available through military and community services. The A&FRC provides information to victims on available medical, financial, legal, and other social services, and assists victims in obtaining those services. At installations without an A&FRC, the LRO appoints an individual to provide information to victims.

7.13.1. In cases where referring a victim to the A&FRC for information may potentially cause undue embarrassment for the victim, LROs are encouraged to provide VWAP information directly to the victim.

7.14. Sexual Assault Prevention and Response Program. It is Air Force and Department of Defense policy to eliminate sexual assault within the Department of Defense by providing a culture of prevention, education and training, response capability, victim support, reporting procedures, and accountability that enhances the safety and well-being of all its members. A key component of this policy is to provide an immediate, trained response capability for each report of sexual assault in all locations, including deployed locations, and to ensure victims of sexual assault are protected, treated with dignity and respect, and receive timely access to appropriate treatment and services.

7.14.1. Within the Air Force, the SARC implements and manages the installation level Sexual Assault Prevention and Response Program (SAPR). In addition to assisting commanders in meeting annual sexual assault prevention and response training requirements, the SARC serves as the single point of contact for integrating and coordinating sexual assault victim care from an initial report of sexual assault, through disposition and resolution of issues related to the victim's health and well-being.

7.14.2. Air Force Sexual Assault Prevention and Response Victim Advocates (SAPR VAs) are appointed by the SARC to provide essential support, liaison services and care to the victim. Responsibilities include providing crisis intervention, referral and ongoing non-clinical support, including information on available options and resources to assist the victim

in making informed decisions about the case. SAPR VA services will continue until the victim states support is no longer needed. SAPR VAs do not provide counseling or other professional services to a victim but refer the victim to the appropriate agency for clinical, legal, and other professional services. SAPR VAs may accompany the victim, at the victim's request, during investigative interviews and medical examinations.

7.14.3. The VWAP and SAPR programs are distinct but complementary programs providing support and services to the victims as required by their governing directives. The LRO, or other officials appointed in this chapter, and the SARC and SAPR VA, must work in concert to discharge their individual responsibilities and provide the victim appropriate information on available options and resources, notice of relevant events in the investigative and judicial processes, and support. The LRO, or any other official appointed in this chapter, remains responsible for the delivery of VWAP services.

7.15. LRO Responsibilities to Witnesses. The LRO or other officials designated in this chapter shall:

7.15.1. Inform eligible witnesses about protection from intimidation or similar threats, and, if appropriate, arrange for a witness to receive reasonable protection from an accused and from individuals acting in concert with or at the behest of the accused. Advise witnesses to immediately report any intimidation, harassment, or similar conduct to military authorities.

7.15.1.1. In a case where a witness' life, well-being, or safety is jeopardized or threatened by participation in the military justice process, the LRO ensures immediate notification to appropriate law enforcement agencies. Air Force law enforcement agencies promptly take measures to provide protection for the witness, as allowed by jurisdictional restrictions. Assist witnesses in obtaining restraining orders or similar protections available from civilian agencies. Inform witnesses of any changes in accused's pretrial status, including, the accused being placed in pretrial confinement, being released from pretrial confinement, or escaping from pretrial confinement.

7.15.1.2. If requested by a witness, take reasonable steps to inform the witness' employer of the reasons for the witness' absence from work. In appropriate cases, assist a witness subjected to serious financial strain directly resulting from a crime, or cooperation in the investigation or prosecution of an offense, in explaining reasons for financial strains to creditors. This does not entitle a non-eligible witness to formal legal assistance, under AFI 51-504, *Legal Assistance, Notary and Preventive Law Programs*.

7.15.1.3. Provide witnesses with appropriate assistance in obtaining available services such as transportation, parking, child care, lodging, and courtroom translators or interpreters.

7.15.1.4. To the extent possible and when appropriate, afford witnesses the opportunity to wait in an area separate from the accused or defense witnesses to avoid embarrassment, coercion, or similar emotional distress.

7.15.1.5. Inform witnesses of the time and place of each trial proceeding the witness is either required or entitled to attend. Promptly notify the witness of any scheduling changes.

7.15.2. Determine the extent to which each individual witness is provided services or information under this paragraph. For example, active duty military, expert, or character witnesses ordinarily do not require all these services.

7.15.3. Provide information and services to witnesses for a suspect or accused, if requested by defense counsel, and authorized by the LRO.

7.16. LRO Responsibilities to Others Entitled to Notice. Witnesses, relatives of victims and witnesses who are minors, and relatives of homicide victims are entitled to receive prompt notification of information concerning cases. If requested, the LRO or other officials designated in this chapter shall notify the individuals of the following:

7.16.1. Apprehension of a suspect or an accused.

7.16.2. Initial appearance of an accused before a pretrial confinement review officer or other judicial official.

7.16.3. Pretrial release of an accused, or any changes in pretrial restrictions.

7.16.4. Court-martial proceedings, including:

7.16.4.1. Any pleas by the accused;

7.16.4.2. Findings; and

7.16.4.3. The sentence imposed, including the date on which the accused becomes eligible for release from confinement, or parole, if applicable.

Section 7E—Notifications, Form Processing, and Miscellaneous Information

7.17. Law Enforcement and Investigative Personnel. At the earliest opportunity after identification of a crime victim or witness and when appropriate, law enforcement and investigative personnel shall provide to each victim and witness DD Form 2701, *Initial Information for Victims and Witnesses of Crime*. The number of DD Forms 2701 distributed annually is reported to the base SJA or equivalent. Therefore, the date this information is provided to the victim or witness shall be annotated on any incident report form. When circumstances dictate, law enforcement and investigative personnel shall promptly inform all victims about the availability of emergency medical care and applicable social services. When necessary, secure the assistance of the A&FRC or victim liaison in obtaining available services in the military and/or civilian community.

7.18. Government Trial Counsel or Designee.

7.18.1. Prior to trial, the government trial counsel or designee provides the victim with a DD Form 2702, *Court-Martial Information for Victims and Witnesses of Crime*, explaining victims' rights and access to services. The number of DD Forms 2702 distributed annually is reported to the base SJA or equivalent.

7.18.2. Witnesses requested or ordered to appear at Article 32 investigations or courts-martial may be entitled to reimbursement for their expenses under Articles 46 and 47, UCMJ, and RCM 405(g). Provide victims and witnesses assistance in obtaining prompt payment of witness fees and related costs. When possible, establish local procedures for paying

vouchers after normal duty hours when necessary to avoid undue hardship. See generally, Chapter 6, paragraphs 6.2. to 6.5.

7.18.3. The government trial counsel or designee provides a victim with a DD Form 2703, *Post-Trial Information for Victims and Witnesses of Crime*, explaining the victim's post-trial rights. The number of DD Forms 2703 distributed annually is reported to the base SJA or equivalent.

7.18.4. For all cases resulting in a sentence to confinement, the government trial counsel or designee completes DD Form 2704, *Victim/Witness Certification and Election Concerning Inmate Status*. Send one copy of the form to the Central Repository, Headquarters Air Force Security Forces Center (HQ AFSFC/SFC), 1517 Billy Mitchell Boulevard, Lackland AFB TX, 78236-0119, one copy to the confinement facility where the accused is in post-trial confinement and give a redacted copy to the victim or witness. The victim's/witness's copy must not contain the accused's SSN or any information concerning other victims or witnesses.

7.18.4.1. The date the DD Form 2704 is given to the victim or witness must be recorded and the number of DD Forms 2704 distributed annually reported to the base SJA or equivalent.

7.18.4.2. Do not attach a copy of the DD Form 2704 to any portion of any record to which the convicted member has access, including the ROT. Doing so could endanger the victim or witness. The DD Form 2704 is exempt from release under the Freedom of Information Act (FOIA).

7.19. Additional Confinement Notification Requirements.

7.19.1. If the sentence includes confinement, the SJA or VWAP coordinator is responsible for informing the victim of the convening authority's action on the findings and sentence of the court-martial, regardless of where the accused is confined when action is taken.

7.19.2. Upon an offender's entry into confinement, the VWAP coordinator at the military confinement facility shall obtain the DD Form 2704 to determine victim or witness notification requirements. If the form is unavailable, inquire of HQ AFSFC/SFC whether any victim or witness has requested notification of changes in the confinee status in the case. Clearly mark an individual's confinement records to indicate the case involves a victim who wants to be informed of the inmate's status.

7.19.3. If an accused is confined at or near the installation where tried, the installation SF commander notifies the victim of an accused's escape, any form of release from custody, or death.

7.19.4. When a victim or witness has requested notification of changes in confinee status on the DD Form 2704, and that status changes as listed below, use the DD Form 2705, *Victim and Witness Notification of Inmate Status*, to notify the victim or witness. The date notifications are given must be recorded and the number of DD Forms 2705 distributed annually reported to the base SJA or equivalent. Provide the earliest possible notice of:

7.19.4.1. The scheduling of a clemency or parole hearing for the inmate.

7.19.4.2. The transfer of the inmate from one facility to another.

7.19.4.3. The escape (and subsequent return to custody), work release, furlough, or any other form of release of the inmate from custody, including release into parole supervision.

7.19.4.4. The death of the inmate if the inmate dies while in custody.

7.19.4.5. Changes in confinee status for any emergency or special temporary home release granted the inmate.

7.19.5. On transfer of a confinee to another military confinement facility, forward the DD Form 2704 to the gaining facility, with an information copy to the Central Repository, HQ AFSFC/SFC.

7.19.6. Report the status of victim and witness notification requests to the Central Repository, HQ AFSFC/SFC, annually.

7.19.7. Victims are entitled to provide input to an accused's disposition board prior to a parole eligibility date or the accused going before the Air Force Clemency and Parole Board. Each victim is responsible to keep HQ AFSFC/SFC informed of the victim's current address.

7.20. Local Civilian Agencies. LROs are encouraged to enter into an appropriate memorandum of agreement with local civilian agencies to ensure cooperative relationships in identifying, reporting, investigating, and providing services and treatment to victims and witnesses.

Section 7F—Training and Self-Inspection

7.21. Training.

7.21.1. General. All personnel involved in the military criminal justice process and those responsible for providing required services to victims and witnesses must be familiar with the requirements of the Air Force VWAP. The LRO is responsible for developing and implementing a program at each installation. The LRO is also responsible for ensuring the accomplishment of required annual training by all local agencies.

7.21.2. Development of the Training Program. The installation SJA, Chief of Security Forces (SF), Air Force Office of Special Investigations (AFOSI) detachment commander, medical facility commander (SG), Sexual Assault Response Coordinator (SARC), Family Advocacy Program (FAP), Airman and Family Readiness Center director (A&FRC), installation chaplain (HC) and representatives from commanders and first sergeants develop local training programs to ensure compliance with the VWAP. Figure 7.2 provides a list of references for use in developing a training program.

7.21.3. Accomplishment of Training. Each individual agency is responsible for training the agency's personnel on their responsibilities under this chapter annually. The SJA trains commanders and first sergeants annually. The LRO coordinates all training required by this chapter and ensures the provisions of this chapter are publicized to all military and civilian agencies providing victim and witness services within their communities.

7.21.4. Preparation of Victim Information Packet. Prepare a victim information packet at each installation through the coordinated efforts of the SJA, SF, AFOSI, SARC, FAP, SG, A&FRC, HC and commanders and first sergeants. Provide the packet to each identified

victim or witness. See Figure 7.3 for a model packet, which may be used as a starting point for a victim or witness handout depending on local circumstances.

7.21.5. Training Requirements for Investigative and Law Enforcement Personnel. Investigative and law enforcement personnel are often the first individuals to have contact with the victims of crimes. Their training must emphasize responsibilities to victims. At the earliest opportunity after detection of a crime and without interfering with the investigation, investigative and law enforcement personnel should make all efforts to:

7.21.5.1. Identify the victim of a crime.

7.21.5.2. Inform the victim of the name, title, business address and telephone number of the A&FRC director or the victim liaison (or the SARC or FAP when applicable) to whom a request for services should be addressed and assist the victim in making contact with those individuals when necessary.

7.21.5.3. Inform the victim of available emergency medical and or social services.

7.21.5.4. Inform the victim of the right to receive reasonable protection for the victim or witness whose life, well-being, or safety is jeopardized by participation in the military justice process.

7.21.6. Funding for victim and witness assistance programs is an operations and maintenance-type expense.

7.22. Self-Inspection. Responsible Officials should develop a system for assessing the effectiveness of their victim and witness assistance program . Additionally, liaisons should keep a record of each case involving victim(s), witness(es), and/or others entitled to notice that shows that they have complied with the notification requirements listed in this chapter. It is recommended that Responsible Officials track the dates information packets (to include DD Forms 2701-2703) and notifications were provided (with copies of all applicable notification letters and indorsements). Responsible Officials are required to utilize and maintain the VWAP Self-Inspection Checklist at Figure 7.4.

7.22.1. Staff assistance visits will examine the effectiveness of victim and witness assistance programs, as well as compliance with this instruction.

Section 7G—Reporting Requirements

7.23. Reporting Requirements. TJAG shall submit an annual report using the DD Form 2706, *Annual Report on Victim and Witness Assistance*, to the Under Secretary of Defense for Personnel and Readiness, Attention Legal Policy Office (OUSD (P&R) LLP), 4000 Defense Pentagon, Washington, DC 20301-4000. Submit the report by 15 March for the preceding calendar year quantifying the assistance provided victims and witnesses of crime.

7.23.1. Each base SJA or equivalent reports the information required to be reported by 7.23.1.1 through 7.23.1.4 through JA channels to their major command or equivalent. Major commands, FOAs and DRUs consolidate the reports and forward them to AFLOA/JAJM to arrive no later than 15 February of each year. The report shall include:

7.23.1.1. The number of victims and witnesses who received a DD Form 2701 from law enforcement or criminal investigations personnel.

7.23.1.2. The number of victims and witnesses who received a DD Form 2702 from the government trial counsel or designee.

7.23.1.3. The number of victims and witnesses who received a DD Form 2703 from the government trial counsel or designee.

7.23.1.4. The number of victims and witnesses who elected via the DD Form 2704 to be notified of changes in confinee status.

7.23.2. Each confinement facility reports the information required to be reported by paragraphs 7.23.2.1 and 7.23.2.2 to the central repository at HQ AFSFC/SFC, who will forward a consolidated report to AFLOA/JAJM to arrive no later than 15 February of each year.

7.23.2.1. The number of victims and witnesses who were notified by confinement facility Victim Witness Assistance Coordinators, via the DD Form 2705, of changes in confinee status. Obtain this number from appropriate forms.

7.23.2.2. The cumulative number of confinees for whom victim or witness notifications must be made by each confinement facility. Obtain this number by totaling the number of confinees with victim or witness notifications requirements as of 1 Jul 95, adding the number of new confinees with the requirement, and then subtracting the number of those confinees who were released, deceased, or transferred to another facility (federal, state, or sister service) during the reporting year.

7.23.3 AFLOA/JAJM consolidates the numbers from the major commands, FOAs, DRUs and HQ AFSFC/SFC, records them on the DD Form 2706, and forwards the DD Form 2706 to TJAG.

Section 7H—Administrative Disposition

7.24. Disclosure of Administrative Disposition. In cases where allegations against a suspect are disposed of other than by trial, a victim or witness may want to be informed of the alternate disposition. Victims and witnesses should be provided as much relevant information as possible, consistent with the privacy rights of the accused. In accordance with 5 U.S.C. § 552a (the Privacy Act), records and information related to Article 15 punishment and administrative discharge proceedings may be disclosed as a routine use to victims and witnesses of a crime for the purposes of providing information consistent with the requirements of VWAP and the Victims' Rights and Restitution Act of 1990. When analyzing Privacy Act exceptions, consider the Air Force's interest in fostering cooperation of victims and witnesses in the instant case, whether the accused has made any disclosures about the action or disposition that would diminish his/her expectation of privacy, and other relevant factors. Because each case presents unique facts and circumstances, decisions to release information must be reviewed on an individualized basis, in light of the Privacy Act and the exceptions allowing disclosure, as provided therein.

Figure 7.1. Victim and Witness Program Responsibilities.

VICTIM AND WITNESS PROGRAM RESPONSIBILITIES Notice of victim's post-trial rights.....……..... JA

Figure 7.2. List of References.

REFERENCE LIST

A. GENERAL REFERENCES:

1. Victim and Witness Protection Act of 1982, 42 U.S.C. §§ 10601 - 10605.
2. Crime Victims' Rights Act, 18 U.S.C. § 3771.
3. DoD Directive 1030.1, *Victim and Witness Assistance Procedures*
4. DoD Directive 6495.01, Sexual Assault Prevention and Response (SAPR) Program
5. DoD Instruction 1030.2, *Victim and Witness Assistance Procedures*
6. DoD Instruction 6495.02, *Sexual Assault Prevention and Response (SAPR) Program Procedures*
7. AFI 36-6001, *Sexual Assault Prevention and Response (SAPR) Program*,
8. AFI 36-3024, *Transitional Compensation for Abused Dependents*
9. Uniformed Services Former Spouses Protection Act – Benefits for Dependents who are Victims of Abuse by Members Losing Right to Retired Pay, 10 U.S.C. § 1408 (h)
10. *Department of the Air Force Policies and Procedures For the Prevention of and Response to Sexual Assault*, 3 June 2005 (www.afpc.af.mil/library/sapr/)

B. SOURCES OF APPLICABLE SERVICES:

1. Emergency Medical Services:

(a) USAF medical treatment facilities (AFI 41-210, *Tricare Operations and Patient Administrative Functions*)

(b) SAF authorization for extraordinary medical assistance for abused dependents and certain former spouses (AFI 41-210, paragraph 2.19.)

(c) Waiver of charges for emergency medical treatment and examination for evidentiary purposes (AFI 41-210, chapter 2)

(d) Locally available civilian medical and psychiatric services

2. Social Services:

(a) Family Advocacy programs (AFI 40-301, *Family Advocacy*)

(b) Abuse shelters (liaison with civilian agencies)

(c) Rape counseling (liaison with civilian agencies)

(d) Air Force Aid Society financial assistance programs (AFI 36-3109, *Air Force Aid Society*)

(e) American Red Cross assistance

(f) Legal Assistance Program (AFI 51-504, *Legal Assistance, Notary, and Preventive Law Programs*)

(g) Local community, county, and/or state social services

(h) See also Sexual Assault Prevention and Response Program, *Department of the Air Force Policies and Procedures For the Prevention of and Response to Sexual Assault, 3 June 2005*

3. Restitution:

(a) Tort Claims (AFI 51-501, *Tort Claims*) (limited application in CONUS)

(b) Other legal methods

(c) AFI 51-502, *Personnel and Government Recovery Claims*, Chapter 6
(d) Redress of injuries to property under UCMJ (Article 139, UCMJ)
(e) Possible condition of a pretrial agreement (RCM 705(c)(2)(C))
(f) Potential clemency factor for convening authority's consideration
(g) Private lawsuits, civilian sources, congressional special relief bills
(h) State crime victim fund [Note: Eligible state programs receive Federal funds for victim compensation. *See* 42 U.S.C. §§ 10601-10602. To be eligible, states cannot discriminate between otherwise compensable crimes on basis of State or Federal jurisdiction. Most States receiving funds pay medical and funeral expenses, and loss of wages.]

4. Victim Counseling, Treatment, Support Programs:
(a) Chaplain services (AFI 52-101, *[Chaplain]Planning and Organizing*)
(b) Clinical psychologist and/or clinical social worker (mental health services)
(c) Information and referral counseling
(d) AFI 36-3009, *Airman and Family Readiness Centers*
(e) Sexual Assault Prevention and Response Coordinator and victim advocate, *Department of the Air Force Policies and Procedures For the Prevention of and Response to Sexual Assault, 3 June 2005*

5. Corrections Process for Offender:
(a) Security Forces, Corrections Program (AFI 31-205, *The Air Force Corrections System*)
(b) AFLOA/JAJR

6. Other Services:
(a) DTM 11-063 – Expedited Transfer of Military Service Members Who File Unrestricted Reports of Sexual Assault
(b) Security Forces activities (AFI 31-201, *Security Forces Standards and Procedures*)
(c) Coordination with civilian law enforcement and prosecutors
(d) Coordination with civilian community services
(e) Early return of dependents from overseas (AFI 36-2110, *Assignments*)
(f) Humanitarian reassignment (AFI 36-2110)

C. REASONABLE PROTECTION FROM A SUSPECTED OFFENDER:

1. Security Forces assistance (AFI 31-201, *Security Forces Standards and Procedures*)
2. AFOSI
3. Threatened Person Assignments (AFI 36-2110, *Assignments*, Attachment 12)
4. Local, State, or Federal law enforcement agencies

Figure 7.3. Model Victim Information Packet.

VICTIM INFORMATION PACKET

Best efforts will be made to afford the services listed below, upon request, to any person who suffered direct physical, emotional, or pecuniary harm as a result of the commission of an offense investigated or prosecuted by U.S. Air Force authorities.

1. Information. The services below may be available. If assistance is needed in contacting the providers, please notify _____.

a. Emergency medical services: [*List providers, addresses and telephone numbers*]

b. Social services: [*List providers, addresses and telephone numbers*]

c. Restitution (or other relief): [*Identify sources of restitution, addresses and telephone numbers*]

d. For further information and referrals concerning victim counseling, treatment, and support programs: *[List providers, addresses and telephone numbers*]

2. Protection. Reasonable protection from a suspected offender may be requested by contacting _____.

3. Notice. The earliest possible notice of the following stages of the criminal investigation and prosecution shall be provided by contacting _____.

a. Status of investigation (to the extent appropriate without interfering with investigation).

b. Arrest of suspected offender.

c. Preferral of charges against suspected offender.

d. Schedule of judicial proceedings (where required or entitled to attend).

e. Release or detention status of suspected offender.

f. Acceptance of guilty plea or verdict after trial.

g. Sentence imposed.

4. Consultation. Consultation with the appropriate commander or designee concerning pretrial decisions, such as negotiated pleas or dismissal of charges, is available under certain circumstances (*see* AFI 51-201, *Administration of Military Justice*, paragraph 7.12.12), by contacting _____.

5. Care of Evidentiary Property. Property of a victim being held for evidentiary purposes will be maintained in good condition and returned as soon as no longer needed for such purposes or required to be maintained by law. See Section 586 of Public Law 112-81, "National Defense Authorization Act for Fiscal Year 2012," December 16, 2011. Direct questions as to the care or return of evidentiary property to _____.

6. Separate Waiting Area. During court proceedings, a waiting area removed from and out of the sight and hearing of the accused and defense witnesses shall be provided by contacting _____.

7. Convening Authority Action. The convening authority, [*Name of convening authority*], reviews the ROT of any court-martial that may be held regarding this offense. The convening authority has the authority to reduce any sentence imposed by the court-martial and the authority to overturn any findings of guilt.

a. If you wish to submit matters for the convening authority's consideration, you must do this within 10 calendar days following after the court-martial. . You will receive an additional notification informing you of this opportunity at the conclusion of the court-martial. Submit such matters in writing to [*Name of convening authority's SJA*] at [*address*].

b. If you desire to be informed of the convening authority's action on any court-martial held regarding this offense, request this information from _____.

8. Post-Trial Notice. To receive general information about the corrections process, and the earliest possible notice of the following events, contact _____.

a. Consideration of the offender by the Air Force Clemency and Parole Board.

b. Escape, deferment, parole, or any other form of release from confinement of the offender.

c. Death of offender, if occurring while in confinement.

NOTE: *Where the offender is serving a sentence to confinement of a year or more, obtain notice by providing a current address or telephone number to HQ AFSFC/SFC, 1517 Billy Mitchell Boulevard, Lackland AFB TX, 78236-0119. The victim is responsible for keeping Air Force officials informed of a current address.*

9. Appeals. To receive the earliest possible notice of any appellate court proceedings, contact _____.

10. Disclaimer. Failure to provide the information or services above does not create a cause of action or defense in favor of any person. No limits are hereby placed on the lawful prerogatives of the Air Force or its officials.

Figure 7.4. Victim and Witness Assistance Program Self-Inspection Checklist.

VICTIM AND WITNESS ASSISTANCE SELF-INSPECTION CHECKLIST

1. Has the installation commander or SPCMCA, as appropriate, established a victim and witness assistance program according to AFI 51-201?

2. Has the installation commander or SPCMCA, as appropriate, delegated program administration responsibility in writing?

a. Has the SJA been named the Local Responsible Official for the installation?

b. Has the SJA selected a VWAP coordinator in writing?

c. Do all other installation agencies involved with victims and witnesses have a focal point or point of contact designated for coordination and provision of services to victims and witnesses?

3. Are commanders, first sergeants, JA, SF, SG, AFOSI, HC, A&FRC (Airman and Family Readiness Center), and others, as necessary, fully trained to meet their responsibilities? Does training include informing them of their responsibility to:

a. identify crime victims at the earliest opportunity after the detection of a crime;

b. promptly inform victims of available medical and social care;

c. direct victims to SJA's office for complete information regarding assistance;

d. provide or coordinate reasonable protection for the victim or witness whose life, well-being, or safety is jeopardized by participation in the military justice process; and

e. inform SJA in advance of offender's anticipated release from post-trial confinement (duration of one year or less), where notice is requested by the victim?

4. Has effective liaison been established with the local community to ensure victims receive coordinated assistance and compensation from both military and civilian communities?

a. When feasible, has the installation responsible official for victim and witness assistance established a memorandum of agreement to ensure a cooperative relationship with local communities to identify, report, investigate, and provide services and treatment to victims and witnesses?

b. Does the responsible official maintain a list of points of contact for the provision of services to victims and witnesses in the local community?

5. Are victims and witnesses effectively and timely informed of their rights and how they can assert them?

a. Are victims personally notified of their rights including:

1) the right to be treated with fairness and with respect for the victim's dignity and privacy;

2) the right to be reasonably protected from the accused offender;

3) the right to be notified of court proceedings;

4) the right to be present at all public court-martial proceedings related to the offense, unless the military judge determines the victim's testimony would be materially affected if the victim heard other testimony;

5) the right to confer with the trial counsel in the case;

6) the right to appropriate restitution, when available;

7) the right to a copy of the record of proceedings; and

8) the right to information about an accused's conviction, sentencing, confinement, and release?

b. Are victims informed of the name, duty title, and duty address and telephone number of the responsible official to whom the victim should address a request for each of the services described in this chapter?

c. Does the responsible official ensure that:

1) the victim is informed of the place where the victim may receive emergency medical and social services;

2) the victim is informed of any restitution or other relief to which the victim may be entitled under this or any other law and how such relief may be obtained;

3) the victim is informed of the public and private programs that are available to provide counseling, treatment, and other support (including state compensation programs) to the victim;

4) if needed, assistance is provided in obtaining available services such as transportation, parking, childcare, lodging and courtroom translators or interpreters that may be necessary to allow the victim or witness to participate in court proceedings; and,

5) the victim receives the necessary assistance in contacting the persons who are responsible for providing the services and relief described in subparagraphs 1), 2) and 3) above?

6. Are victims inform of the availability of legal assistance in accordance with 10 U.S.C. § 1565b if they are otherwise eligible for legal assistance under AFI 51-504, *Legal Assistance, Notary, and Preventive Law Programs*?

7. Are victims consulted or notified concerning the disposition of all cases relevant to them?

a. Is the victim informed of the status of the investigation of the crime to the extent appropriate and to the extent that it will not interfere with the investigation?

b. Is the victim informed of the arrest/apprehension of a suspected offender?

c. Is the victim informed of the preferral of charges against a suspected offender?

d. Is the victim informed of the scheduling of each court proceeding that the victim is required or entitled to attend?

e. Is the victim informed of the release or detention status of an offender or suspected offender?

f. Is the victim informed of the acceptance of a plea of guilty or the rendering of a verdict after trial?

g. Is the victim informed of the sentence imposed on an offender, including the date on which the offender will be eligible for parole?

h. Does the installation commander or SPCMCA, as appropriate, or SJA ordinarily consult with victims and consider their inputs concerning:

1) a decision not to prefer charges;

2) decisions concerning pretrial restraint of the alleged offender or the offender's release;

3) pretrial dismissal of charges;

4) negotiations of pretrial agreements and their potential terms;

5) a discharge in lieu of court-martial; and

6) a convening authority's decision to set aside findings or provide sentence relief?

8. Have effective procedures been established to ensure that victim and witness requests for notification of case and prisoner status are recorded, properly acted upon and/or forwarded to the appropriate authorities for action?

a. Are victims provided the earliest possible post-trial notice of:

1) consideration of the offender by the Air Force Clemency and Parole Board;

2) escape, deferment, parole, or any other form of release from confinement of the offender; and

3) death of the offender, if occurring while in confinement?

b. Are victims immediately notified of any post-trial appellate relief or clemency granted an offender?

9. Are separate waiting areas provided for victims and prosecution witnesses at military justice proceedings?

10. Are installation personnel prepared to provide reasonable protection to victims and witnesses, and/or arrange for civilian protection, as necessary?

a. Does each victim receive reasonable protection from a suspected offender and persons acting in concert with or at the behest of the suspected offender?

b. Are victims and witnesses advised that any attempted intimidation, harassment, or other tampering should be promptly reported to the military authorities and that their complaints will be promptly investigated and appropriate action will be taken?

c. Is each victim informed that criminal sanctions may be imposed on individuals who violate their interests either through tampering, threatening, intimidating, retaliating against, or otherwise obstructing or attempting to obstruct their testimony?

d. Does the responsible official notify military and/or civilian law enforcement agencies, when appropriate, of the need to take the measures necessary to provide reasonable protection for the victim or witness?

11. After court proceedings, has appropriate action been taken to ensure the property of a victim or witness held as evidence is safeguarded and returned as expeditiously as possible?

12. Has the installation commander or SPCMCA, as appropriate, established an effective means of regularly evaluating the quality of the victim and witness assistance program?

Chapter 8

TRIAL MATTERS

Section 8A—Changes to and Withdrawal of Charges and Specifications after Referral to Trial

8.1. Changes. Minor and major changes may be made to charges and/or specifications after referral as authorized and explained in RCM 603. Changes should be made by lining through the material while ensuring the form remains legible. All changes and modifications should be dated and initialed by the trial counsel with the permission of the convening authority. Do not use white-out tape or liquid for minor or major changes.

8.1.1. Minor Changes. Make minor changes to a charge and/or specification on the charge sheet. Initial and date the change. Minor changes may be accomplished without having the charge sworn anew by the accuser. Promptly provide copies of the charge sheet with the changes to the accused and defense counsel. After arraignment, only a military judge may authorize minor changes to the charge sheet.

8.1.2. Major Changes. Major changes or amendments to a charge and/or specification cannot be made over the objection of the accused unless the charge and/or specification affected are preferred anew. A new referral will also be necessary and, in the case of a GCM, a new Article 32 investigation will be required if the charge and/or specification, as changed, was not covered in the prior investigation.

8.1.2.1. Make a major change or amendment to a charge and/or specification on the original charge sheet. Initial and date the change. If the accused objects to the change, a new preferral and referral of the changed or amended charge and/or specification must be accomplished by attaching an indorsement to the original charge sheet containing the following matters: a new preferral, notification to the accused, receipt by summary court-martial convening authority, referral, and service under RCM 602.

8.1.2.2. Even if an accused does not object to a major change or amendment, it may be prudent to prefer anew. Re-preferral and re-referral may avoid a jurisdictional issue as to whether the accused was improperly tried for a charge never referred to trial by the convening authority in an actual order or functional equivalent. *United States v. Wilkins*, 29 M.J. 421 (C.M.A. 1990).

8.2. Withdrawal. Before findings are announced, a convening authority may cause any charges or specifications to be withdrawn from a court-martial. RCM 604. Withdrawal of charges or specifications extinguishes the jurisdiction of a court-martial over them, unlike a dismissal that extinguishes the charges themselves. Withdrawn charges and/or specifications should be disposed of promptly (e.g., dismissed, re-referred to another court-martial, or forwarded to another convening authority for disposition). An officer authorized to sign referrals or trial counsel may withdraw charges and/or specifications at the direction of the convening authority.

8.2.1. Complete Withdrawal. To withdraw all charges and specifications from a court-martial, trial counsel lines through the referral section (Part V) of the charge sheet, specifies the disposition and the date, and initials the action taken (e.g., “Withdrawn on 15 Sep 11, [initials]”). If the convening authority or a superior competent authority directs both

withdrawal and dismissal of all charges and specifications, reflect accordingly (e.g., "Withdrawn and Dismissed on 15 Sep 11, [initials]").

8.2.2. Partial Withdrawal. To withdraw a specific charge and/or specification from a court-martial, while allowing the other offense(s) to proceed to trial, line through the affected charge and/or specification, specify the disposition and the date, and initial the action taken. (e.g., "Withdrawn on 15 Sep 11, [initials]"). If the convening authority directs both withdrawal and dismissal of a particular charge and/or specification, reflect accordingly (e.g., "Withdrawn and Dismissed on 15 Sep 11, [initials]"). The trial counsel must determine whether any remaining charges and/or specifications should be renumbered (and if renumbered, initial the renumbering). The following rules apply to renumbering charges and/or specifications:

8.2.2.1. When charges and/or specifications are withdrawn before arraignment, the remaining charges and/or specifications must be renumbered and the new numbers reflected on the charge sheet and throughout the ROT.

8.2.2.2. When charges and/or specifications are withdrawn after arraignment and after they have come to the attention of court members (or the military judge sitting alone), the remaining charges and/or specifications should not be renumbered. The military judge instructs the members that the withdrawn charges and/or specifications should not be considered for any reason.

8.2.2.3. When charges and/or specifications are withdrawn after arraignment but before the court members are aware of the charges, the remaining charges and/or specifications should, at the direction of the military judge, be renumbered. The new numbers should be reflected on the charge sheet and referred to throughout the ROT from the point of renumbering. If the military judge directs renumbering, withdrawn charges and/or specifications should not be brought to the attention of the members. If the military judge does not direct renumbering, the remaining charges and/or specifications should not be renumbered and the military judge instructs the members that they should not draw any inference from the numbering of the charges and/or specifications.

Section 8B—Conditional Guilty Plea

8.3. Conditional Guilty Plea. RCM 910(a)(2); *United States v. Monroe*, 50 M.J. 550 (A.F. Ct. Crim. App. 1999) and *United States v. Phillips*, 32 M.J. 955 (A.F.C.M.R. 1991). When approving a guilty plea conditioned on preserving review of an adverse determination of a pretrial motion, the military judge should make the following findings on the record: (1) the offer is in writing and clearly details the motion that the accused wishes to preserve on appeal; (2) the government's consent is in writing and signed by an official authorized to consent; (3) the particular motion was fully litigated before the military judge; and, (4) the motion is case dispositive. The SJA or the person "Acting as the Staff Judge Advocate" to the convening authority, or the trial counsel at the direction of the SJA or the person "Acting as the Staff Judge Advocate", is authorized to consent for the government to the accused entering a conditional guilty plea.

Section 8C—Pretrial Agreements (RCM 705)

8.4. Policy Considerations. Use caution whenever a pretrial agreement (PTA) is being considered.

8.4.1. SJAs have an obligation to preserve a military justice system that promotes good order and discipline and is fair, timely, and transparent to the military community and the public at large. There are many undesirable aspects associated with the use of a PTA in a criminal trial; not the least of which is the impression often created by such an agreement that the interests of justice are being compromised. The advantages to both the government and the accused should clearly outweigh the unattractive features of a PTA. The SJA must be able to articulate to the convening authority the benefits to the government and the accused as well as the costs to the military justice system of entering a PTA in order to properly balance the considerations; otherwise any articulable benefit makes a PTA seem attractive. PTAs should not be used to mask case processing inefficiencies.

8.4.2. The use of a PTA may be advisable in the following situations:

8.4.2.1. Cases where the victim of crime is traumatized and experts advise the government that participation in the trial process will cause further trauma.

8.4.2.2. Cases where sensational information involving innocent persons can be avoided through a negotiated plea.

8.4.2.3. Cases where several accused are involved, and the testimony of one is required in the trial of one or more of the others. In this case, a plea agreement may be more desirable than a grant of immunity.

8.4.2.4. Cases where essential witnesses are located at exceptional distances, are not amenable to process or are not otherwise available. Current operations, in some circumstances, may make critical witnesses unavailable.

8.4.2.5. Cases involving national security where harm to the government of a fully litigated trial should be avoided. In these cases, pretrial agreements can be used so that evidence involving exposure of national security information can be protected.

8.4.3. Cost, expediency, collateral consequences, forum selection, and litigation risk are all factors the SJA and the CA need to consider in determining whether a PTA is warranted. However, individually they are not ordinarily factors that outweigh the detrimental aspects of PTAs.

8.4.4. PTAs that would include a provision for waiver of mandatory forfeitures must be carefully scrutinized to ensure the accused's expectations will be met. For example, when an accused enters a no-pay status upon the expiration of his or her term of service, there will be no pay available to forfeit, and therefore no amount to waive for the benefit of dependents. An agreement predicated upon terms including a waiver that is thwarted due to no pay entitlement may render pleas by an accused improvident and result in reversal of a conviction. *United States v. Mitchell*, 58 M.J. 251 (C.A.A.F. 2003); *United States v. Perron*, 58 M.J. 78 (C.A.A.F. 2003).

8.4.5. Defense Offer. The SJA, trial counsel, and counsel for the accused may clarify the terms of a defense PTA offer to obtain sufficient information to enable the convening authority to decide whether to reject the offer or request permission to negotiate.

8.5. Authorization Required To Enter into PTA Discussion in National Security and Related Cases.

8.5.1. In General. The Chief, Military Justice Division (AFLOA/JAJM), must grant permission to enter into PTA discussions in cases involving an offense (including attempt, conspiracy, and solicitation to commit such an offense) of espionage, subversion, aiding the enemy, sabotage, spying, or violation of punitive rules or regulations and criminal statutes concerning classified information or the foreign relations of the United States. AFLOA/JAJM ensures coordination with DoJ according to DoD Instruction 5525.7. AFLOA/JAJM permission is not required for the convening authority to reject a PTA offer.

8.5.2. Request for Permission to Negotiate. The GCMCA personally or through his or her SJA requests permission to negotiate a possible PTA from AFLOA/JAJM by the most expeditious means available. Include the following information in the request:

8.5.2.1. Background information on the accused including name, rank and organization;

8.5.2.2. The offenses charged;

8.5.2.3. A summary of evidence against the accused;

8.5.2.4. Terms of the accused's PTA offer; and,

8.5.2.5. Factors warranting a PTA.

8.5.3. Permission to Proceed. A grant of permission to enter into PTA discussions does not amount to approval of the terms or conditions of any PTA, which may result from the negotiations.

8.6. Authority to Conclude Agreement. Unless withheld by a superior authority, GCMCAs and SPCMCAs are authorized to enter into or reject offers to enter into PTAs with the accused. The decision to accept or reject a PTA offer submitted by an accused is within the sole discretion of the convening authority that referred the case to trial. *United States v. Caruth*, 6 M.J. 184 (C.M.A. 1979). The accused is entitled to have the convening authority personally act upon the offer before trial. *United States v. Upchurch*, 23 M.J. 501 (A.F.C.M.R. 1986).

8.7. Terms and Format. See RCM 705(b) and (c) for terms and conditions which may be in a PTA. PTAs must be in writing and signed by the accused and counsel. When a convening authority accepts a PTA, the convening authority personally signs it, unless the convening authority previously authorized another individual such as the SJA or trial counsel to sign. If the SJA or trial counsel signs the PTA, use an authority line such as "FOR THE COMMANDER." Oral PTAs are prohibited, as are promises to intervene on the accused's behalf in any manner in exchange for a guilty plea. Include all documentation pertaining to a PTA, including Appendix A, changes, or modifications, in the ROT. Figure 8.1 is a sample PTA, but it may be modified to fit the circumstances of a case. However, modification of Figure 8.1 should be undertaken very cautiously; the sample language reflects generally required and legally acceptable agreement terms.

8.7.1. Changes in PTA. If the negotiation results in an agreement for different relief for the accused than such included in the original offer, prepare and sign a different offer and/or Appendix A reflecting the agreed terms. If only a new Appendix A is prepared, the date of the original offer will still appear in the first paragraph of Appendix A. If another Appendix A or offer is prepared, attach the original Appendix A or offer to the ROT as an allied paper.

8.7.2. Stipulations of Fact. In order to make members and the military judge, when sitting alone, sufficiently aware of the circumstances of the offenses with which an accused is charged, the convening authority may require the accused and counsel to enter into stipulations of fact or testimony as a part of the PTA. RCM 705(c)(2)(A).

8.8. Withdrawal from PTAs. Either party may withdraw from a PTA as provided in RCM 705(d)(4). Withdrawals by the convening authority must be in writing and signed by the convening authority. Give a copy to the accused and defense counsel. Withdrawals by the accused should be in writing and given to the SJA or trial counsel. The PTA and the withdrawal, by either side, should be included in the ROT as a pretrial allied paper. AFMAN 51-203, Figure 4.1.

8.8.1. Post-Trial Matters. If the accused does not fulfill a promise to conform his or her conduct to certain conditions before action or during any period of suspension of the sentence, as agreed to in the PTA, the convening authority may be relieved of the obligation to fulfill the PTA. However, the accused's promise must be included in the PTA and there must be compliance with the hearing requirements in RCM 1109 before an alleged violation by the accused may relieve the convening authority of the obligation to fulfill the agreement. RCM 705(c)(2)(D); *United States v. Smith*, 46 M.J. 263 (C.A.A.F. 1997); *United States v. Hunter*, 65 M.J. 399 (C.A.A.F. 2008); *United States v. Shook*, 70 M.J. 578 (A.F. Ct. Crim. App. 2011).

8.9. In-Court Inquiry. Notify the military judge of a PTA before arraignment. The military judge must question the accused prior to accepting the plea to determine whether the accused understands and agrees to the meaning and effect of each PTA condition and the agreed upon sentence limitations. In a trial by military judge alone, the military judge should not inquire into the actual sentence limitations specified in the plea agreement until after sentence announcement. PTAs that are subject to in-court inquiry, whether or not accepted by the military judge, are appellate exhibits in the ROT. See RCM 705(e) for PTA nondisclosure requirements.

Section 8D—Evidentiary Matters

8.10. Confidential Drug or Alcohol Abuse Records. Federal statutes and regulations restrict the disclosure of records as to the identity, diagnosis, prognosis, or treatment of drug and alcohol abusers under the Federal drug and alcohol abuse prevention programs. Refer to 42 U.S.C. § 290dd-2 and 42 C.F.R. § 2.12.

8.10.1. Although the interchange of records entirely within the Armed Forces are exempt from the prohibitions in paragraph 8.10, the Department of Defense adopted the standards as a matter of policy to the extent it provides such records may not be used to initiate or substantiate any criminal charges against the rehabilitant, except as authorized by a court order issued under 42 U.S.C. § 290dd-2 and as allowed in AFI 44-120, *Military Drug Demand Reduction Program*, (implementing DoDD 1010.1, *Military Personnel Drug Abuse Testing Program*).

8.10.2. Disclosure of these records is permitted at the request of, and with written consent of, the accused-patient:

8.10.2.1. As evidence for the defense before findings.

8.10.2.2. As evidence in mitigation or extenuation in pre-sentencing proceedings.

8.10.2.3. After trial in support of clemency or clemency petitions to TJAG or SecAF.

8.10.3. Follow the procedure outlined in 42 C.F.R. § 2.31 in authorizing release of the records by the accused-patient. Avoid discussion of the records in open court to the extent feasible.

8.10.4. Only release necessary and relevant portions of the records for purposes of paragraph 8.10.2. An accused cannot selectively authorize disclosure of the records to mislead the court or other parties to the trial (e.g., disclosing favorable early records, but not later ones indicating regression). If there is reason to believe an accused is selectively authorizing disclosure, either resolve the matters among counsel, or by an *in camera* review of the records by the military judge.

8.10.5. Drug and alcohol abuse records may be disclosed at trial without the consent of the accused to rebut or impeach evidence presented by the accused. *United States v. Evans*, 20 M.J. 504 (A.F.C.M.R. 1985); *United States v. Fenyo*, 6 M.J. 933 (A.F.C.M.R. 1979), pet. denied, 7 M.J. 161 (C.M.A. 1979).

8.11. Psychotherapist-Patient Confidentiality. When psychotherapist-patient communications are involved, consult the psychotherapist-patient privilege under MRE 513 and, when applicable, the evidentiary protections and limitations extended to an accused entered in the Limited Privilege Suicide Prevention Program (LPSP) under AFI 44-109, *Mental Health and Military Law*.

8.11.1. MRE 513 is a limited evidentiary privilege protecting confidential communications between a patient and a psychotherapist, or an assistant to a psychotherapist, if the communications were made for the purpose of facilitating diagnosis or treatment of the patient's mental or emotional condition. It applies only to communications made after 1 November 1999. While the privilege broadly applies to all "patients," including military members, the privilege is narrowed by eight exceptions enumerated in the rule. If an exception applies, no privilege under the rule exists to preclude disclosure.

8.11.2. MRE 513 provides that the privilege applies only to "case[s] arising under the UCMJ." It extends to all stages of a proceeding under the UCMJ, including law enforcement investigations into suspected offenses, proceedings for search authorizations, nonjudicial punishment proceedings, court-martial actions, and other proceedings enumerated in MRE 1101. MRE 513 has no application outside such UCMJ proceedings. As stated in the MCM's Analysis to this rule, "there is no intent to apply Rule 513 in any proceeding other than those authorized under the UCMJ. . . . Rule 513 applies only to UCMJ proceedings, and do[es] not limit the availability of such information internally to the services, for appropriate purposes." MCM, Appendix 22.

8.11.3. Therefore, the MRE 513 privilege has no application if access to the confidential communications between a military member and a psychotherapist is sought for a non-UCMJ-related purpose. In these situations, confidential communications should be disclosed to persons or agencies with a proper and legitimate need for the information and authorized by law or regulation to receive them. When UCMJ proceedings are pending against the member whose confidential communications are being sought for a non-UCMJ-related purpose, no privilege applies.

8.11.4. Disputes between a requestor and a psychotherapist or patient may arise over the disclosure of confidential communications. AFI 44-109 has established procedures that address this issue. The installation SJA is authorized to resolve the dispute and determine whether disclosure should be made. When the request is for non-UCMJ purposes, the focus should be on whether the requestor has a proper and legitimate need for the confidential communications and is authorized by law or regulation to receive them. When the request seeks disclosure for UCMJ purposes, the SJA's focus should be on whether an enumerated exception in MRE 513 authorizes disclosure. The SJA, in UCMJ cases, must guard against improper disclosures to investigators and trial counsel that may "poison the case" with inadmissible evidence.

8.11.5. The MRE 513 privilege also interacts with the protections afforded members in the LPSP Program. Confidential communications of members in the LPSP program cannot be used against them in a UCMJ action, even if an exception in MRE 513 applies. Members may be entered into the program once they are officially notified that they are either under investigation or suspected of committing an offense under the UCMJ.

8.12. Confidentiality of Sexual Assault Program Records. When communications between an alleged victim of sexual assault and a Sexual Assault Response Coordinator (SARC) and/or Victim Advocate (VA) are involved, consult the confidential reporting program for victims of sexual assault established by DoDD 6495.01, *Sexual Assault Prevention and Response (SAPR) Program*, and *Department of the Air Force Policies and Procedures for the Prevention of and Response to Sexual Assault*.

8.12.1. A victim has a privilege to refuse to disclose, and to prevent any other person from disclosing, a confidential communication made between the victim and a victim advocate, in a case arising under the UCMJ, if such communication was made for the purpose of facilitating advice or supportive assistance to the victim. See M.R.E. 515.

8.12.2. Restricted reporting allows a sexual assault victim to confidentially disclose the details of his or her assault to specified individuals and receive medical treatment and counseling, without triggering the official investigative process. Service members who are sexually assaulted and desire restricted reporting under this policy may only report the assault to the SARC, VA or a health care provider (HCP). In cases where a victim elects restricted reporting, the SARC, assigned VA (whether uniformed or civilian), and HCPs may not disclose covered communications to law enforcement or command authorities, either within or outside the Department of Defense, except as provided by the DoDI and/or AF Policy.

8.12.3. In the event confidential information as defined in paragraphs 8.12.1 and 8.12.2 is required to be disclosed, the disclosure will be limited to information necessary to satisfy the purpose of the disclosure in the event an authorized disclosure is made.

8.12.3.1. Disclosure may be made to:

8.12.3.1.1. Command officials or law enforcement (including SF and AFOSI or other criminal investigative service) when the disclosure is authorized in writing by the victim;

8.12.3.1.2. Command officials or law enforcement when disclosure is necessary to prevent or lessen a serious and imminent threat to the health or safety of the individual or another;

8.12.3.1.3. Disability Retirement Boards and officials when disclosure by a healthcare provider is required for fitness for duty for disability retirement determinations, limited to only that information which is necessary to process the disability retirement determination;

8.12.3.1.4. SARC, VAs or healthcare provider when disclosure is necessary for the supervision of direct victim services; and/or

8.12.3.1.5. Military or civilian courts of competent jurisdiction when disclosure is ordered by a military, Federal, or State judge, or other officials or entities as required by a Federal or State statute or applicable U.S. international agreement.

8.12.4. The SARC, assigned VA, and HCP will consult with the servicing legal office, in the same manner as other recipients of privileged information, to determine if the exception criteria apply. Until those determinations are made, only non-identifying information should be disclosed. When there is uncertainty or disagreement on whether an exception applies, the matter shall be resolved IAW AFI 36-6001, *Sexual Assault Prevention and Response (SAPR) Program,* Chapter 3.

Section 8E—Pre-sentencing Matters (RCM 1001)

8.13. Personnel Data and Character of Prior Service. "Personnel records of the accused," as referenced in RCM 1001, includes all those records made or maintained in accordance with Air Force directives that reflect the past military efficiency, conduct, performance, and history of the accused, as well as any evidence of disciplinary actions, including punishment under Article 15, UCMJ, and previous court-martial convictions.

8.13.1. Personnel Information File. Relevant material contained in an accused's unit personnel information file (PIF) may be admitted pursuant to RCM 1001(b) if:

8.13.1.1. Counsel provided a copy of the document or made the document available to opposing counsel prior to trial; and

8.13.1.2. There is some evidence in the document or attached to it that:

8.13.1.2.1. The accused received a copy of the correspondence (a document bearing the signature of the accused, or a witnessed statement regarding the accused's refusal to sign, would meet this criterion) and had the opportunity to respond to the allegation; and,

8.13.1.2.2. The document is not over 5 years old on the date the charges were referred to trial.

8.13.1.3. Relevant material contained in an accused's PIF may be admitted under RCM 1001(d) for rebuttal purposes, even if it does not comply with 8.13.1.2.1. and 8.13.1.2.2., if, in the military judge's discretion, other competent means of authenticating the material have been presented to the court. *United States v. Strong*, 17 M.J. 263 (C.M.A. 1984).

8.13.2. Nonjudicial Punishment. Records of punishment under Article 15, UCMJ, from any file in which the record is properly maintained by regulation, may be admitted if not over 5 years old on the date the charges were referred. Measure this time period from the date the commander notified the accused of the commander's intent to impose nonjudicial punishment. Exclude periods in which the accused is absent without authority in computing the 5-year period. If the PIF contains an AF Form 366, *Record of Proceedings of Vacation of Suspended Nonjudicial Punishment*, which meets this five-year requirement, a copy of the Article 15 record imposing the punishment vacated is also admissible, regardless of whether the original Article 15 action was served on the accused within this time period. Nothing in this paragraph precludes use of Article 15 actions over five years old as rebuttal evidence pursuant to RCM 1001(d).

8.13.3. Performance Reports. Trial counsel offers all Enlisted or Officer Performance Reports maintained according to departmental directives, as evidence of the character of the accused's prior service. RCM 1001(b)(2); *United States v. Wingart*, 27 M.J. 128 (C.M.A. 1988).

8.13.4. Previous Convictions. The DD Form 493, *Extract of Military Records of Previous Convictions*, may be used to introduce evidence of an accused's previous conviction. Do not offer evidence of a previous conviction by SCM, in which counsel did not represent the accused, unless the accused waived the right to counsel. *United States v. Booker*, 5 M.J. 238, 246 (C.M.A. 1977). A conviction by SCM is not admissible until reviewed pursuant to Article 64(a), UCMJ. See also RCM 1001(b)(3).

8.14. Hate Crimes. Trial counsel may present evidence in aggravation that the accused intentionally selected a victim or any property as the object of the offense because of the actual or perceived race, color, religion, national origin, ethnicity, gender, disability or sexual orientation of any person. RCM 1001(b)(4).

Section 8F—Officer Resignations for the Good of the Service (RILOs)

8.15. RILOs. Officers may submit a RILO with the understanding that SecAF may direct a discharge under other than honorable conditions (UOTHC) when their conduct makes them subject to trial by court-martial. (See Figure 8.2) Officers must understand that if SecAF accepts their resignation they may be required to reimburse a portion of advanced education assistance, special pay, or bonuses received if they leave active duty before completing the period of active duty they agreed to serve. See AFI 36-3206, *Administrative Discharge Procedures for Commissioned Officers*, for complete recoupment guidance. Officers who are subject to recoupment of education assistance, special pay, or bonuses must sign a Recoupment Statement and attach it to their resignation memorandum. (See Figure 8.4).

8.15.1. Commanders should not recommend that SecAF accept a RILO for expediency when the member's conduct would be more appropriately addressed at trial. Before making any recommendations, commanders at all levels must consider the best interests of the Air Force and the effect a resignation accepted by SecAF will have on good order and discipline. The expense of a court-martial should rarely be the deciding factor in making a recommendation on a tendered resignation under this paragraph. To permit the full development of the facts of the case and appropriate consideration of dispositions other than trial, officers are encouraged not to tender a resignation for the good of the service before charges are referred

to trial by court-martial. SPCMCAs, GCMCAs and MAJCOM commanders are authorized to deny RILOs submitted prior to the referral of charges. If denied, the officer may again submit a RILO after referral of charges. Once referral of charges occurs, RILOs may only be acted upon at the Secretarial level. A RILO may not be submitted post-arraignment.

8.15.2. Procedure. Forward all pre-referral RILOs, in which approval is recommended, and all post-referral officer RILOs expeditiously to AFLOA/JAJM through command channels. *NOTE*: Legal offices at each level of command shall use the Comprehensive RILO Checklist located on the AFLOA/JAJM website.

8.15.2.1. Transmit a signed copy of the RILO package to AFLOA/JAJM through command channels. In addition to the officer's resignation and any supporting documents submitted by the officer, the RILO package should include (as applicable) copies of:

8.15.2.1.1. Any reports of investigation, statements, or other documents supporting the charges or accusations against the officer;

8.15.2.1.2. The charge sheet, forwarding letters and any indorsements with attachments, including the personal data sheet on the officer;

8.15.2.1.3. The report of the Article 32 investigation with attachments;

8.15.2.1.4. Recommendations on disposition of the RILO from each commander required to review the RILO;

8.15.2.1.4.1. The wing commander or equivalent authority indorses the resignation to the GCMCA (or to the SPCMCA if the wing commander or equivalent authority does not exercise special court-martial convening authority). (See Figure 8.3)

8.15.2.1.4.2. The GCMCA indorses the resignation to the officer's MAJCOM of assignment.

8.15.2.1.4.3. The MAJCOM/CC (or MAJCOM/CV if delegated) of assignment indorses the resignation and forwards it to AFLOA/JAJM, with an information copy of the officer's RILO submission to HQ AFPC/DPSOS.

8.15.2.1.4.4. The wing commander or any superior commander may return to an officer a resignation that is conditioned on the character of discharge SecAF may direct or that is conditioned on a specific date of separation.

8.15.2.1.4.5. Documents submitted by the defense after the original submission of the resignation package will be considered at the discretion of the recommendation and decision authorities.

8.15.2.1.5. A comprehensive legal review from the base level (or equivalent) legal office where the RILO originated, including the view of each victim of the alleged offense(s) (s*ee* paragraphs 7.3 and 7.12.12.6).

8.15.2.2. Defense Counsel. Before officers resign for the good of the service, they are given an opportunity to meet with counsel or they are provided with military counsel unless they expressly decline one.

8.15.2.2.1. If officers refuse counseling by military counsel, they should state this in their resignation memorandums.

8.15.2.2.2. The Air Force will not reimburse officers for civilian counsel.

8.15.2.3. Written legal reviews are not required at intermediate levels of command between the originating legal office and AFLOA/JAJM, unless an intermediate level legal office disagrees with a lower level legal review or needs to add and discuss omitted matters. Otherwise, written coordination indicating concurrence is all that is required. MAJCOMs may require additional legal reviews if they desire.

8.15.2.4. Do not delay processing court-martial charges through referral solely because a RILO is pending.

8.15.2.5. AFLOA/JAJM forwards the resignation to SecAF.

8.15.2.6. HQ AFPC/DPSOS schedules the officer's date of separation as soon as possible upon receiving notification from AFLOA/JAJM that the RILO has been approved.

8.15.3. Requests to Proceed to Trial Pending Action on Officer Resignation. Prior authorization from AFLOA/JAJM is required before proceeding to trial in all officer cases in which action on a RILO is pending. For purposes of this paragraph, the start of trial is defined as the acceptance of pleas at arraignment. In the request to proceed, include justification why the trial should proceed before a decision on the resignation. If permission to proceed is granted, do not, under any circumstances, prepare a convening authority action before SecAF issues a decision on the resignation. A Request to Proceed is not required to conduct pre-arraignment preliminary sessions pursuant to Article 39(a)(1), (2) and (4), UCMJ, including conducting evidentiary hearings and other motions which may help expeditiously process the case in the interests of judicial economy.

8.15.4. Seven Day Rule for RILOs. Do not proceed to trial in any officer case with a RILO pending without prior authorization from AFLOA/JAJM. AFLOA/JAJM will normally approve requests to proceed to trial while a RILO is pending, if the RILO is submitted more than seven calendar days after service of charges on the accused under RCM 602. In those cases, the only justification necessary in the request to proceed to trial is the untimely submission of the RILO, but additional reasons may be submitted if they exist. If a RILO is submitted within seven days of service of charges under RCM 602, requests to proceed to trial pending action on the RILO will normally be disapproved by AFLOA/JAJM absent compelling circumstances warranting trial while the RILO is pending. RILO processing should not be stopped or delayed, nor should the RILO be rejected for processing, based solely upon the time submitted unless submitted post-arraignment. All timely RILOs must be forwarded through functional and command channels for Secretarial action, even if submitted more than seven days after service of charges under RCM 602.

8.15.5. Subsequent Resignations. The wing commander or any superior commander may return to an officer a subsequent resignation that is based on the same grounds or supported by the same evidence as a previous resignation. ***EXCEPTIONS:*** First, an officer whose resignation has been declined prior to referral of charges, may resubmit that resignation after charges are referred to trial. Process a resubmitted resignation as expeditiously as possible to the level that denied the original resignation. Do not attach additional indorsements or

recommendations unless required by changed circumstances. Continue processing an officer's resignation as prescribed in paragraph 8.15.1. Second, process other subsequent resignations if the Show Cause Authority (as defined in AFI 36-3206) determines that unusual circumstances warrant.

8.15.6. Withdrawing Resignations. Base legal offices forward relevant materials to the officer's MAJCOM of assignment through the GCMCA. Base legal offices also ask the command or headquarters to hold a pending resignation when the officer files a withdrawal request.

8.15.6.1. Base legal offices will include the following:

8.15.6.1.1. Request to withdraw resignation.

8.15.6.1.2. Wing commander's (or equivalent authority) indorsement.

8.15.6.1.3. Copy of resignation with indorsements and attachments.

8.15.6.2. The GCMCA indorses the withdrawal request and forwards it to the officer's MAJCOM of assignment.

8.15.6.3. The MAJCOM/CC (or MAJCOM/CV if delegated) indorses the withdrawal request and forwards it to AFLOA/JAJM for action with an information copy to HQ AFPC/DPSOS.

8.15.7. If base legal offices receive a request for a retirement in lieu of court-martial proceedings, for the good of the service, contact AFLOA/JAJM for further guidance.

8.15.8. RILO Processing Time Management. Expeditious processing of RILOs is essential to preventing unnecessary trial delay, uncertain trial preparation, wasted resources, distraction to the mission, disrupted schedules of victims and witnesses, and prolonged uncertainty and anxiety for the accused. The following Air Force measures are established for RILO processing.

8.15.8.1. Process RILOs within 60 days on average from the date the accused first submits a RILO to the date the accused is notified of a final decision on the RILO. This timeline is further delineated as follows:

8.15.8.1.1. Base level (or equivalent) legal offices should process and forward the original RILO package (including documents required pursuant to paragraph 8.15.1) to AFLOA/JAJM, and electronically post such documentation for review by intermediate levels of command, no later than 10 days after the accused first submits the RILO;

8.15.8.1.2. NAF (or equivalent) legal offices should process and electronically post the GCMCA indorsement and any required legal review no later than 7 days after the base level legal office submits the RILO package;

8.15.8.1.3. MAJCOM legal offices should process and forward the MAJCOM indorsement and any required legal review to AFLOA/JAJM, and electronically post such documentation, no later than 7 days after the NAF legal office submits the GCMCA indorsement;

8.15.8.1.4. AFLOA/JAJM and AFLOA/JAJ should process and forward the original RILO package, along with all required documentation, to AF/JA no later than 7 days after receipt of the completed package with all required indorsements and legal reviews;

8.15.8.1.5. AF/JA should process and forward the original RILO package, along with all required documentation no later than 5 days after receipt of the package from AFLOA/JAJ;

8.15.8.2. Failure to meet this measure at any stage of RILO processing shall not confer any rights or benefits on the accused.

8.15.8.3. Withdrawal and dismissal of charges. If a RILO is pending and the convening authority withdraws and dismisses all charges, the RILO will be returned to the applicant without further processing and will not require a decision by SecAF on acceptance or denial of the RILO. The base legal office is responsible for returning the RILO to the applicant. If charges are later repreferred, and the officer would like to submit a RILO, the process will begin anew.

Section 8G—Matters Requiring Air Force Legal Operations Agency Assistance

8.16. Appeals by the United States from an Adverse Ruling by a Military Judge (RCM 908).

8.16.1. Trial counsel may file a notice of appeal by the United States under Article 62, UCMJ, and RCM 908 only after consultation with the Government Trial and Appellate Counsel Division (AFLOA/JAJG). The SJA decides whether to file such notice of appeal with the convening authority's concurrence.

8.16.2. After filing a notice of appeal conforming to the requirements of RCM 908(b) with the military judge, trial counsel sends notice to AFLOA/JAJG within 20 days, requesting that office file the appeal with the Air Force Court of Criminal Appeals (AFCCA). In the request, identify the ruling or order to be appealed and include the following:

8.16.2.1. A copy of the charges and specifications;

8.16.2.2. An original and two copies of the verbatim record of the applicable proceedings, or, if not available, a summary of the evidence and facts;

8.16.2.3. Trial counsel's certification that the appeal is not taken to delay the case;

8.16.2.4. Trial counsel's certification that, if the order or ruling excludes evidence, the excluded evidence is substantial proof of a fact material in the proceeding; and

8.16.2.5. A memorandum opinion on the law applicable to the issues appealed, including an explanation why the issues appealed are significant enough to require appeal by the United States.

8.16.3. AFLOA/JAJG decides whether to file the appeal with AFCCA, and notifies the trial counsel, SJA and AFLOA/JAJM.

8.17. Extraordinary Writs by Government Counsel. A petition for extraordinary relief by the prosecution in a court-martial is, and should remain, a rare course of action.

8.18. Classified or Controlled Information. Special procedures and requirements apply in cases where classified information may be used as evidence. In all such cases, contact AFLOA/JAJM as soon as possible for guidance on how to proceed.

8.18.1. Declassification. At the earliest stage practicable, government counsel should coordinate with the original classification authority to request declassification of potential evidence.

8.18.2. Asserting the MRE 505 Privilege. Only SecAF, or the head of a government agency for documents owned by agencies outside the Air Force, may claim the privilege from disclosure of classified information (MRE 505). A person who may claim the privilege may authorize a witness or trial counsel to claim the privilege on his or her behalf. Forward requests for assertion of the privilege through command channels to AFLOA/JAJM.

8.18.3. Classified Material in the Record. When a ROT contains classified material, declassify the material when proper. If it is impossible to declassify the material, the record must be classified. In determining whether a particular ROT must be classified because of its content, consideration should be given to DoD 5200.1-R, *Information Security Program*, and AFI 31-401, *Information Security Program Management*. See AFMAN 51-203, Chapter 6, for additional guidance.

8.18.4. Controlled Material in the Record. When a ROT contains controlled material (e.g., promotion testing materials, PME test materials, CDC EOC Exams, etc.), safeguard the materials to prevent further disclosure or unauthorized access. See AFMAN 51-203, Chapter 6, for additional guidance.

8.19. Disclosure of Government Information other than Classified Information (MRE 506). Immediately notify AFLOA/JAJM if a case involves assertion of the privilege against disclosure of government information.

8.19.1. Asserting the MRE 506 Privilege. Only SecAF, or the head of a government agency for documents owned by agencies outside the Air Force, may claim the privilege from disclosure of government information other than classified information. The privilege for records and information of the Inspector General may be claimed by the immediate superior of the inspector general officer responsible for creation of the records or information, the Inspector General, or any other superior authority (MRE 506). A person who may claim the privilege may authorize a witness or trial counsel to claim the privilege on his or her behalf. Forward requests for assertion of the privilege through command channels and the Air Force Safety Center Staff Judge Advocate (AFSC/JA), to AFLOA/JAJM.

Section 8H—Trial by Military Judge

8.20. Requesting Trial by Military Judge. To request a trial by military judge alone, the accused should use the DD Form 1722, *Request for Trial Before Military Judge Alone*. If the DD Form 1722 is used, it must be included in the ROT as an appellate exhibit. AFMAN51-203, *Records of Trial*, Figure 4.1. Refer to RCM 903 for additional guidance.

Section 8I—Use of Audiovisual and Teleconferencing Technology

8.21. Audiovisual and Teleconferencing Technology. The use of audiovisual and teleconferencing technology is authorized by SecAF to the extent and under the conditions allowed for in RCM 804(b), 805(a), 805(c), and 914B.

Section 8J—Findings and Sentencing Worksheets

8.22. Use of Findings and Sentencing Worksheets. The following forms may be used to assist court members put court-martial findings and sentences in the format required by the Manual for Court-Martial:

8.22.1. AF Form 1092, *Court-Martial Findings Worksheet*.

8.22.1.1. Where a specification against a service member alleges wrongful acts on "divers occasions," trial counsel should request members be instructed that any findings made by exceptions and substitutions that remove the "divers occasions" language should clearly reflect the specific instance of conduct upon which the modified findings are based. Such changes can generally be accomplished through reference in the substituted language to a relevant date or other facts in evidence that will clearly put the accused and the reviewing court on notice of what conduct served as the basis for the finding. *United States v. Walters*, 58 MJ 391 (CAAF 2003).

8.22.2. AF Form 1093, *Sentence Worksheet* (Special Court-Martial).

8.22.3. AF Form 835, *Sentence Worksheet* (General Court-Martial).

Figure 8.1. Sample Format of Offer for Pretrial Agreement and Appendix A.

Offer for Pretrial Agreement:

U N I T E D S T A T E S	)	
	)	
v.	)	Place:
	)	
GRADE, NAME, SSN, ORGANIZATION	)	Date:

OFFER FOR PRETRIAL AGREEMENT

I, (grade, name, SSN) , am presently the accused under court-martial charges, dated _____ (and_____). I have read the charge(s) and specification(s) alleged against me, and they have been explained to me by my defense counsel, (rank, if military, and name). I understand the charge(s) and specification(s), and I am aware I have a legal and moral right to plead not guilty and to leave the prosecution with the burden of proving my guilt beyond a reasonable doubt by legal and competent evidence. Understanding the above and under the conditions set forth below, and in consideration of agreement by the convening authority to approve a sentence in accord with the limitations set forth in Appendix A, (I offer to waive my right to a trial by members and I will elect to be tried by military judge alone) (and to) (withdraw Charge _____, Specification _____) (modify Specification _____ of

Charge _____ to the lesser offense of _____) (refer the case to a special court-martial), I offer to plead Guilty

To all Charges and Specifications
or
To the Charge and Specification(s)
or
To the following Charge(s) and Specification(s): (set forth by number or in full the charge(s) and specification(s) to which the guilty plea will apply. If the plea is to be a lesser included offense as to one or more specifications, set forth the exceptions and substitutions correctly and in full. MCM, Appendix 10.

I understand that this offer, when accepted by the convening authority, constitutes a binding agreement. I assert that I am, in fact, guilty of the offense(s) to which I am offering to plead guilty, and I understand that this agreement permits the government to avoid presentation in court of sufficient evidence to prove my guilt. I offer to plead guilty because it will be in my best interest that the convening authority grants me the relief set forth above and in Appendix A. I understand that I waive my right to a trial of the facts and to be confronted by the witnesses against me, and my right to avoid self-incrimination insofar as a plea of guilty will incriminate me.

In making this offer, I state that:

1. I am satisfied with the defense counsel who advised me with respect to this offer and consider (him) (her) (them) competent to represent me in this court-martial.

2. No person or persons made any attempt to force or coerce me into making this offer or to plead guilty.

3. My counsel fully advised me of the nature of the charges against me, the possibility of my defending against them, any defense which might apply, and the effect of the guilty plea which I am offering to make, and I fully understand (his) (her) advice and the meaning, effect, and consequences of this plea.

4. I understand the signature of the convening authority to this offer and to Appendix A, or to any modified version of Appendix A which I also sign, will transform this offer into an agreement binding upon me and the Government.

5. I understand that I may withdraw my plea of guilty at any time before sentence but not after sentence is announced and that, if I do so, this agreement is canceled and of no effect. This agreement will also be canceled and of no effect, if any of the following occurs:

a. Refusal of the court to accept my plea of guilty, as set forth above, or modification of the plea by anyone during the trial to not guilty or to a lesser degree of guilt.

b. Withdrawal by either party to the agreement before the trial.

c. My failure to agree with the trial counsel on stipulations concerning facts and circumstances.

(d. My failure to request or the court's refusal to grant my request to be tried by military judge alone.)

6. I understand the convening authority's obligation to approve a sentence no greater than that provided in Appendix A to this agreement may be canceled after a hearing following the guidelines in RCM 1109, if I commit any offense chargeable under the UCMJ between the announcement of sentence and the convening authority's approval of any sentence (or fail to provide restitution to _____ in the amount of _____ by _____) (fail to return _____ to _____ by _____) (fail to refrain from _____ between the announcement of sentence and the convening authority's approval of any sentence) (_____). (***See* note 1**.)

7. I understand that if this agreement is canceled for any reason stated above, this offer for an agreement cannot be used against me in any way or at any time to establish my guilt of the offense(s), and the limitations upon disposition of my case set forth in Appendix A will have no effect.

This document and Appendix A include all of the terms of this pretrial agreement, and no other inducements have been made by the convening authority or any other person which affect my offer to plead guilty.

_____ _____

Date Name, Rank, USAF
Accused

I certify I gave the accused the advice referred to above, I explained to (him/her) the elements of the offense(s) and I witnessed (his/her) voluntary signature to this offer for a pretrial agreement. (I am a member of the bar of _____) (I am a judge advocate) (certified/not certified under Article 27(b)).

_____ _____

Date Name, Rank, USAF (if applicable)
Defense Counsel

I recommend (acceptance) (rejection) of this offer.

_____ _____

Date Name, Rank, USAF
Staff Judge Advocate

The foregoing instrument, including Appendix A, dated _____, is (approved and accepted) (disapproved).

_____ _____

Date

Name, Rank, USAF
Commander (***See*** **note 2**)

Appendix A to Offer for Pretrial Agreement: (Appendix A must be prepared as a separate document that can stand apart from the portion entitled Offer for Pretrial Agreement)

UNITED STATES	)	
	)	
v.	)	Place:
	)	
GRADE, NAME, SSN, ORGANIZATION	)	Date:

APPENDIX A TO OFFER FOR PRETRIAL AGREEMENT

1. As consideration for the offer of the accused to plead guilty as set forth in the Offer for Pretrial Agreement, dated _____ , the convening authority will undertake that:

(The approved sentence will not exceed _____) (***See* note 3**)

OR

(No punitive discharge will be approved.)

2. (This is the original Appendix A submitted with the Offer for Pretrial Agreement.)

OR

(This Appendix A replaced the original submitted with the Offer for Pretrial Agreement.) (*See* **note 4**)

_____ _____
Date Name, Rank, USAF
Accused

I certify I advised the accused of the effect of the foregoing and I witnessed (his/her) voluntary signature to this Appendix A.

_____ _____
Date Name, Rank (if applicable)
Defense Counsel

I recommend (acceptance) (rejection) of this Appendix A.

_____ _____
Date Name, Rank, USAF
Staff Judge Advocate

The foregoing Appendix A is approved in conjunction with the Pretrial Agreement, dated ____.

_____ _____

Date Name, Rank, USAF
Commander (***See* Note 5**)

NOTES:

1. The clauses contained in paragraph 6 of this figure are optional. If used, carefully tailor them to include adequate protections against arbitrary revocation of the agreement to prevent their being declared void as against public policy. *See United States v. Dawson*, 10 M.J. 142 (C.M.A. 1982); *United States v. Connell*, 13 M.J. 156 (C.M.A. 1982); MCM, Appendix 21, Analysis, RCM 705(c)(2)(D).
2. The convening authority signs approving and accepting the Offer for Pretrial Agreement only if approving it and Appendix A.
3. Overall sentence caps may be confusing. If the parties wish to cap the sentence in the aggregate (allowing substitution of punishments for those specifically adjudged, so long as the aggregate effect does not exceed the aggregate adjudged), the pretrial agreement should be specific on this point. Otherwise, to avoid confusion, consider using the following language when limiting more than one form of the punishment: "He will approve no punitive discharge, if one is adjudged, more severe than a Bad Conduct Discharge; he will approve no confinement, if confinement is adjudged, in excess of [state time in months or years]; he will approve no forfeiture with a monthly amount in excess of $500 per month, nor a number of months in excess of 36 months. There are no restrictions on his ability to approve other forms of punishment that may be adjudged."
4. See paragraph 8.7.1.
5. The convening authority signs Appendix A only if approving it and the Offer for Pretrial Agreement.

Figure 8.2. Sample Memorandum, Resigning for the Good of the Service.

Use this memorandum for officers resigning instead of undergoing trial by court-martial or who are subject to trial by court-martial. Follow the instructions in parentheses ( ). Use material enclosed in brackets [ ] as appropriate.

(Date)

MEMORANDUM FOR (Functional address symbol of wing commander or equivalent authority)

FROM: (Officer's grade, full name, SSN)

SUBJECT: Resignation for the Good of the Service under AFI 51-201

I am resigning for the good of the service under AFI 51-201 effective as soon as possible.

I am resigning voluntarily for the good of the service because [my conduct renders me subject to trial by court-martial.] [I am serving under a suspended sentence to dismissal (if the sentence includes any other punishment, set out all of its elements).] I am resigning in my own best interest. Nobody threatened me, coerced me, or made promises to induce me to resign.

I understand that if the Secretary of the Air Force accepts my resignation, I will receive a discharge under other than honorable conditions unless the Secretary of the Air Force determines that I should receive a discharge under honorable conditions (general) or an honorable discharge. I understand I may lose all rights and benefits under laws administered by the Department of Veterans' Affairs, regardless of the character of discharge I receive. I understand that if I receive a discharge under other than honorable conditions, I will not receive settlement for accrued leave.

(Use if the officer resigns awaiting trial by court-martial:) [I understand that my case may go to trial while Secretarial action is pending and that I may not withdraw my resignation without approval of the Secretary of the Air Force or his or her designee.]

[I am not accountable or responsible for public property or funds.] [I am accountable or responsible for public property or funds. I have attached the required certificate of relief.] (***NOTE:*** If accountable or responsible for public property or funds, attach a certificate indicating that they've been relieved from accountability or responsibility. Specify whether they've returned all issued government property to the proper agency.)

[I [have] [have not] consulted with counsel regarding this action.] [I decline counsel but (grade, full name, and full duty title of the Chief, Force Support Squadron) counseled me and I fully understand my rights and options regarding this action.] [I fully understand my rights and options regarding this action, as explained to me by (enter area defense counsel's grade and full name, if military, or full name and business address, if civilian, or both).]

(signature)
(typed full name, grade, USAF)
(organization)

[__ Attachments:]
[1. Certificate of Relief from Accountability or Responsibility]
[2. Recoupment Statement]

Figure 8.3. Sample Memorandum, Indorsing a Resignation for the Good of the Service.

Use this memorandum for wing commanders or equivalent authorities to indorse resignations for the good of the service. Follow the instructions in parentheses ( ). Use material enclosed in brackets [ ] as appropriate.

(Date)

MEMORANDUM FOR: (Functional address symbol of the GCMCA)
(Functional address symbol of MAJCOM of assignment)
AFLOA/JAJM
IN TURN

FROM: (Commander's functional address symbol)

SUBJECT: Resignation for the Good of the Service under AFI 51-201 (Officer's grade, full name, and SSN)

I recommend that the Secretary of the Air Force [accept] [not accept] this resignation because (state reasons).

If the Secretary of the Air Force accepts the resignation, I recommend that the officer receive [an honorable discharge.] (or) [a discharge under honorable conditions (general).] (or) [a discharge under other than honorable conditions.]

(Enter officer's grade and last name) [is] [is not]:

- Under investigation.
- Under charges.
- Awaiting the result of a trial.
- Absent without leave.
- Absent in the hands of civil authorities.
- In default with respect to public property or funds. (If the officer is in default, explain the circumstances in full.)

(Enter officer's grade and last name) was given the opportunity to meet with counsel. The officer:

-Was counseled by_____ .]
-[Declined counsel.]

(For officers resigning while awaiting trial by court-martial, include one of these statements:)

[Court-martial charges have been brought against this officer. I have attached a complete summary of all the facts which are the basis for this resignation. (Include Article 32, Report of Investigation. When there is not an Article 32, include the charge sheet, pretrial advice, the convening authority's referral memorandum, and other investigative reports if available.)]

[Court-martial charges have not been brought against the officer. I have attached all information or evidence that shows that the officer is subject to trial by court-martial and which is the basis for this resignation. (Include, if available, Article 32, Report of Investigation, and any other investigative reports.)]

I certify that at the time of the misconduct, the officer wasn't suffering from a mental disease or defect. The officer presently understands the nature of the proceedings and can help in the defense.

Action under AFI 31-501 is [complete] [not required]. (See AFI 31-501 if the officer has or once had access to SCI, SIOP-ESI, or other special access programs.)

(signature)
(typed name, grade, USAF)
(title)

Figure 8.4. Recoupment Statement for Resignation for the Good of the Service.

I understand that if I am separated per my request before completing the period of active duty I agreed to serve, I may be subject to recoupment of a portion of education assistance, special pay, or bonus money received.

I understand the recoupment in all cases will be an amount that bears the same ratio to the total amount or cost provided to me as the unserved portion of active duty bears to the total period of active duty I agreed to serve.

I understand education assistance includes such programs as service academy, armed forces health profession scholarship program, Uniformed Services University of the Health Sciences, ROTC college scholarship program, tuition assistance, Air Force Institute of Technology, and minuteman education program.

I understand that if I dispute the indebtedness for educational assistance, the show cause authority will appoint an officer (or a civilian employee) to conduct an inquiry into the facts and hear evidence presented by me and other parties as appropriate, to determine the validity of the

debt. The show cause authority will forward the report of inquiry, together with his/her recommendation concerning recoupment, with the case to the Secretary of the Air Force for decision.

(signed) (date)

(typed name, grade, SSN)

Chapter 9

POST-TRIAL PROCEDURE

Section 9A—Report of the Result of Trial (RCM 1101; RCM 1305).

9.1. Purpose. The Report of Result of Trial is the primary source of findings and sentence information.

9.2. Publication of Result of Trial. The Report of Result of Trial memorandum will be automated and printed from AMJAMS. After final adjournment of the court-martial in every case, the trial counsel will promptly sign and publish the result of trial using the Report of Result of Trial memorandum. (See Figure 9.16.). Distribute the Result of Trial memorandum to the accused's immediate commander, the GCM and SPCM convening authorities and their SJAs, the commander of the local SFS and AFOSI detachment, and, if the accused is in confinement, to the commanding officer responsible for the confinement facility and the confinement officer. Additional copies may be distributed as directed by the convening authority.

9.2.1. Format. The Report of Result of Trial memorandum will be dated the date that it is published. If corrections are necessary, issue a CORRECTED COPY and use the new date published. Pleas and findings should be entered for both the Charges and the Specifications. See paragraph 10.10 for corrected copy guidance. Make corrections the same as a court-martial order (CMO). See paragraph 10.10.1.

9.2.2. Expurgated and Unexpurgated. For cases involving sex offenses, regardless of outcome, prepare two copies and replace names of victims in the expurgated copy with initials. The expurgated copy is then distributed. Both copies are included in the original record of trial. In cases involving child victims 16 years and under, prepare and distribute an expurgated copy only. Expurgate other information as appropriate using the guidance under paragraph 10.7.

9.2.3. Content. The Report of Result of Trial memorandum must accurately reflect findings of guilty to lesser included offenses and pleas or findings with exceptions and/or substitutions. To ensure accuracy, make sure your AMJAMS inputs are correct and timely. The sentence portion of the Report of Result of Trial memorandum shall include both the sentence as announced as well as the PTA sentence limitation. Ensure specifications which have pleas and findings with exceptions and/or substitutions are entered verbatim, not simply summarized. Indicate "Sex Offender Notification Required," "DNA Processing Required," and/or "Crime of Domestic Violence" as applicable. See paragraphs 13.18, 13.20.4, and 13.22 for more information.

Section 9B—Post-Trial Confinement

9.3. Entry into Post-Trial Confinement. Sentences to confinement run from the date adjudged, except when suspended or deferred by the convening authority. Use the DD Form 2707, *Confinement Order*, to enter an accused into post-trial confinement.

9.3.1. Processing DD Form 2707.

9.3.1.1. When a court-martial sentence includes confinement, the legal office should prepare the top portion of the DD Form 2707. The person directing confinement, typically the trial counsel, signs item 7(a). The Staff Judge Advocate signs item 8(d) as the officer conducting a legal review and approval. The same person cannot sign both item 7(a) and 8(d). Before signing the legal review, the judge advocate should ensure the form is properly completed and the individual directing confinement actually has authority to direct confinement.

9.3.1.2. Unless limited by a commander in the accused's chain of command the authority to order post-trial confinement is delegated to the trial counsel or assistant trial counsel. See RCM 1101(b).

9.3.1.3. Security Forces personnel receipt for the prisoner by completing and signing item 11 of the DD Form 2707. The servicing legal office must retain a signed copy of the DD Form 2707. Security Forces personnel must ensure the prisoner receives a medical examination within 24 hours or the next duty day after entry into confinement as required by AFI 31-205, paragraph 5.3.2. Security Forces personnel ensure medical personnel complete items 9 and 10 of the DD Form 2707. Ensure a completed copy of DD Form 2707 is returned to the legal office for insertion in the ROT. Security Forces retains the original DD Form 2707 for inclusion in the prisoner's Correctional Treatment File (CTF).

9.3.2. If an accused is in pretrial confinement, no action is normally necessary to continue that confinement. The Report of Result of Trial memorandum may serve in lieu of the DD Form 2707. See AFI 31-205, paragraph 5.1.

9.4. Effect of Pretrial Confinement. An accused receives day-for-day credit for any pretrial confinement served in military, civilian or foreign confinement facilities, for which the accused has not received credit against any other sentence. *United States v. Allen*, 17 M.J. 126 (C.M.A. 1984), *United States v. Murray*, 43 M.J. 507 (A.F. Ct. Crim. App. 1995) and *United States v. Pinson*, 54 M.J. 692 (A.F. Ct. Crim. App. 2001). An accused may also be awarded pretrial confinement credit for restriction tantamount to confinement, having previously been punished for the same offense with nonjudicial punishment, violations of RCM 305, violations of Article 12, UCMJ, and/or Article 13, UCMJ.

9.4.1. When a military judge directs credit for illegal pretrial confinement (violations of Article 12, Article 13, and/or RCM 305), this credit must be ordered in the convening authority's initial action (RCM 1107(f)(4)(F)). See Figure 9.11.

9.4.2. Any credit for pretrial confinement should be clearly reflected on the Report of Result of Trial memorandum and DD Form 2707, along with the source of each portion of credit and total days of credit awarded (e.g., "310 days of confinement credit based upon 10 days of credit for restriction tantamount to confinement, 100 days of credit for military pretrial confinement, and 200 days of administrative credit for illegal pretrial confinement.").

9.5. Confinement Facility (RCM 1101; 1107(f)(4)(C); 1113(d)(2)(C)). HQ AFSFC/SFC oversees Air Force correctional facilities worldwide, is responsible for inmates gained by HQ AFSFC/SFC (inmates not ordered to serve sentences in local correctional facilities), and approves all inmate transfers between military corrections facilities. HQ AFSFC/SFC, not the convening authority, selects the corrections facility for post-trial confinement and rehabilitation

for inmates gained by HQ AFSFC/SFC. Refer to AFI 31-205 for confinement rules and practices.

9.5.1. Correctional facilities other than those in the Air Force Corrections System may be used to confine inmates. HQ AFSFC/SFC sends detailed instructions covering selection of inmates for these assignments, details of transfer, and other administrative matters. The GCMCA over an inmate transferred to such a facility exercises the same responsibilities as those assigned in this chapter to the Commander, Air Force District of Washington (AFDW) for inmates in the Air Force Corrections System.

Section 9C—Preparing, Serving, and Forwarding Records of Trial

9.6. Preparing Records of Trial. Prepare court-martial records of trial (ROT) in accordance with RCM 1103, RCM 1305, MCM Appendices 13-15, and AFMAN 51-203, *Records of Trial*. Ensure ROTs are authenticated in accordance with RCM 1104(a). See also AFMAN 51-203, chapter 12 and paragraph 10.3.

9.7. Serving Records of Trial. Serve the ROT on the accused in accordance with RCM 1104(b) or RCM 1305(d). Include the proof of service, or substitute service, in the ROT. (It is good practice to notify the defense counsel of record when service of the ROT on the accused is completed.)

9.7.1. Victims of a crime punishable under Article 120, UCMJ, who testified during the proceedings of a special or general court-martial are entitled to a copy of the record of proceedings without charge as soon as the records are authenticated.

9.7.1.1. In a case with a conviction, in accordance with RCM 1103(b)(2)(B-D), provide victims with the record of proceedings to include: a copy of the record of trial; a copy of the charge sheet; a copy of the convening order and any amending orders; a copy of the request, if any, for trial by military judge alone, or that the membership of the court shall include enlisted persons; a copy of the exhibits which were received in evidence; and, when made available, a copy of the dated, signed, action by the convening authority. Since the convening authority's action is normally prepared after authentication, offer to delay providing the record to the victim until after the convening authority's action is signed. If the victim agrees, obtain written confirmation of the victim's decision. If the victim instead elects to receive the authenticated record of trial as soon as it is available, the convening authority's signed action shall be served on the victim as soon as it is available. *Note: Ensure records sealed in accordance with RCM 1103A are not provided to the victim. Also ensure all records provided to the victim are redacted in accordance with the Freedom of Information Act and the Privacy Act.*

9.7.1.2. In a case with an acquittal, in accordance with RCM 1103(e) and AFMAN 51-203, furnish the victim with the same record provided to the accused: a copy of the convening order (an any amending orders); sufficient information to establish jurisdiction over the accused and the offense, and abbreviated ROT. *Note: Ensure all records provided to the victim are redacted in accordance with the Freedom of Information Act and the Privacy Act.*

9.8. Forwarding Records of Trial. Forward the ROT to the convening authority or his or her SJA, in accordance with RCM 1104(e). After the convening authority takes action, promptly

forward the original ROT and required copies to AFLOA/JAJM for appellate review, or the GCM/SJA for review under Article 64a, UCMJ, using the most cost-effective method which provides a means to track the ROT. Do not forward incomplete ROTs (e.g., ROTs that are missing documents or have unsigned receipts). Incomplete ROTs will not be considered transferred in AMJAMS. Consult AFMAN 51-203, Chapters 3 and 13, for the number of required copies that must accompany the original and for forwarding instructions.

Section 9D—Matters Submitted by Victims

9.9. Post-Trial Submission of Victim Impact Statements. Immediately following trial, or as soon thereafter as practicable, the trial counsel or designee generates a letter to each victim, if any, of the accused's result of trial. The trial counsel or designee should personally serve this letter on the victim(s), or his or her Special Victims' Counsel if applicable, at the same time as the DD Form 2704, *Victim/Witness Certification and Election Concerning Prisoner Status*. The SJA of the wing where the court-martial occurred signs the letter. This letter invites the victim(s) to provide input, in the form of a written victim impact statement, to the convening authority's SJA, as to whether or not the convening authority should approve the findings and sentence or grant some form of clemency. The letter provides that the victim has 10 calendar days to submit a statement and states the time and date by which their statement must be received in order to be considered. It also advises that any statements will be provided to the accused and defense as part of the post-trial process and that the defense will have an opportunity to comment on it as a part of their post-trial submission to the convening authority. See Figure 9.2. Like the accused, a victim can request a one-time extension.

9.9.1. Eligible victims may consult with a legal assistance attorney or Special Victims' Counsel about the results of the court-martial and the post-trial process IAW AFI 51-504, *Legal Assistance, Notary, and Preventive Law Programs*. The trial counsel or designee may explain the post-trial process to victims IAW DD Form 2703, *Post-Trial Information for Victims and Witnesses of Crime*.

9.9.2. SJAs should generally not delay processing post-trial matters as a result of these statements. For example, they should not delay providing the SJAR and post-trial paperwork to the accused and defense counsel in order to try to locate a victim who is not readily available or who chooses to provide a statement after the time and date set forth in the letter from the SJA to the victim. This applies to victims of all crimes to include, but not limited to, sexual assault, larceny, etc.

9.10. Service of Victim Impact Statements. Serve the victim impact statements, if any, on the accused and defense counsel at the same time as the ROT. Generally, the victim impact statements should be provided as attachments to the SJAR. If an SJA decides to accept a victim impact statement that is received after the SJAR and ROT have been served on the accused and defense counsel, the SJA shall serve the victim impact statement on the accused and defense counsel at that time, re-starting the 10 days provided for the accused to respond.

Section 9E—Matters Submitted by the Accused and/or Defense Counsel (RCM 1105)

9.11. Notice Regarding Post-Trial Submissions. The SJA, trial counsel, or assistant trial counsel provides the accused and defense counsel a memorandum (Figure 9.3) informing the accused of the right to submit matters, including clemency matters, for the convening authority's

consideration, and the time period for making such submissions. Address the letter to the accused and provide a copy to the defense counsel responsible for post-trial matters. If an SJA recommendation is not required in the case, provide the letter to the detailed military defense counsel, unless the accused requested otherwise. Include a copy of the notification letter, with the accused's receipt, in the ROT as specified in AFMAN 51-203, paragraph 4.6 and Figure 4.1.

9.11.1. Waiver of Accused's Right to Submit Matters. If the accused submits a waiver of the right to submit matters, include the written waiver in the ROT. See Figures 9.4 and 9.5.

9.12. Applications to Defer Sentence and Waive Required Forfeitures. Before action is taken on a case, an accused may submit an application to the convening authority, through the servicing SJA, to defer any adjudged and/or mandatory forfeiture of pay or allowances, reduction in grade, or service of a sentence to confinement. See Articles 57(a)(2), 57a(a), and 58b(a)(1). If an accused has dependents, an application may also be submitted to the convening authority, through the servicing SJA, to waive any mandatory forfeiture of pay and allowances under Article 58b(b), for the benefit of the accused's dependents. Applications for deferral and/or waiver may be submitted through the servicing SJA any time after the sentence is announced and before action by the convening authority. See Section 9G for additional guidance on deferring and waiving forfeitures of pay and allowances.

9.13. RCM 1105 Submissions. An accused may submit matters, including clemency recommendations, for the convening authority to consider before taking action on the case. Failure to submit matters within the time prescribed shall be deemed a waiver of the right to submit such matters. Submission of any matters shall be deemed a waiver of the right to submit additional matters unless the right to submit additional matters within the prescribed time limits is expressly reserved in writing. An accused may also waive, in writing, the right to submit matters; once submitted, such waiver may not be revoked. See RCM 1105(d). See RCM 1105 for further discussion on matters that may be submitted, waivers, and the appropriate time periods for submissions.

9.14. Requests for Entry in Return to Duty Program (RTDP). The RTDP offers selected enlisted personnel with exceptional potential the opportunity to return to active duty and have their punitive discharge, if adjudged, remitted. Participants are provided with programs individually designed to address their confining offenses and improve their conduct, attitude, and productivity for continued Air Force service. The accused's defense counsel assists the accused in volunteering for the RTDP by obtaining and submitting the appropriate paperwork to the convening authority. An eligible inmate who volunteered, but was not approved by the convening authority for entry into the RTDP, may be eligible to apply for entry to the Air Force Clemency and Parole Board. See AFI 31-205, paragraph 11.6, for additional guidance on applications and requirements for entry in the RTDP.

Section 9F—Staff Judge Advocate Recommendation and Addendum (RCM 1106)

9.15. Mandatory Recommendation. A Staff Judge Advocate's Recommendation (SJAR) is required in cases where the convening authority takes action on a ROT by GCM or a ROT by special court-martial that includes a sentence to a bad conduct discharge or confinement for one year.

9.15.1. An SJAR is not required when the convening authority takes action on a ROT in a SCM or SPCM that does not include either a sentence to a bad conduct discharge or confinement for one year. In these cases, the SJA must provide the convening authority with the ROT, the defense submission, an acknowledgement to be signed by the convening authority that he or she considered the defense submissions, and a proposed action for the convening authority's signature. When an SJAR is not required, the action may be forwarded using the sample action memorandum provided in Figure 9.6, to ensure all of the matters the Convening Authority is required to consider are listed. If this action memorandum is not used there must be some evidence that the convening authority acknowledged all the matters he or she is required to consider. Practitioners must be careful not to raise new matters in the action memorandum, otherwise it must be served on the accused. If there is a need to address a new matter, be sure to serve new matters on the accused and accused's counsel and allow 10 days from service to submit comments. See RCM 1106(f)(7).

9.16. SJAR Contents. An SJAR should be a clear and concise recommendation written in memorandum format containing the information required by RCM 1106(d). Attach copies of the Report of Result of Trial memorandum, and the personal data sheet of the accused admitted at trial (see Figure 3.7.) to the SJAR. See sample format at Figure 9.7.

9.16.1. When combined with the SJAR and the Report of Result of Trial memorandum, the personal data sheet ensures that required information concerning the accused's service record is provided to the convening authority.

9.16.2. Include the original SJAR with all attachments (the Report of Result of Trial memorandum and the personal data sheet) in the original ROT. The attachments must follow immediately behind the SJAR in the ROT, even if these documents are also included in other parts of the record. Place a copy of the SJAR and attachments in each copy of the ROT.

9.16.3. The SJAR must include items required by RCM 1106 that are not included on the personal data sheet or the Report of Result of Trial memorandum. This includes a description of the character of the accused's service prior to the charges (RCM 1106(d)(3)(C)), any clemency recommendations made by the sentencing authority (made in conjunction with the announced sentence) (RCM 1106(d)(3)(B)), and any additional credit awarded by the military judge for illegal pretrial confinement. The SJAR should also contain the victim impact statement (if any), the maximum sentence for the guilty specifications/charges and a copy or summary of the terms and conditions of any pretrial agreement, including a statement of any action the convening authority is obligated to take under the agreement or a statement of the reasons why the convening authority is not obligated to take specific action under the agreement.

9.16.4. When an allegation of legal error is raised in matters submitted under RCM 1105 or when otherwise deemed appropriate by the SJA, the SJAR will state the staff judge advocate's opinion as to whether corrective action on the findings or sentence should be taken.

9.16.5. The SJAR should address any previously approved request from the accused for deferral of confinement, forfeitures of pay, and/or reduction in grade, and any previously approved or pending request from the accused or the accused's dependents for a waiver of mandatory forfeitures under Article 58b, UCMJ. Approved deferrals and waivers must be

documented in the convening authority's action and the convening authority must act upon pending requests.

9.16.5.1. If a convening authority previously disapproved a request for deferral or waiver prior to initial action on the sentence, comment in the SJAR on that request and what action may still be appropriate. For example, a convening authority may disapprove a deferral or waiver request based upon matters adverse to the accused from outside the record. If the convening authority also considers such matters when taking action on the sentence, the accused is entitled to notice and an opportunity to rebut. See RCM 1107(b)(3)(B)(iii). Notice may be satisfied through the SJAR.

9.17. Preparing and Signing the SJAR. The SJAR must clearly indicate that the recommendation is from the SJA. An assistant performing the duties of the SJA may sign as "Acting as the Staff Judge Advocate." An assistant SJA may prepare the recommendation, but the SJA (or if unavailable, the person "Acting as the Staff Judge Advocate") must review the ROT and sign the SJAR. No person who participated in the court-martial as a member, a military judge, a trial counsel, a defense counsel or investigating officer may draft or sign the SJAR or addendum or otherwise act as the SJA or legal advisor to any reviewing or convening authority in that case. See RCM 1106(b).

9.17.1. If the convening authority does not have an SJA (or the person "Acting as the Staff Judge Advocate") or the person serving in that capacity is disqualified under RCM 1106(b) or otherwise, then the convening authority must request the assignment of another SJA to prepare the SJAR or forward the record to any GCMCA as provided in RCM 1107(a). See RCM 1106(c)(1).

9.17.1.1. If all judge advocates on the SPCMCA's staff are disqualified from preparing and signing the SJAR, forward the record to the GCMCA's SJA. That officer may prepare and sign the SJAR or designate another SJA (or the person "Acting as the Staff Judge Advocate") in the GCMCA's command to prepare and sign the SJAR.

9.17.1.2. If all judge advocates on the GCMCA's staff are disqualified from preparing and signing the SJAR, forward the record to the MAJCOM's SJA. That officer may prepare and sign the SJAR or designate another SJA (or the person "Acting as the Staff Judge Advocate") in the MAJCOM to prepare and sign the SJAR. If all the SJAs (or the person "Acting as the Staff Judge Advocate") in the MAJCOM are disqualified from preparing and signing the SJAR, the MAJCOM SJA requests AFLOA/JAJM's assistance in designating an SJA to prepare and sign the SJAR.

9.17.2. If the original SJA did not sign the SJAR, the SJA signing the SJAR must include an explanation in the allied papers of the ROT. An explanation is not required if it is clear from the ROT (e.g., forwarding memorandum, transfer memorandum) why the original SJA did not sign the SJAR.

9.18. Service of SJAR on Defense. Ensure copies of the SJAR, including its attachments, are served on the accused's counsel and, unless impracticable, on the accused. Obtain receipts for service of the SJAR from both and include them in the ROT. If service on the accused is impracticable or if the accused so requests on the record at the court-martial or in writing, forward the accused's copy to the accused's defense counsel and attach a statement to the ROT explaining why the accused was not served. See RCM 1106(f)(1).

9.19. Defense Counsel Response to SJAR. The accused's counsel may submit objections or rebuttal to any matter in the SJAR and may comment on any other matter. Defense counsel must submit comments within 10 days of service of the ROT on the accused (under RCM 1104(b)) or receipt of the SJAR, whichever is later, unless the period is extended. See RCM 1106(f)(4) and (5). If a victim impact statement is accepted by an SJA during the accused's 10 days, the accused's 10 day clock will restart on the day that victim impact statement is accepted.

9.20. Addendum to the SJAR. When the SJA receives matters submitted by an accused or defense counsel under RCM 1105 or 1106(f)(4) after service of the SJAR on defense, the SJA must prepare an addendum to the SJAR for the convening authority. The SJA must address whether corrective action is required when an allegation of error is raised in matters submitted under RCM 1105. The response may consist of a statement of agreement or disagreement with the matter raised by the accused or counsel. RCM 1106(d)(4). The SJA may address other matters raised by defense submissions in the addendum. Figure 9.8 is a sample addendum to the SJAR when defense matters are submitted. If matters are not submitted, the SJA should still prepare an addendum to the SJAR. See paragraph 9.20.3.

9.20.1. The Addendum to the SJAR must:

9.20.1.1. List each defense submission as a separate attachment to the addendum;

9.20.1.2. Advise the convening authority that per RCM 1107(b)(3)(A) he or she must consider the result of trial, the recommendation of the SJA and all written matters submitted by the defense. RCM 1107(b)(3)(A)(iii); and

9.20.1.3. Advise the convening authority that he or she may consider other matters prior to taking action, such as the ROT, personnel records of the accused, and such other matters as the convening authority deems appropriate. However, if the convening authority considers matters adverse to the accused from outside the record, the accused must be notified and given an opportunity to rebut. See RCM 1107(b)(3)(B). This includes any victim impact statements submitted.

9.20.2. New Matters in Addendum. New matters include all references to issues that are not included in the ROT and are not served on defense counsel and the accused with the SJAR. New matters ordinarily do not include the SJA's discussion of the correctness of the defense counsel's comments on the recommendation. If the addendum includes new matters, serve the accused and defense counsel with the addendum containing the new matter. They are allowed 10 days from service to submit comments. RCM 1106(f)(7).

9.20.2.1. When an addendum containing new matters is served upon the accused and defense counsel for comment, a second or additional addendum must be prepared to address defense comments or the absence of such comments. The second or additional addendum must list any additional defense submissions as an attachment, must re-advise the convening authority to comply with paragraphs 9.20.1.2 and 9.20.1.3, and may address any matters raised in additional defense submissions. If any addendum contains new matters, comply with paragraph 9.20.2.

9.20.3. If the SJA does not receive matters from the accused or defense counsel per RCM 1105 after service of the SJAR on defense per RCM 1106, the SJA must still prepare an addendum to the SJAR for the convening authority. In this case, the matters addressed in paragraphs 9.20.1.1 and 9.20.1.2 are not required, nor would paragraph 9.20.2 apply unless

new matters are addressed in the Addendum to the SJAR. Figure 9.9 is a sample addendum to the SJAR when defense matters are not submitted.

9.21. Staff Summary Sheets. Avoid use of a staff summary sheet (SSS) in conjunction with the SJAR, addendum to the SJAR, and action memorandum. If a SSS or other document is used to forward the record (e.g., SJAR, action memorandum, RCM 1105 or RCM 1106 matters from the defense, Addendum to the SJAR, ROT) to the convening authority for action, it must be included with the ROT. The contents of any SSS should not ordinarily include any information not previously addressed in the SJAR or addendum to the SJAR. Such information in the SSS may constitute new matter. Any document that the SJA uses to supplement the post-trial recommendation must be served on the defense counsel when it contains new matter. *United States v. Thompson*, 43 M.J. 703 (A.F. Ct. Crim. App. 1995). If the SSS adds new matter not otherwise addressed in the SJAR or addendum to the SJAR, it must be served on the accused and defense counsel for comment. *United States v. Leslie*, 16 M.J. 714 (A.F.C.M.R. 1983).

Section 9G—Initial Action by the Convening Authority (RCM 1107)

9.22. When Initial Action May Be Taken. The convening authority may not take initial action until the time period for the accused to submit matters for consideration under RCM 1105(c) has expired or the accused has waived the right to submit such matters under RCM 1105(d).

9.22.1. Action While RILO is Pending. The convening authority must not, under any circumstances, take action under RCM 1107 on any officer case in which an accused's resignation for the good of the service (RILO) is pending final SecAF decision (see paragraph 8.16.2).

9.22.2. Acquittals. There is no convening authority action for an acquittal of all charges and specifications. A promulgating order is required. See paragraph 10.8.1.1.

9.22.3. Provide a copy of the dated, signed, action by the convening authority in accordance with paragraph 7.11.9. and paragraph 9.7.1.1.

9.23. Convening Authority Discretion. The convening authority is not required to take any action on the findings, to review the case for legal errors, or to review the case for factual sufficiency. Action taken on the findings and sentence is a matter of command prerogative and within the sole discretion of the convening authority.

9.23.1. Convening authorities should consider an accused's service in an area of combat operations in determining what punishment, if any, to approve. Where the sentence of an accused with an outstanding record in an area of combat operations extends to a punitive discharge, convening authorities should consider suspending or remitting the discharge, provided that return to duty is in the best interests of the Air Force.

9.23.2. Convening authorities may not substitute an administrative discharge for an adjudged punitive discharge. However, in cases involving relatively minor offenses, an accused with an outstanding combat record, or other exceptional circumstances, and where restoration to duty is inappropriate, convening and reviewing authorities may consider recommending to SecAF, administrative, rather than punitive, separation under Article 74(b), UCMJ. Contact AFLOA/JAJR, 1500 West Perimeter Road, Ste 1170, Joint Base Andrews Naval Air Facility Washington, MD 20762, for assistance and coordination on such recommendations.

9.24. Disqualification of Convening Authority. A convening authority may not conduct the post-trial review of a case if the attendant facts and circumstances would lead a reasonable person to impute to him/her a personal interest in the outcome of the case or a personal bias towards the accused. *United States v. Gudmundson*, 57 M.J. 493 (C.A.A.F. 2002); *United States v. Voorhees*, 50 M.J. 494 (C.A.A.F. 1999); *United States v. Crossley*, 10 M.J. 376 (C.M.A. 1981); *United States v. Gordon*, 1 C.M.A. 255, 2 C.M.R. 161 (C.M.A. 1952).

9.24.1. If the SPCMCA is unable to take action in a case, forward the case to the GCMCA through the GCMCA's SJA. If the GCMCA is unable to take action, the MAJCOM commander designates a convening authority to do so.

9.24.2. The ROT allied papers must include a memorandum by the SJA (of the convening authority taking action) explaining why a different convening authority took action on the case or place a copy of G-series order behind the Action. The memorandum is not required if it is clear from the ROT (e.g., forwarding memorandum, transfer memorandum) why a different convening authority took action on the case.

9.24.3. Transfer of responsibility for recommendation and action does not transfer authority to order or rescind deferments of sentence under Article 57a. That authority remains with the convening authority granting the deferment or, if the accused is no longer under that command, then with the GCMCA for the command to which the accused is currently assigned.

9.25. Format for Initial Actions. Prepare convening authority's initial action in accordance with RCM 1107(f) and the guidance in the MCM, Appendix 16. Samples of a convening authority's initial action are at Figure 9.10. If a convening authority or reviewing authority withdraws an action and substitutes a new one, refer to paragraph 10.10.2 and Figure 10.8 for the proper format.

9.25.1. Findings. Findings are addressed in the action only when any findings of guilty are disapproved, in whole or part. See sample formats in MCM, Appendix 16.

9.25.2. Deferred Forfeitures and Reduction in Grade and Waiver of Automatic Forfeitures. See Section 9H for guidance, and Figures 9.11 and 9.12 for sample formats for initial actions.

9.26. Additional Considerations When Preparing Initial Actions.

9.26.1. Limitation on Forfeitures (RCM 1003). If no confinement is adjudged and a forfeiture exceeding two-thirds pay per month is adjudged, reduce the approved forfeiture to not more than two-thirds pay per month to run for a specified period of time or up until the punitive discharge is executed. Where an accused sentenced to an adjudged period of confinement and a forfeiture exceeding two-thirds pay per month has served the adjudged period of confinement prior to the convening authority's action, reduce the approved forfeiture to not more than total forfeitures for the period the accused was in confinement and not more than two-thirds pay per month thereafter, to run either for a specified period of time or up until execution of an adjudged punitive discharge. See RCM 1107(d)(2), Discussion; *United States v. Craze*, 56 M.J. 777 (A.F. Ct. Crim. App. 2002); *United States v. York*, 53 M.J. 553 (A.F. Ct. Crim. App. 2000); and *United States v. Warner*, 25 M.J. 64 (C.M.A. 1987). Forfeitures of pay per month must be stated in whole dollars (RCM 1003).

9.26.2. Duration of Forfeitures. When total forfeitures are approved, the duration of forfeitures is not specified. An enlisted member, sentenced to a punitive discharge, confinement and total forfeitures, restored to duty after release from confinement is entitled to pay and allowances from the date the member is restored to duty, and the forfeitures become inoperative thereafter. DoD 7000.14-R, *Department of Defense Financial Management Regulation*, Vol. 7A, paragraph 480804.

9.26.3. Application of Article 58a, UCMJ. The provisions of Article 58a do not apply to the Air Force. All reductions in grade will be based upon adjudged and approved sentences.

9.26.4. Suspension of Sentences and Proceedings to Vacate a Suspended Sentence. RCM 1108 and RCM 1109. In a case where the convening authority suspends all or part of the execution of a sentence, include a copy of the suspension terms and the member's receipt in each copy of the ROT with the suspension action. If a suspended sentence is later vacated, document the vacation hearing on a DD Form 455, *Report of Proceedings to Vacate Suspension of a General Court-Martial Sentence or of a Special Court-Martial Sentence Including a Bad-Conduct Discharge Under Article 72, UCMJ, and R.C.M. 1109*. If the member waives the vacation hearing, the DD Form 455 is not required. Send the completed DD Form 455 or the member's waiver to AFLOA/JAJM for review and filing with the original ROT. Distribute court-martial orders announcing the vacation of a suspended sentence as required in Chapter 10. Use special orders to announce SCM sentence vacations.

Section 9H—Articles 57(a) and 58b, UCMJ

9.27. Distinctions between Articles 57(a) and 58b, UCMJ. Articles 57(a) and 58b are separate and distinct statutory provisions. They serve different purposes.

9.27.1. Article 57(a) mandates the effective date of any forfeiture of pay and allowances or reduction in grade that is included in the sentence of a court-martial. It provides that adjudged forfeitures and an adjudged reduction in grade will take effect upon the convening authority's action or 14 days after the sentence is adjudged, whichever occurs first. There is no additional requirement under Article 57(a) for the sentence to include confinement or a punitive discharge. Therefore, adjudged forfeitures and reductions, unless deferred, should take effect on the date provided for in Article 57(a) even if there is no confinement or punitive discharge in the case.

9.27.2. Article 58b requires forfeiture of pay (and allowances in GCMs) due a member during qualified periods of confinement or parole. The mandatory forfeitures (also known as required or automatic forfeitures) under this provision only take effect if three conditions exist:

9.27.2.1. The adjudged sentence includes confinement for more than six months or death, or confinement for any period and a dishonorable discharge, bad conduct discharge, or dismissal;

9.27.2.2. The accused is in confinement or on parole; and

9.27.2.3. The accused is otherwise entitled to pay and allowances that are subject to mandatory forfeitures.

9.27.3. As with adjudged forfeitures, mandatory forfeitures take effect the date of action or 14 days after the sentence is adjudged, whichever is sooner. The amount of pay and allowances forfeited in a GCM is all pay and allowances otherwise due the accused. The amount of pay forfeited in a SPCM is two-thirds of pay otherwise due the accused. In these cases, make sure FF are announced in whole dollar amounts. Allowances otherwise due are not subject to mandatory forfeitures in SPCM.

9.28. Deferral and Waiver Provisions under Articles 57(a) and 58b: Articles 57(a) and 58b contain provisions that enable a convening authority to permit payments to the accused and/or the accused's dependents that would otherwise have been forfeited.

9.28.1. Article 57(a)(2) permits the convening authority to defer either adjudged forfeitures or an adjudged reduction in grade, or both, from taking effect until action. The accused must submit a written request to have adjudged and, if applicable, mandatory forfeitures deferred. The accused's pay will not stop if the convening authority approves a deferment of both adjudged and mandatory forfeitures, or approves a deferment of only adjudged forfeitures when there are no mandatory forfeitures. The convening authority may rescind a deferment at any time. Deferred forfeitures are paid to the accused.

9.28.2. Mandatory forfeitures can only be waived in cases where an accused has dependents. Waived forfeitures must be paid to the dependents. See paragraph 9.30 for dependency determinations.

9.28.3. Mandatory forfeitures can only be waived by the convening authority for a period not exceeding six months, or the period of confinement if less than six months.

9.28.4. Waived forfeitures cannot be applied beyond the member's expiration of term of service (ETS) because the pay entitlement ceases at that point.

9.28.5. The accused does not have to apply for a waiver of mandatory forfeitures. The convening authority may waive mandatory forfeitures on his or her initiative.

9.28.6. The convening authority can waive mandatory forfeitures either before taking action or when taking action on the case. The waiver can be retroactive, designated to begin on a date 14 days after the sentence is adjudged.

9.28.7. The convening authority must defer, suspend, mitigate or disapprove all or part of adjudged total forfeitures in order to waive any amount of mandatory forfeitures. Mandatory forfeitures can be waived for the benefit of the accused's dependents only to the extent adjudged forfeitures are not in effect. See *United States v. Emminizer*, 56 M.J. 441 (C.A.A.F. 2002).

9.28.8. A convening authority can defer mandatory forfeitures (and any adjudged forfeitures) until action and then waive mandatory forfeitures for a period not to exceed six months. A combination of deferral and waiver can maximize the pay and allowances going to the accused and his or her family.

9.29. Mechanics of Deferring and Waiving Forfeitures: Figure 9.1 explains the relationship between adjudged and mandatory forfeitures from the date sentence is adjudged until the end of the forfeiture period. To assist in drafting the convening authority's action on the sentence, see Figures 9.11 and 9.12.

9.29.1. Accused's Deferral Request. If an accused requests a deferral of a reduction in grade and/or a forfeiture of pay (and allowances) until action is taken, the convening authority may approve the request, in full or in part, or may disapprove the request.

9.29.1.1. The accused's deferral request should specify whether a request for deferred forfeitures is for adjudged forfeitures, mandatory forfeitures, or both. If it is unclear, the convening authority may treat it as a request for deferral of both.

9.29.1.2. The convening authority's action on the request should be reflected in a signed and dated document.

9.29.1.3. The terms of approved deferrals must also be reported in a 14-day memorandum in accordance with Figure 9.13 and must be reported in the action the convening authority ultimately takes on the case.

9.29.1.4. A deferral of forfeitures may be for adjudged forfeitures, mandatory forfeitures, or both, and for all pay and allowances to which the accused is entitled or a lesser sum.

9.29.2. Waiver of Mandatory Forfeitures. In cases where mandatory forfeitures are waived, whether prior to or as part of the action, the approved waiver should express the amount approved in dollar amounts per month. The exception to this is when the waiver is for total pay and allowances in a GCM. If two-thirds pay are approved in a SPCM, these must be reflected in whole dollar amounts.

9.29.2.1. Approved requests must identify the dependents that will receive the waived forfeitures. If payments are made to an ex-spouse or other person on behalf of minor dependents, confirmation that the designated payee is the appointed guardian or custodian of a minor dependent is required. Legal offices should provide information described in AFMAN 65-116V1, *Defense Joint Military Pay System Active Component (DJMS-AC) FSO Procedures*, paragraph 67.5.5, to the local finance office when processing waiver requests. This information includes a copy of the waiver request (if submitted), copy of the approved waiver request with amount approved, full name of payees, proof of dependency of payees or certification that the payees are dependents of the member, payment account information, and a statement signed by payee and member agreeing to notify legal and finance if the payee ceases being a dependent during the period payments are made.

9.29.2.2. If mandatory forfeitures are waived before action, the convening authority must reflect approval in a signed and dated document. Such a waiver of mandatory forfeitures must also be reported in the 14-day memorandum and in the convening authority's action on the case.

9.29.2.3. Contact the local accounting and finance office to determine the accused's entitlements and the actual amount of pay and allowances the accused and/or the accused's dependents may be entitled to receive. A number of factors can impact these entitlements:

9.29.2.3.1. Basic Allowance for Subsistence (BAS). In most cases, the accused will lose BAS upon entering confinement. Therefore, the convening authority cannot give the accused's family any portion of the accused's BAS.

9.29.2.3.2. Taxes. Federal and state taxes will be withheld from any payments of deferred or waived forfeitures. Therefore, if the convening authority wants the accused's family to receive a certain amount of money, the amount of taxes should be factored into the calculation.

9.29.2.3.3. Grade Reduction. A reduction in grade may significantly lower the amount of the accused's pay that is eligible for waiver. Therefore, if the convening authority wants the accused's family to receive a certain amount of money, the effect of a reduction in grade should be taken into consideration.

9.29.2.3.4. Spouse on Active Duty. A spouse who is also an active duty military member can receive only waived forfeiture of pay, not pay and allowances.

9.29.2.3.5. Expiration of Term of Service (ETS). There are no forfeitures to waive on any date after the accused's ETS. Any PTA to approve a waiver of any amount of forfeitures when the accused is near or beyond his or her ETS may render pleas improvident because the accused may not receive the benefit of his bargain. PTAs containing a waiver provision must clearly state that any waiver is only applicable to pay and/or allowances that the accused is otherwise entitled to receive. See *United States v. Perron*, 58 M.J. 78 (C.A.A.F. 2003) and paragraph 8.4.4.

9.30. Dependency Determinations under Article 58b: When addressing waivers of mandatory forfeitures under Article 58b, UCMJ, an issue may arise as to whether a person qualifies as a dependent.

9.30.1. Dependent Categories. RCM 1101(d)(3) provides that, for the purpose of waiving forfeitures, a "dependent" means any person qualifying as a dependent according to 37 U.S.C. § 401. This statute identifies four categories of dependents:

9.30.1.1. Spouse of the accused, regardless of military status.

9.30.1.2. Unmarried child of the accused under 21 years of age, including an adopted child or stepchild. In addition, special rules permit a child as old as 23 years of age to be a dependent if enrolled as a full-time student and a child older than 21 years of age to be a dependent if incapable of self-support due to mental or physical incapacity. However, in these two cases the accused must provide more than one-half of the child's support.

9.30.1.3. Parent of the accused. Additional dependency requirements are required, including the accused providing over one-half of the parent's support. Parents includes natural parents, stepparents, and adoptive parents of the accused or the accused's spouse; and any other person who stood in loco parentis to the accused for a continuous 5 year period before the member became 21 years of age.

9.30.1.4. Unmarried persons placed in legal custody of the member as a result of a court order for a period of at least 12 months. This category of persons, known as wards, must depend upon the accused for over one-half of their support and must meet numerous other criteria set forth in the statute (37 U.S.C. § 401).

9.30.2. Evidence of Dependency. Sufficient evidence of dependency is required to support an Article 58b waiver. The nature of this evidence will depend on the status of the dependent.

9.30.2.1. Dependency status for a spouse and/or child may be established by their enrollment in DEERS or by other competent evidence, such as a marriage certificate for a spouse or a birth certificate or court order establishing paternity and/or child support obligations for a child.

9.30.2.2. Dependency determinations for a child over 21 years of age, parents, or a ward are more complex because they only qualify as a dependent if the military sponsor provides more than one-half of their support. A thorough determination by DFAS is necessary. A precondition for waiving forfeitures for the benefit of one of these dependents should be an "approval letter" of dependency from DFAS. The accused, or other party requesting the waiver, should provide a copy of the DFAS "approval letter" with any request to waive mandatory forfeitures.

9.30.2.3. If an accused was unable to qualify the person(s) as dependent(s) with DFAS, there will normally be insufficient evidence of dependency to support an Article 58b waiver of mandatory forfeitures.

9.31. Service of Legal Reviews on the Accused: The Air Force Court of Criminal Appeals has addressed whether an SJA's legal advice to a convening authority regarding requests for deferral or waiver of forfeitures must be served upon the accused with an opportunity to respond. Deferrals need not be served, see paragraph 9.31.1. Waivers must be served, see paragraph 9.31.2. In either case, legal offices should process requests promptly.

9.31.1. Article 57(a) Deferral of Forfeiture Requests. In *United States v. Key*, 55 M.J. 537 (A.F. Ct. Crim. App. 2001), the Court held that an SJA review of a request for deferral of forfeitures does not need to be served on the defense for comment prior to submission to the convening authority. The Court compared such a request to a request for deferral of a sentence to confinement, for which no SJA recommendation is required and, historically, the SJA's legal analysis of the request is not served on the accused. Any SJA review and action by the convening authority on the request must become a part of the completed ROT.

9.31.2. Article 58b Waiver of Forfeiture Requests. In *United States v. Spears*, 48 M.J. 768 (A.F. Ct. Crim. App. 1998), the Court considered whether a legal review of a request for a waiver of forfeitures must be served on the defense prior to submission to the convening authority. The Court noted that SJAs are not required to prepare legal reviews of requests for waiver of automatic forfeitures. The Court treated the request for waiver of forfeitures as a clemency request and declared that practitioners must exercise care when addressing the request for waiver of forfeitures before the record is completed. *Spears* set this basic approach: any legal review prepared by the SJA for the convening authority prior to completion of the SJAR should be attached to the SJAR and become part of the completed ROT. Any legal review that may be prepared after the SJAR should be treated as an addendum to the SJAR and served on the accused for comment when it contains matter outside the record. Serve it on the accused before submission to the convening authority and include it in the completed ROT.

9.32. Application of Article 57(a) and 58b To Cases With Offenses Committed Prior to 1 April 1996. For cases in which all of the charged offenses occurred before 1 April 1996, the U.S. Court of Appeals for the Armed Forces, in *United States v. Gorski*, 47 M.J. 370 (C.A.A.F. 1997), held these provisions operate in violation of the ex post facto clause of the Constitution.

9.32.1. For cases affected by the *Gorski* decision, any forfeitures collected pursuant to Article 58b (mandatory forfeitures); Article 57(a)(1)(A) (adjudged forfeitures taken prior to convening authority action); and/or any pay and allowances withheld due to a reduction in grade pursuant to Article 57(a)(1)(A) (reduction in grade prior to convening authority action), are without legal effect and will be restored.

9.32.2. For cases involving offense(s) committed both before and after 1 April 1996, the Court, in *United States v. Carter*, 49 M.J. 392 (C.A.A.F. 1998), applied unitary sentencing principles and limited the *Gorski* holding to those cases where the maximum sentence for any or all offenses committed on or after 1 April 1996 would induce mandatory forfeitures under Article 58b.

Section 9I—Contingent Confinement

9.33. Contingent Confinement. Contingent confinement is confinement authorized by a court-martial in the form of a fine-enforcement provision. See RCM 1003(b)(3) and RCM 1113(d)(3). A fine enforcement provision may be ordered executed in accordance with the procedures below.

9.33.1. Authority to Execute Contingent Confinement. A fine does not become effective until ordered executed (Article 57(c), UCMJ). Fines may be ordered executed in the convening authority's initial action (Article 71(c)(2), UCMJ). The accused is not required to pay a fine until the fine is ordered executed. Moreover, an accused may not be ordered to serve contingent confinement until the fine is ordered executed and the requirements of paragraph 9.34 are met. If the accused fails to demonstrate that he or she has made good faith efforts to pay the fine but cannot because of indigency, the convening authority may order the sentence of confinement executed by following the procedures outlined in paragraph 9.34.

9.33.2. Enforcement. Once court-martial jurisdiction attaches, an accused remains subject to the UCMJ through the execution and enforcement of a sentence. Article 2(a)(1), UCMJ, confers jurisdiction over members of a regular component of the armed forces, including those awaiting discharge after the expiration of terms of enlistment. Jurisdiction continues for the purpose of enforcing an adjudged sentence for individuals discharged as the result of a court-martial conviction. *Carter v. McClaughry*, 183 U.S. 365 (1902); *Peebles v. Froehlke*, 46 C.M.R. 266 (C.M.A. 1973).

9.34. Procedures for Executing Contingent Confinement. Contingent confinement may be executed in accordance with the following procedures:

9.34.1. When the fine is ordered executed, the accused must be notified in writing the fine is due and payable. A specific due date should be included in the notification. If the accused is in confinement, the due date should normally be a reasonable period before the accused is scheduled for release from confinement to allow adequate time for a contingent confinement hearing and convening authority action.

9.34.2. After the fine is considered due, the SJA for the base where the accused was tried ascertains whether the accused has met his or her obligations concerning the fine. If it appears the fine has not been paid, notify the convening authority. If the convening authority finds probable cause to believe a fine is unpaid, the convening authority may order a contingent confinement hearing. The convening authority for this hearing is the officer who

convened the court-martial, his or her successor in command, or the officer exercising GCMCA over the command to which the accused is assigned. If the accused is no longer a member of the Air Force, the Air Force District of Washington (AFDW) Commander (GCMCA over the Air Force Corrections System) is the convening authority. The purpose of the hearing is to determine whether the fine is delinquent, whether the delinquency, if any, resulted from the accused's indigence and whether the contingent confinement should be executed.

9.34.3. A military judge is detailed as hearing officer to conduct the contingent confinement hearing in the same manner as detailed to a court-martial.

9.34.4. The accused is provided written notice of the time and place of the hearing. The convening authority provides the accused with temporary duty orders or invitational travel orders if the accused is not in confinement and the hearing is beyond reasonable commuting distance from the accused's residence. See Figure 6.8 for appropriate funding authority. The notice informs the accused of the following:

9.34.4.1. The accused's alleged failure to pay the fine;

9.34.4.2. The purpose of the hearing to determine whether the fine is delinquent and whether the delinquency, if any, is the result of the accused's indigence;

9.34.4.3. The accused's right to present witnesses and documentary evidence;

9.34.4.4. The accused's right to representation by military defense counsel; and

9.34.4.5. The evidence which was relied upon in issuing the notice of hearing and the options available to the convening authority.

9.34.5. Unless the hearing is otherwise waived, the hearing officer makes findings on whether payment of a fine is delinquent and whether any delinquency resulted from the accused's indigence. Payment of a fine is delinquent if not made within the period specified in the approved sentence or, if no period is specified, within a reasonable time. An accused's failure to pay a fine is not due to indigence if the failure to pay the fine resulted from a willful refusal to pay the fine or a failure to make sufficient good faith efforts to pay it. The Government bears the burden of proof, by a preponderance of the evidence, of showing that payment of the fine is delinquent. The accused bears the burden of proof, by a preponderance of the evidence, of showing that any delinquency resulted from indigence.

9.34.6. Hearing Procedures.

9.34.6.1. The hearing officer determines the facts from the best evidence available. Rulings on evidentiary and procedural matters are final. Strict evidentiary rules do not apply and hearsay statements are admissible.

9.34.6.2. The accused may testify and present witnesses and documentary evidence. Witness testimony may be presented through sworn or unsworn statements, affidavits, depositions, prior testimony, stipulations of expected testimony, or telephone conference. The accused may not compel the production of a witness at Government expense unless the request is made to the hearing officer, in writing, before the hearing and the hearing officer determines:

9.34.6.2.1. The physical presence of the witness is critical to a fair determination of a material issue in dispute;

9.34.6.2.2. The witness is available to testify; and

9.34.6.2.3. There is no substitute for the live testimony of the prospective witness (e.g. written statements, affidavits, stipulations, or telephone conference).

9.34.6.3. The accused has a right to confront and cross-examine those witnesses testifying at the hearing.

9.34.6.4. The accused may be represented at the hearing by a civilian attorney or civilian representative of the accused's choice at no cost to the Government. The accused is also entitled to representation by either an ADC or military counsel of the accused's selection, if reasonably available (see paragraph 5.4). The accused is not entitled to representation by more than one military counsel.

9.34.6.5. A court reporter reports the hearing and prepares a summarized record of the proceeding. The record includes a summary of the evidence presented and any objections or requests considered by the hearing officer.

9.34.6.6. The hearing officer submits a written report to the convening authority through the SJA, including a statement of the evidence relied upon to support the findings. If the hearing officer chooses to make the findings and statement of evidence on the record, transcribe them verbatim. The hearing officer forwards the report and/or record to the convening authority.

9.34.6.7. The convening authority takes final action on the hearing officer's findings and determinations. The convening authority may adopt, modify or reject the hearing officer's findings and determinations. If the hearing officer's findings and determinations are not adopted, the convening authority must specify the evidence relied upon and the reasons for the decision.

9.34.6.8. If the convening authority determines payment of the fine is delinquent and the failure to pay is not due to indigence, the convening authority may order the sentence of confinement executed. See Figure 9.13 for a sample order executing contingent confinement. If the convening authority determines the accused has made good efforts to pay the fine, but cannot because of indigency, the convening authority may not order the sentence of confinement executed unless he or she determines that there is no other punishment adequate to meet the Government's interest in appropriate punishment. See RCM 1113(d)(3).

9.34.6.9. Forward a copy of the summarized record of the contingent confinement hearing for each copy of the ROT required by AFMAN 51-203, chapters 3 and 13 to AFLOA/JAJM.

Section 9J—Notifications of Adjudged Sentence, Action of the Convening Authority, and Deferment or Waiver

9.35. Reporting by Base Level SJA. In all courts-martial with mandatory forfeitures under Article 58b, UCMJ, adjudged forfeitures, or reduction in grade, the SJA of the office that prosecuted the case must send a memorandum by the most expeditious means available to HQ

AFPC/DPSOE (enlisted only) and the member's finance office, with informational copies to HQ AFSFC/SFC and DFAS-DE/FJPC in the format set out in Figure 9.12. The referenced memorandum must be sent within 24 hours of the date the convening authority takes action under RCM 1107 or 14 days after the sentence is adjudged, whichever is earlier. If any portion of the punishment or mandatory forfeitures is deferred or if the convening authority waives any portion of the mandatory forfeitures prior to the date of the message, the memorandum must include the terms of such deferment or waiver. Notification can be made to DFAS at **afcourtmartials@dfas.mil**; DPSOE at **afpc.dpppwm@us.af.mil**; and AFSFC at **hqafsfc.apellv@us.af.mil.**

9.36. Reporting by Convening Authority's SJA. If action is taken more than 14 days after the sentence is adjudged, in any case where the approved sentence includes a reduction in grade or forfeitures (mandatory or adjudged), the SJA of the convening authority must send a second memorandum within 24 hours after the convening authority's RCM 1107 action. If any portion of the punishment or mandatory forfeiture is deferred or if the convening authority waives any portion of the mandatory forfeiture, the second memorandum must include the terms of such deferment or waiver. Send the message to the same addressees listed in paragraph 9.35 and, if the accused is confined, to the confinement facility, using the format in Figure 9.14 For members who enter a prisoner status requiring a permanent change of station, also send the memorandum to the gaining AFO.

9.37. Notification and Distribution of Documents to Confinement Facilities.

9.37.1. After action by the original convening authority, the AFDW Commander exercises GCMCA over inmates transferred to Level II Regional Corrections Facilities (RCFs) and long-term corrections facilities as defined in AFI 31-205, and over those Air Force members and former members paroled or placed on excess leave from such facilities.

9.37.2. When an inmate (with or without a punitive separation) is transferred into the Air Force Corrections System, the servicing SJA sends:

9.37.2.1. Four copies of the court-martial order to HQ AFSFC/SFC and two copies of the court-martial order to the corrections officer of the facility housing the offender;

9.37.2.2. Two copies of any victim request to be notified of changes in the inmate's status and of clemency hearings to both HQ AFSFC/SFC and the corrections officer;

9.37.2.3. One copy of the SJAR to both HQ AFSFC/SFC and the corrections officer;

9.37.3. If at the time the inmate is transferred to a corrections facility, the court-martial order has not been published, send one copy of the Report of Result of Trial and the convening authority's action to HQ AFSFC/SFC (e-mail transmission in lieu of mailing is permissible) and two copies of each to the corrections officer.

Section 9K—Involuntary (Required) and Voluntary Excess Leave

9.38. Excess Leave.

9.38.1. The convening authority will place an accused that had either no confinement adjudged or already completed the period of confinement on involuntary excess leave while awaiting appellate review of an unsuspended punitive separation (See Article 76a, UCMJ). After serving an approved sentence of confinement, members of the Air Reserve

Components may be removed from active duty status rather than being placed in excess leave and recalled as necessary to complete appellate review. Contact HQ AFRC/JA for guidance.

9.38.2. Members with an adjudged sentence that includes a punitive discharge may volunteer to be placed on excess leave pending the convening authority's action. If the convening authority approves the punitive separation, terminate the accused's voluntary excess leave status. Return the accused to duty or place on involuntary excess leave.

9.38.3. When an approved sentence includes unsuspended confinement, the confinement must be served, remitted, or deferred before placing an accused on either voluntary or involuntary excess leave.

9.38.4. An accused with accrued leave when required to take excess leave may elect to either receive pay and allowances during the period of accrued leave and then continue on unpaid excess leave or receive payment for the accrued leave as of the day excess leave begins, and serve the entire period on unpaid excess leave.

9.38.5. If the accused's sentence to a punitive separation is set aside or disapproved upon appellate review, the accused is entitled to pay and allowances for the period of required excess leave, unless a rehearing or new trial is ordered and a punitive separation results from the rehearing. The amount of pay and allowances is reduced by the amount of income, unemployment compensation, and public assistance benefits received by the accused from any government agency during the period of excess leave.

9.38.6. The convening authority may order the accused to begin involuntary excess leave upon completion of a sentence to confinement in the RCM 1107 action, upon completion of a sentence to confinement or at any time following approval of a sentence which includes a punitive discharge, subject to paragraph 9.38.3. Such involuntary excess leave may continue until the date the discharge is executed, unless terminated at any earlier date.

9.38.7. When a convening authority directs excess leave for an accused serving in an overseas area, the convening authority directs reassignment to the Force Support Squadron at the base nearest the appellate leave address provided by the accused.

9.38.7.1. An accused may go directly to his or her leave address without reporting into the gaining unit. The accused will determine whether to physically report into the gaining unit before departure.

9.38.7.2. The losing commander, consistent with the accused's election, will direct the accused to travel from the overseas location to either the appellate leave address or the gaining unit as soon as possible after completion of out-processing. After arrival, the accused will commence taking accrued leave, if so elected, and/or required excess leave.

9.38.7.3. The accused will be considered assigned to the Force Support Squadron at the gaining base on the date the member physically reports to the unit or, in cases where the accused does not physically report to the gaining unit, the date determined by the local FSS's Personnel Relocations Element based upon the accused's departure date and travel time.

9.38.7.4. Overseas members may provide a leave address in an OCONUS state or territory of the United States (e.g., Alaska, Hawaii, Guam) and HQ AFPC may assign the member to the Force Support Squadron nearest such leave address. Overseas Airmen in

foreign countries must provide an appellate leave address in a state or territory of the United States and will be reassigned to a Force Support Squadron at the base nearest the leave address. Overseas members in foreign countries will be required to depart the foreign country.

9.38.8. Procedures for Placing an Accused on Excess Leave. When the convening authority orders an accused to take excess leave, the convening authority sends the accused a letter (Figure 9.15), through command channels, directing the excess leave and informing the accused of entitlements, status, and responsibilities while on excess leave. If the convening authority directed the excess leave in the action (see Figure 9.10.), the convening authority's SJA, or the person Acting as the Staff Judge Advocate, may sign and serve the letter on the accused. The SJA for the convening authority directing excess leave ensures a signed copy of this letter, with the accused's receipt and any subsequent address changes, is sent to the servicing FSS. A copy of all excess leave letters must be sent to AFLOA/JAJM. In cases of an accused being reassigned from overseas, a copy of the letter must also be sent to the SJAs of the SPCMCA and GCMCA of the gaining unit, the gaining excess leave FSS/CC, and AFLOA/JAJA. See Figure 9.15.

9.38.8.1. Action to place the accused on voluntary or involuntary excess leave must comply with JFTR, paragraph U7506, and AFIs 36-3003, *Military Leave Program*, 36-2110, *Assignments*, 36-2102, *Base-Level Relocations Procedures* and 31-205. Ensure AMJAMS is updated to reflect the accused's appellate leave address.

9.38.9. Travel of Personnel Awaiting Completion of Appellate Review (Excess) Leave. An accused involuntarily placed on excess leave while awaiting completion of appellate review of a court-martial sentence to a punitive discharge or dismissal from the service may be provided travel or transportation in kind, according to the JFTR, Volume I. Ensure a special travel order is published in "A" series if the court-martial convening authority directs involuntary appellate (excess) leave according to AFI 36-3003 and this instruction. If the accused's court-martial sentence is disapproved or set aside, and the member is restored to duty, the member is authorized travel or transportation in kind, according to the JFTR Volume I. In such cases, publish an "A" Series Travel Order IAW the publishing directive.

Figure 9.1. Relationship between Adjudged and Mandatory Forfeitures.

FORFEITURE PERIOD	ADJUDGED FORFEITURES (AF)	MANDATORY FORFEITURES (MF) (See Note 1)
DATE SENTENCE ADJUDGED TO 14 DAYS AFTER SENTENCE ADJUDGED (w/o action)	Not in effect. Accused continues to be paid unless post ETS	Not in effect. Accused continues to be paid unless post ETS

14 DAYS AFTER THE DATE ON WHICH THE SENTENCE IS ADJUDGED TO ACTION	In effect, except for any portion the CA defers. (See Note 2)	In effect, except for any portion the CA defers (See Note 2), and/or waives and directs payment to the accused's qualifying dependents. (See Notes 3 & 4)
ACTION TO END OF FORFEITURE PERIOD	The amount the CA approves is still in effect. The CA may approve, disapprove, commute or suspend the AF in whole or in part.	Still in effect, except any portion the CA waives or has waived. (See Notes 4 & 5)

NOTES:
1. Mandatory forfeitures (MF) only apply when the three conditions listed in paragraph 9.27.2. exist.
2. If the accused applies for deferment, the convening authority (CA) may defer all or a portion of the AF and/or MF 14 days after the date on which the sentence was adjudged until the convening authority takes action. The accused should specify whether the deferment requested is for AF, MF, or both (a request for deferment of forfeitures in general is considered a request for both). If a deferment is approved, the accused will be paid a sum equal to the pay and allowances to which he or she is entitled, minus any amounts forfeited (AF and/or MF not deferred). The CA may rescind a deferment (AF and/or MF) at any time.
3. The CA may waive available MF with or without a request from the accused. The CA may waive MF to the extent that the accused is entitled to pay and allowances (see Note 1 above).
4. MF may be waived until the earlier of: 1) a period not to exceed six months; 2) the accused's release from confinement; or 3) the last day the accused is otherwise entitled to pay and allowances (see Note 1 above).
5. At action, the CA may waive all or a portion of the available MF (if previously waived, waiver is memorialized in the action) for the benefit of the accused's dependents. The CA may disapprove, commute or suspend all or a portion of the AF to increase the amount of MF available for the CA to waive. The CA may retroactively waive MF, starting 14 days after the date on which the sentence was adjudged.

Figure 9.2. Sample Letter to Victim Regarding Victim Impact Statement Submission

[Letterhead]

(Date)

MEMORANDUM FOR (Grade and Name of Victim)
FROM: (JA Office and Grade and Name of Base level SJA)
SUBJECT: Submission of matters, United States v. (Grade and Name of accused)
1. On (Date of conviction), (Current grade and name of the accused) was convicted by (Type of Court-Martial) of (Insert charges and specifications). For these crimes, (he/she) was sentenced to (Sentence). The next step in the process is for the Convening Authority, (grade and name of Convening Authority), to decide whether to approve all or any portion of the findings and sentence. I am writing to let you know how you can provide input to (me) (the Convening Authority's Staff Judge Advocate (SJA)) for the Convening Authority's consideration.
2. Now that (current grade and name of the accused) has been found guilty, (his/her) case will be reviewed by the Convening Authority. (He/She) will determine whether to approve the findings

and sentence. Before the Convening Authority takes action, (I) (the Convening Authority's SJA) will, pursuant to Rules for Courts-Martial (RCM) 1106, submit a recommendation to (him/her), with a copy to defense counsel. (I) (the Convening Authority's SJA) will review the record of trial and advise the Convening Authority on whether the court-martial was lawfully constituted and had jurisdiction over the accused and each offense, whether any errors were committed which materially prejudiced (his/her) substantial rights, whether there is enough evidence in the record to support each finding of guilty, and whether the adjudged sentence is lawful. Per RCM 1107, the Convening Authority can approve the sentence as adjudged, approve a lesser sentence, or disapprove the sentence entirely. The Convening Authority can also disapprove some or all of the findings of guilt. However, (he/she) cannot take any action that makes the verdict or sentence worse, i.e. (he/she) cannot add charges or more punishment.

3. You may submit a statement in writing to (me) (the Convening Authority's SJA) for consideration in advising the Convening Authority. The choice is entirely yours. This statement could describe the impact (Current grade and name of the accused)'s crime had on your life. You may also discuss whether you believe the Convening Authority should approve the findings and sentence or grant some form of clemency. However, this statement should not reference any crimes for which (Current grade and name of the accused) was not convicted of by the court-martial in order to avoid any prejudice to (his/her) post-trial rights.

4. If you want to submit a statement, please provide it to me no later than (time/date) at the following office or email address: (office address) (email address). Your signature is required on any statement submitted. [I will then provide your letter to the Convening Authority's SJA.] If you submit a statement, we will provide it, along with all of the relevant trial related documents, to (Current grade and name of the Accused) and (his/her) attorney. (Current grade and name of the accused) and (his/her) attorney will then have an opportunity to provide our office with anything they want the Convening Authority to consider when making (his/her) decision on whether to approve the findings and sentence.

5. (*If eligible)*You may also consult with (a legal assistance attorney) or (Special Victims' Counsel) on whether to submit a victim impact statement and the contents of such a statement IAW AFI 51-504, *Legal Assistance, Notary, and Preventive Law Programs*.

_____

(NAME), (Grade), USAF
Staff Judge Advocate

1st Ind, (Grade and Name of Victim) Date:

MEMORANDUM FOR (JA Office and Grade and Name of Base level SJA)

I understand that I may provide a statement to (the Convening Authority's Staff Judge Advocate (SJA)) for consideration in advising the Convening Authority on whether to approve all or any portion of the findings and sentence. (I am submitting the attached statement) (I do not intend to submit a statement)

(Grade and Name of Victim)

2nd Ind, (JA Office and Grade and Name of Base level SJA)

MEMORANDUM FOR (Grade and Name of Victim)

((Grade and Name of Victim) provided a statement) ((Grade and Name of Victim) did not provide a statement)

(NAME), (Grade), USAF
Staff Judge Advocate

Figure 9.3. Submission of Matters by the Accused.

(Date)

MEMORANDUM FOR (Grade and Name of Accused)

FROM: (JA Office)

SUBJECT: Submission of Matters to the Convening Authority – *United States. v. (Grade and Name of Accused)*

1. Since you have been convicted and sentenced by court-martial, you have the right to submit matters for consideration by the convening authority of your court-martial before the convening authority takes action on your case. The matters you submit may include any matters that might affect the convening authority's decision to approve or disapprove any findings of guilt or any part of the sentence in your case. These matters may include:

a. Allegations of errors affecting the legality of the findings or sentence in your case.

b. Portions or summaries of your ROT, or copies of evidence introduced at trial.

c. Matters in mitigation that were not available for consideration at your trial.

d. Clemency recommendations by any court member, the military judge, or any other person.

e. Any other matters you or your counsel believe the convening authority should be aware of before taking action in your case, whether or not available or introduced into evidence at your trial.

f. (*If the accused is enlisted*) Your desire for entry into the Return to Duty Program. See AFI 31-205.

2. You should consult with your defense counsel to decide whether to submit such matters. The convening authority will consider all matters you submit before taking action in your case. Failure to submit matters within the time provided in paragraph 4 constitutes a waiver of your right to do so.

3. If you decide not to submit matters for the convening authority's consideration, you may waive, in writing, the right to submit such matters. Such a waiver may expedite the post-trial processing and review of your case, if that is what you desire. You should consult your defense counsel before waiving your rights to submit matters. Once you make such a written waiver, it may not be withdrawn or revoked. You may indicate any waiver of your rights to submit matters on the indorsement to this letter or by submitting a separate written waiver.

4. [*For a GCM or SPCM, insert*:] You have 10 days to submit matters for consideration by the convening authority from the date you receive a copy of the authenticated ROT or, if applicable, the date both you and your defense counsel receive a copy of the recommendation of the staff judge advocate, whichever is later. If you are unable to submit your matters within this period, you may, for good reason, apply to the convening authority, through the convening authority's staff judge advocate for an extension of the period.

[*For a SCM, insert the following as paragraph 4*:] You have 7 days from the date your sentence was announced to submit your matters for the convening authority's consideration. Your matters must be submitted by (date)(time). If you are unable to submit your matters within this period, you may, for good cause, apply to the convening authority, through the convening authority's staff judge advocate, for an extension of the period.

5. In addition to the submissions described above, you may submit an application to the convening authority, through the servicing SJA, to defer any forfeitures of pay or allowances, reduction in grade, or service of a sentence to confinement. If you have dependents, you may also submit an application to the convening authority, through the servicing SJA, to waive any mandatory forfeitures of pay and allowances under Article 58b(b), UCMJ, with the amount waived paid to your dependents. Applications for deferral and/or waiver may be submitted immediately. In order for the convening authority to give such requests proper consideration, they should normally be submitted no later than the time provided in paragraph 4 above.

(NAME), (Grade), USAF
(Duty Title)

cc: Defense Counsel

1st Ind, (Grade and Name of Accused)

(Date)

MEMORANDUM FOR (JA Office)

Receipt acknowledged at (time) on (date).

I have consulted with my defense counsel concerning my rights to submit matters for the convening authority's consideration before the convening authority takes action in my case. After considering the advice of my defense counsel, I (waive)(do not waive) my right to submit such matters. I (will)(will not) submit any matters for the convening authority's consideration.

(NAME), (Grade), USAF
Accused

Figure 9.4. Waiver of Clemency Matters by the Accused (No Request for Deferment of Reduction in Grade or Forfeitures, or Waiver of Mandatory Forfeitures).

(Date)

MEMORANDUM FOR (Defense Counsel)

FROM: (Grade and Name of Accused)

SUBJECT: Waiver of Right to Submit Clemency Matters – *United States v. (Grade and Name of Accused)*

1. I have been briefed by my defense counsel, (Name and Grade of Defense Counsel), (Location), concerning my rights to submit matters to the convening authority, detailed in Article 60, UCMJ, (and) Rule for Court-Martial 1105 (and Article(s) 57a (and 58b), UCMJ), before he/she takes action in my case. After considering my rights and the advice of my counsel, I hereby elect that I will not submit any matters for the convening authority's consideration. This waiver is voluntary and no one has coerced me in any way or made any promises in regard to my decision. I understand that this waiver is irrevocable once submitted.

2. I understand my rights and the time limitations to make submissions to the convening authority. *[For a GCM or SPCM insert:]* I understand that I have 10 days from (the later of) my receipt of a copy of the authenticated record of trial (or receipt of the Staff Judge Advocate's Recommendation (, or Addendum, if served upon me)) to submit matters. I understand that I may request an extension of up to 20 additional days to submit matters and, for good cause, the convening authority or that authority's staff judge advocate may grant my request. *[For a SCM, insert:]* I understand that I have 7 days from the date my sentence was announced to submit matters for the convening authority's consideration. I understand that I may, for good cause, apply to the convening authority, through the convening authority's staff judge advocate, for an extension of the period.

3. I understand that the convening authority may, for any reason, disapprove findings of guilt to any charge and/or specification, but may not change a finding of not guilty to guilty. I also understand that the convening authority may, for any reason, disapprove a legal sentence, mitigate [lessen] the sentence, or change a punishment to one of a different [but not more severe] nature. I understand the convening authority may not increase the severity of the punishment.

4. My counsel has informed me that the convening authority has sole discretion to defer sentences, including confinement, reduction in grade and (adjudged and/or mandatory) forfeitures (as well as sole discretion to waive mandatory forfeitures of pay (and allowances)). I hereby voluntarily elect that I will not submit any requests for a deferment or waiver.

(NAME), (Grade), USAF
Accused

1st Ind, (Defense Counsel) (Date)

MEMORANDUM FOR (Convening Authority)

1. (Name and Grade of Accused), having [received the record of trial (and) the Staff Judge Advocate's Recommendation (and Addendum), dated _____][been sentenced by (general)(special)(summary) court-martial on (date)], has, after receiving the advice of counsel concerning (his)(her) rights to submit matters to the convening authority pursuant to Article 60, UCMJ, and RCM 1105, voluntarily decided to waive the right to submit matters for consideration by the convening authority.

2. I have advised (Rank and Name of Accused) that (he)(she) may submit to the convening authority any matters that may reasonably tend to affect the convening authority's decision whether to disapprove any findings of guilty or to approve all or any portion of the sentence. This includes any allegations of errors affecting the legality of the findings or sentence; portions of the record of trial and copies of documentary evidence offered or introduced at trial; matters in mitigation which were not available for consideration at the court-martial; and clemency recommendations from any person. I have also advised (him)(her) that the convening authority must consider any written submissions, if any, prior to taking action.

(NAME), (Grade), USAF
Defense Counsel

Figure 9.5. Waiver of Clemency Matters by the Accused (Request for Deferment of Reduction in Grade or Forfeitures, or Waiver of Mandatory Forfeitures).

(Date)

MEMORANDUM FOR (Defense Counsel)

FROM: (Grade and Name of Accused)

SUBJECT: Waiver of Right to Submit Clemency Matters – *United States v. (Grade and Name of Accused)*

1. I have been briefed by my defense counsel, (Name and Grade of Defense Counsel), (Location) concerning my rights to submit matters to the convening authority, detailed in Article 60, UCMJ, and Rule for Court-Martial 1105 (and Article(s) 57a (and 58b), UCMJ), before (he)(she) takes action in my case. I previously submitted a Request for [(Deferment of [Reduction in Grade] and/or [Forfeitures]), (Waiver of Mandatory Forfeitures)] on (date). [(Decision(s) on [that/those] request(s) (is/are) still pending.) (The convening authority previously denied my request.)] After considering my rights and the advice of my counsel, I hereby elect that I will not submit any additional matters for the convening authority's consideration. This decision is voluntary. I have not been coerced in any way or received any promises in regard to my decision.

2. I understand my rights and the time limitations to make submissions to the convening authority. I understand that I have 10 days from (the later of) my receipt of a copy of the authenticated record of trial (or receipt of the Staff Judge Advocate's Recommendation (, or Addendum, if served upon me)) to submit matters. I understand that I may request an extension of up to 20 additional days to submit matters and, for good cause, the convening authority or that authority's staff judge advocate may grant my request.

3. I understand that the convening authority may, for any reason, disapprove findings of guilt to any charge and/or specification, but may not change a finding of not guilty to guilty. I also understand that the convening authority may, for any reason, disapprove a legal sentence, mitigate (lessen) the sentence, or change a punishment to one of a different [but not more severe] nature. I understand the convening authority may not increase the severity of the punishment.

4. My counsel has informed me that the convening authority has sole discretion to defer sentences, including confinement, reduction in grade and (adjudged and/or mandatory) forfeitures (, as well as sole discretion to waive mandatory forfeitures of pay (and allowances)). I request that my prior request(s) be (approved)(reconsidered). (I do not specifically request any other specific form of clemency.)

(NAME), (Grade), USAF
Accused

1st Ind, (Defense Counsel) (Date)

MEMORANDUM FOR (Convening Authority)

1. (Rank and Name of Accused), having [received the record of trial (and) the Staff Judge Advocate's Recommendation (and Addendum), dated _____] [been sentenced by

(general)(special)(summary) court-martial on (date)], has, after receiving the advice of counsel concerning his/her rights to submit matters to the convening authority pursuant to Article 60, UCMJ, and RCM 1105, voluntarily elected to waive the right to submit matters for consideration by the convening authority.

2. I have advised (Rank and of Accused) that (he)(she) may submit to the convening authority any matters that may reasonably tend to affect the convening authority's decision whether to disapprove any findings of guilty or to approve all or any portion of the sentence. This includes any allegations of errors affecting the legality of the findings or sentence; portions of the record of trial and copies of documentary evidence offered or introduced at trial; matters in mitigation which were not available for consideration at the court-martial; and clemency recommendations from any person. I have also advised (him)(her) that the convening authority must consider any written submissions, if any, prior to taking action.

(NAME), (Grade), USAF
Defense Counsel

Figure 9.6. Action Memorandum in Summary or non-BCD Special Courts-Martial.

(Date)

MEMORANDUM FOR (Convening Authority)

FROM: (JA Office)

SUBJECT: Action: *United States v. (Grade and Name of Accused)*

1. On (date), you referred the case of (rank and name of accused), (accused's organization), to trial by (summary)(special) court-martial. The court convened on (date). Attached is the Report of Result of Trial memorandum, which summarizes the charges and specifications, pleas, findings and sentence. Also attached is a personal data sheet on the accused for your consideration prior to taking action on the sentence. In addition, you may consider the record of trial, personnel records of the accused, and such other matters, as you deem appropriate. However, if you consider matters adverse to the accused from outside the record, with knowledge of which the accused is not chargeable, the accused must be notified and given an opportunity to rebut.

2. Pursuant to Article 60, UCMJ, the accused has submitted the attached matters (Atchs 2, 3, 4 and 5) for your consideration prior to taking final action in this case. You must consider all written matters submitted by the defense and may consider any other matters submitted by the defense prior to taking action on the findings and sentence.

OR

2. Pursuant to Article 60, UCMJ, the accused may submit matters for your consideration prior to taking final action in this case. However, (the accused did not submit clemency matters.)(the accused has chosen to waive his right to submit clemency matters (Atch 2).)(the accused has chosen to waive his right to submit clemency matters and has also waived the remaining portion of his time to submit clemency matters (Atch 2).)

3. A proposed Action of the Convening Authority (Atch 1) approving the findings and sentence of the court has been prepared for your signature. Should you desire to take some other action in this case, we will prepare the appropriate document at your direction. If you concur, please sign the Action of the Convening Authority.

(NAME), (Grade), USAF
Staff Judge Advocate

8 Attachments:
1. (Proposed Action of the Convening Authority)(DD Form 2329 with Proposed Action)
2. Defense Counsel Ltr, dtd ___
3. Accused's Ltr, dtd ___
4. Mr. ____ Ltr, dtd __
5. AFGCM Citation, dtd ___
6. Report of Result of Trial memorandum
7. Personal Data Sheet
8. Record of Trial (2 volumes)

OR

5 Attachments:
1. (Proposed Action of the Convening Authority
2. Waiver of Clemency Matters, dtd ___ (if used)
3. Report of Result of Trial memorandum
4. Personal Data Sheet
5. Record of Trial (2 volumes)

1st Ind, (Convening Authority)

(Date)

MEMORANDUM FOR (JA Office)

I considered the attachments before taking action on this case.

(NAME), (Grade), USAF
Commander

Figure 9.7. Staff Judge Advocate's Recommendation.

MEMORANDUM FOR (Convening Authority)

FROM: (JA Office)

SUBJECT: Staff Judge Advocate's Recommendation – *United States v. (Grade and Name of Accused)*

1. On (date of referral), you referred the case of (rank and name of accused), (unit of assignment), (base), to trial by (general) (special) court-martial. On (date of trial), court convened. Attached is the Report of Result of Trial memorandum, which summarizes the charges and specifications, pleas, findings, and sentence. Also attached is a personal data sheet on the accused for your consideration prior to taking action on the sentence. Pursuant to RCM 1106, I make the following recommendations.

2. The primary evidence against the accused consisted of (a plea of guilty) (a stipulation of fact), (a confession), (testimony by the victim), and ( ). There is no corrective action required in regard to the findings of guilty. I am satisfied that the evidence upon which the conviction is based is legally sufficient.

3. The character of the accused's service prior to charges was (outstanding), (satisfactory), (marginal), (unsatisfactory), and ( ). [Include any recommendation for clemency by the sentencing authority, made in conjunction with the announced sentence under RCM 1106(d)(3)(B). Also address any military judge awarded additional credit for illegal pretrial confinement.]

4. [Note: If the defense raised legal errors in matters submitted under RCM 1105, address them pursuant to RCM 1106(d)(4). Also, address requests for deferral of punishment and waiver of required forfeitures, and if applicable, include that upon application, the accused's dependants may also qualify for transitional compensation that may be approved in addition to any waived forfeitures. See paragraphs 9.14.5 through 9.14.5.1.]

5. The accused was sentenced to ( ). The maximum imposable sentence for the offense(s) for which the accused was convicted is ( ). There was a pretrial agreement in this case providing that the accused would (plead guilty to all charges and specifications) (_____). In exchange, (confinement would be limited to ____ (years)(months))(the case would be referred to a special court-martial)(_____). The agreement contained no other restrictions on other available forms of punishment. No further action is required on your part regarding the pretrial agreement.

6. I have considered all matters in the record of trial, including all matters presented in the pre-sentencing portion of the trial. The sentence adjudged (is) (is not) appropriate for the offense(s) for which the accused was convicted. [If the sentence is not appropriate explain why it is not appropriate.] (I recommend you approve the sentence as adjudged.) [In accordance with the pretrial agreement, I recommend you only approve so much of the sentence as calls for ( ).]

(NAME), (Grade), USAF
Staff Judge Advocate

2 Attachments:
1. Report of Result of Trial memorandum
2. Personal Data Sheet

Figure 9.8. Addendum to Staff Judge Advocate's Recommendation when Matters are Submitted.

(Date)

MEMORANDUM FOR (Convening Authority)

FROM: (JA Office)

SUBJECT: Addendum to Staff Judge Advocate's Recommendation: *United States v. (Grade and Name of Accused)*

1. Pursuant to Article 60, UCMJ, [the accused] has submitted the attached matters (Atchs 2, 3, 4 and 5) for your consideration prior to taking final action in this case. Rule for Courts-Martial 1107(b)(3)(A)(iii) provides that you must consider these matters before taking final action in this case. You shall also consider the result of trial and the recommendation of the Staff Judge Advocate. In addition, you may consider the record of trial, personnel records of the accused, and such other matters as you deem appropriate. However, if you consider matters adverse to the accused from outside the record, with knowledge of which the accused is not chargeable, the accused must be notified and given an opportunity to respond.

2. The defense alleges legal error in that [_____]. I considered carefully these allegations of error, and find them to be without merit.

3. I also reviewed the attached clemency matters submitted by the defense. [My earlier recommendation remains unchanged.] [I recommend that you approve the findings and sentence as adjudged.][I recommend _____.]

4. A proposed Action of the Convening Authority (Atch 1) [approving the findings and sentence of the court has been prepared for your signature][has been prepared based on my recommendation]. Should you desire to take some other action in this case, we will prepare the

appropriate document at your direction. If you concur, please sign the Action of the Convening Authority.

(NAME), (Grade), USAF
Staff Judge Advocate

6 Attachments:
1. Proposed Action of the Convening Authority
2. Defense Counsel Ltr, dtd ___
3. Accused's Ltr, dtd ___
4. Mr. ____ Ltr, dtd ___
5. AFGCM Citation, dtd ___
6. SJAR (w/__ Atchs), dtd ___

1st Ind., (Convening Authority) (Date)

MEMORANDUM FOR: (JA Office)

I have considered the attached matters before taking action on this case.

(NAME), (Grade), USAF
Commander

Figure 9.9. Addendum to Staff Judge Advocate's Recommendation when Matters are not Submitted.

(Date)

MEMORANDUM FOR (Convening Authority)

FROM: (JA Office)

SUBJECT: Addendum to Staff Judge Advocate's Recommendation: *United States. v. (Grade and Name of Accused)*

1. Pursuant to Article 60, UCMJ, the accused may submit matters for your consideration prior to taking final action in this case. However, [the accused did not submit clemency matters.][the accused has chosen to waive his right to submit clemency matters (Atch 2).][the accused has chosen to waive his right to submit clemency matters and has also waived the remaining portion of his time to submit clemency matters (Atch 2).]

2. My earlier recommendation remains unchanged. I recommend that you approve the findings and sentence as adjudged.

3. A proposed Action of the Convening Authority (Atch 1) approving the findings and sentence of the court has been prepared for your signature. Should you desire to take some other action in this case, we will prepare the appropriate document at your direction. If you concur, please sign the Action of the Convening Authority.

(NAME), (Grade) USAF
Staff Judge Advocate

3 Attachments:
1. Proposed Action of the Convening Authority
2. Waiver of Clemency Matters, dtd ___ (if used)
3. SJAR (w/__ Atchs), dtd ___

1st Ind, (Convening Authority) (Date)

MEMORANDUM FOR: (JA Office)

I have considered the attachments before taking action on this case.

(NAME), (Grade), USAF
Commander

Figure 9.10. Sample Convening Authority Actions.

Punitive Discharge Approved

ACTION OF THE CONVENING AUTHORITY:

DEPARTMENT OF THE AIR FORCE, HEADQUARTERS, EIGHTY FIRST TRAINING WING (AETC), KEESLER AIR FORCE BASE, MISSISSIPPI 39534-2553

In the case of AIRMAN FIRST CLASS JOHN R. SMITH, XXX-XX-XXX, United States Air Force, 81st Communications Squadron, the sentence is approved and, except for the bad conduct discharge, will be executed. The Air Force Corrections System is designated for the purpose of confinement and the confinement will be served therein or elsewhere as directed by Headquarters, Air Force Security Forces Center, Corrections Division. Unless competent

authority otherwise directs, upon completion of the sentence to confinement, AIRMAN BASIC SMITH will be required, under Article 76a, UCMJ, to take leave pending completion of appellate review.

(NAME), (Grade), USAF
Commander

Adjudged Sentence in Part

ACTION OF THE CONVENING AUTHORITY:

DEPARTMENT OF THE AIR FORCE, HEADQUARTERS, EIGHTY FIRST TRAINING WING (AETC), KEESLER AIR FORCE BASE, MISSISSIPPI 39534-2553

In the case of AIRMAN FIRST CLASS JOHN R. SMITH, XXX-XX-XXX, United States Air Force, 81st Communications Squadron, only so much of the sentence as provides for 2 months confinement, forfeiture of $775.00 pay per month for 2 months, reduction to the grade of E-1 and a bad conduct discharge is approved and, except for the bad conduct discharge, will be executed. The term of confinement having been served, no place of confinement is designated. Unless competent authority otherwise, directs, AIRMAN BASIC SMITH will be required under Article 76a UCMJ, to take leave pending completion of appellate review.

(NAME), (Grade), USAF
Commander

New Action Required

ACTION OF THE CONVENING AUTHORITY:

DEPARTMENT OF THE AIR FORCE, HEADQUARTERS, SECOND AIR FORCE (AETC) KEESLER AIR FORCE BASE, MISSISSIPPI 39534-2804

In the case of AIRMAN FIRST CLASS JOHN R. SMITH, XXX-XX-XXXX, the record of trial having been returned by (The Judge Advocate General)(the Air Force Court of Criminal Appeals) with directions that a new action be accomplished, the action taken (by me)(by my predecessor) on 16 February 2011, is withdrawn, and Special Court Martial Order Number 8, Headquarters Eighty First Training Wing (AETC), dated 16 February 2011, is rescinded and the following is substituted for the original action: In the case of AIRMAN FIRST CLASS JOHN R. SMITH, XXX-XX-XXXX, United States Air Force, 81st Communications Squadron, the entire sentence is approved and, except for the bad conduct discharge, will be executed. The term of confinement having been served, no place of confinement is designated. Unless

competent authority otherwise directs, AIRMAN BASIC SMITH will be required, under Article 76a, UCMJ, to take leave pending completion of appellate review.

(NAME), (Grade), USAF
Commander

Figure 9.11. Sample Convening Authority Action Language.

Approving Adjudged Sentence in its Entirety:
In the case of (GRADE) (NAME) (SSN), United States Air Force, (UNIT), the sentence is approved [and will be executed][and, except for the (type of punitive discharge), will be executed].

Approving Adjudged Sentence in Part:
In the case of (GRADE) (NAME) (SSN), United States Air Force, (UNIT), only so much of the sentence as provides for _____ (identify each punishment that is approved by type and amount, to include any punitive discharge if applicable) is approved [and will be executed][and, except for the (type of punitive discharge), will be executed].

Sentences Including Death or Punitive Discharge:
If an adjudged sentence includes death, dismissal, or discharge, the convening authority may not order these punishments executed in the initial action. See RCM 1113(c). Use the following format in the action: "In the case of (GRADE) (NAME) (SSN), United States Air Force, (UNIT), the sentence is approved and, except for the (part of the sentence extending to death)(dismissal)(dishonorable discharge)(bad conduct discharge), will be executed."

Review Required under Article 69(a)
Include the following in the convening authority's initial action in general court-martial cases requiring review under Article 69(a), UCMJ: "In the case of (GRADE) (NAME) (SSN), United States Air Force, (UNIT), the sentence is approved and will be executed. The record of trial is forwarded to The Judge Advocate General for examination under Article 69(a), UCMJ, unless appellate review is waived or withdrawn under Article 61, UCMJ."

Sentences Including Confinement

Designating Place of Confinement:
If an accused's punishment includes confinement, service of which has not been completed at time of action, use the following language in the convening authority's action to designate place of confinement: "The Air Force Corrections System is designated for the purpose of confinement, and the confinement will be served therein or elsewhere as directed by Headquarters Air Force Security Forces Center, Corrections Division."

If no military facilities are reasonably available, the installation commander may authorize the use of civilian facilities to incarcerate inmates IAW AFI 31-205. Use the following language in

the convening authority's action to designate place of confinement: "The Air Force Corrections System is designated for the purpose of confinement, and the confinement will be served therein or elsewhere directed by Headquarters Air Force Security Forces Center, Corrections Division. If no military facility is reasonably available, confinement will be served in a civilian facility as directed by the installation commander."

Confinement Completely Served Prior to Action:
In the case of (GRADE) (NAME) (SSN), United States Air Force, (UNIT), the sentence is approved and (, except for the (type of punitive discharge),) will be executed. The term of confinement having been served, no place of confinement is designated.

Deferred Confinement. RCM 1101(c):
In the case of (GRADE) (NAME) (SSN), United States Air Force, (UNIT), the sentence is approved and will be executed. The service of the sentence to confinement was deferred on _____ until _____.

Credit for Illegal Pretrial Confinement. RCM 1107(f)(4)(F).
In the case of (GRADE) (NAME) (SSN), United States Air Force, (UNIT), (the sentence is approved)(and will be executed)(only so much of the sentence as provides for _____ (identify the punishment that is approved by type and amount) is approved [and will be executed][and, except for the (type of punitive discharge), will be executed]). The accused will be credited with _____ days for illegal pretrial confinement against the sentence to confinement.

Suspended Confinement:
In the case of (GRADE) (NAME) (SSN), United States Air Force, (UNIT), the sentence is approved and will be executed, but the execution of that part of the sentence extending to [confinement] [confinement in excess of _____] is suspended for ____(months) (years), at which time, unless the suspension is sooner vacated, the suspended part of the sentence will be remitted without further action. [The period of confinement having been suspended, no place of confinement is designated][The Air Force Corrections System is designated for the purpose of confinement, and the confinement will be served therein or elsewhere as directed by HQ Air Force Security Forces Center, Corrections Division.]
Also, see paragraph 9.24.4 for additional requirements when punishment is suspended.

Directing Entry into Return to Duty Program
The Air Force Corrections System is designated for the purpose of rehabilitation in the Air Force Return to Duty Program, and the confinement will be served therein or elsewhere as directed by Headquarters Air Force Security Forces Center, Corrections Division.

Directing Excess Leave

(CONFINEMENT) Include the following in the convening authority's action to place an accused with an approved, unsuspended and unexecuted dismissal, dishonorable discharge or bad conduct discharge on excess leave upon completion of the term of confinement: "Unless competent authority otherwise directs, upon completion of the sentence to confinement, (NAME and REDUCED GRADE, as approved, of ACCUSED) will be required, under Article 76a,

UCMJ, to take leave pending completion of appellate review." See **Section 9J** for additional guidance on excess leave pending appellate review.

(CONFINEMENT COMPLETED) Include the following in the convening authority's action to place an accused with an approved, unsuspended and unexecuted dismissal, dishonorable discharge or bad conduct discharge on excess leave when confinement has been served: "Unless competent authority otherwise directs, (NAME and REDUCED GRADE, as approved, of ACCUSED) will be required, under Article 76a, UCMJ, to take leave pending completion of appellate review." See **Section 9J** for additional guidance on excess leave pending appellate review.

Figure 9.12. Sample Convening Authority Action Language Involving Forfeitures.

Disapproval of All Adjudged Forfeitures:
In the case of (GRADE) (NAME) (SSN), United States Air Force, (UNIT), only so much of the sentence as provides for a bad conduct discharge, confinement for ___ ([month(s)] [year(s)]), and reduction to the grade of ____ is approved and, except for the bad conduct discharge, will be executed. [*Note: No reference to any adjudged forfeitures.*]

Disapproval of a Portion of Adjudged Forfeitures:
In the case of (GRADE) (NAME) (SSN), United States Air Force, (UNIT), only so much of the sentence as provides for a bad conduct discharge, confinement for ___ ([month(s)] [year(s)]), forfeiture of $___ pay per month for ___ ([month(s)] [year(s)]), and reduction to the grade of ____ is approved and, except for the bad conduct discharge, will be executed. [*Note: The approved forfeitures are less than the adjudged forfeitures in amount, length, or both.*]

Mitigation of All Adjudged Forfeitures:
In the case of (GRADE) (NAME) (SSN), United States Air Force, (UNIT), so much of the sentence extending to forfeiture of (total pay and allowances) ([two-thirds] [$___] pay per month for ___ [month(s)] [year(s)]) is changed to a reprimand. The sentence as changed to a bad conduct discharge, confinement for ___ ([month(s)] [year(s)]), reduction to the grade of ____, and a reprimand is approved and, except for the bad conduct discharge, will be executed. [*Note: The adjudged sentence did not include a reprimand. Also, the language of the reprimand must be included in the convening authority's action.*]

Suspension of Entire Period of Adjudged Forfeitures:
In the case of (GRADE) (NAME) (SSN), United States Air Force, (UNIT), the sentence is approved and, except for the bad conduct discharge will be executed, but the execution of that part of the sentence extending to forfeiture of (total pay and allowances) ([two-thirds] [$____] pay per month for ____ [month(s)] [year(s)]) is suspended for ___ ([month(s)] [year(s)]), at which time, unless the suspension is sooner vacated, the suspended part of the sentence will be remitted without further action.

Suspension of Six Months of Adjudged Forfeitures for Six Months:
In the case of (GRADE) (NAME) (SSN), United States Air Force, (UNIT), the sentence is approved and, except for the bad conduct discharge will be executed, but the execution of the first six months of that part of the sentence extending to forfeiture of (total pay and allowances) ([two-thirds] [$___] pay per month for ___ [month(s)] [year(s)]) is suspended for six months, at which time, unless the suspension is sooner vacated, the suspended part of the sentence will be remitted without further action. The collection of the remaining ___ ([month(s)] [year(s)]) of forfeiture of (total pay and allowances) ([two-thirds] [$___] pay per month for ___ [month(s)] [year(s)]) will begin at the end of the period of suspension, or sooner if the suspension is vacated. [*Note: This language is based on the scenario contemplated in Emminizer (56 MJ 441). To our knowledge, it has not been tested at the appellate level.*]

Deferral of Adjudged and Mandatory Forfeitures:
Pursuant to Articles 57, Section (a)(2), and 58b, Section (a)(1), Uniform Code of Military Justice, (all) ($____pay per month) of the adjudged forfeitures and (all) ($____pay per month) of the mandatory forfeitures were deferred ([14 days from the date sentence was adjudged] [from _____- *insert other date prior to action*]) until ([the date of this action] [_____ - *specify an earlier date*]).

Deferral of Adjudged Forfeitures Only:
Pursuant to Article 57, Section (a)(2), Uniform Code of Military Justice, (all) ($____pay per month) of the adjudged forfeitures were deferred ([14 days from the date sentence was adjudged] [from _____- *insert other date prior to action*]) until ([the date of this action] [_____ - *specify an earlier date*]).

Deferral of Mandatory Forfeitures Only:
Pursuant to Articles 57, Section (a)(2), and 58b, Section (a)(1), Uniform Code of Military Justice, (all) ($____pay per month) of the mandatory forfeitures were deferred ([14 days from the date sentence was adjudged] [from _____- insert other date prior to action]) until ([the date of this action] [_____ - specify an earlier date]).

Waived Forfeitures to Begin at Action or on an Earlier Date:
Pursuant to Article 58b, Section (b), Uniform Code of Military Justice, (all) ($____pay per month) of the mandatory forfeitures are waived for a period of ___ months [*Note: no more than 6 months*] or release from confinement (*if applicable:* or expiration of term of service), whichever is sooner, with the waiver commencing on ([the date of this action] [_____ - *specify an earlier date if the waiver is retroactive*]). The (total pay and allowances) ([two-thirds] [$___] pay per month) is directed to be paid to ([_____, spouse of the accused, for the benefit of ([herself] [himself]) and the accused's ___ dependent children] [_____, legal guardian of _____, for the benefit of the accused's dependent, _____]).

Waived Forfeitures Granted on an Earlier Date and Memorialized in the Action:
Pursuant to Article 58b, Section (b), Uniform Code of Military Justice, (all) ($____pay per month) of the mandatory forfeitures were waived for a period of ___ months [*Note: no more than 6 months*] or release from confinement (*if applicable:* or expiration of term of service), whichever is sooner, ([from 14 days after sentence was adjudged] [from _____- *insert other date*

prior to action]). The (total pay and allowances) ([two-thirds] [$____] pay per month) was directed to be paid to ([_____, spouse of the accused, for the benefit of ([herself] [himself]) and the accused's ___ dependent children] [_____, legal guardian of _____, for the benefit of the accused's dependent, _____]).

NOTE: Be sure to include language designating confinement and language directing excess leave.

Figure 9.13. Sample Notification of Adjudged Sentence or Convening Authority Action.

MEMORANDUM FOR HQ AFPC/DPSOE (enlisted only)
HQ AFSFC/SFC
DFAS-IN/FLTBA
(Local Servicing Finance Office)

FROM: (JA Office)

SUBJECT: (Adjudged Sentence)(Convening Authority Action) (SPCM or GCM) – *United States v. (Accused's Rank and Name)*

1. Request you update personnel and pay data as the result of sentence on:

a. (Rank)
b. (First Name)(Middle Initial)(Last Name)
c. (SSN)
d. (Unit)

2. On (Date of Sentence)(Action), the following sentence was (adjudged)(approved):

a. DISCHARGE: (Dismissal)(DD)(BCD)(N/A)
b. CONFINEMENT: _____ (years)(months)(N/A)
c. FORFEITURE: (Total)($_____pay per month for _____ months)(N/A)
d. FINE: ($_____)(N/A)
e. REDUCTION TO: (Grade)(N/A)
f. DATE ADJUDGED: (Date)

Use the following paragraph with the 14 day message:

3. [(Adjudged forfeitures)(Reduction in grade)(Automatic forfeitures of (2/3)(total) pay and allowances)(took effect)(will take effect) on (date) (were deferred until action).] (and/or) [Automatic forfeitures in the amount of (2/3)(total)($_____ per month) pay and allowances were waived from (date) until (date).]

Use the following paragraphs in the message after action is taken:

3. Entire sentence was ordered executed (except discharge/dismissal)(except discharge and the following portions, which were suspended: _____)(except _____). Automatic forfeitures of

(2/3)(total)($_____ per month) pay and allowances (took effect on (date)) (were deferred)(were waived) (from (date) until (date)).

4. Action will be promulgated by (SPCMO)(GCMO) No. _____, HQ (Convening Authority) dated _____.

(NAME), (Grade), USAF
(Duty Title)

Figure 9.14. Sample Contingent Confinement Execution Order.

DEPARTMENT OF THE AIR FORCE
HEADQUARTERS (Numbered) AIR FORCE (MAJCOM)
(location and zip code)

General Court-Martial Order XX December XXXX
No. X

In the general court-martial case of (RANK) (NAME), (Social Security Number), United States Air Force, (organization and station), that portion of the sentence promulgated in General Court-Martial Order No. X, this headquarters, dated (date), providing for an additional (period of time) confinement in lieu of the (dollar amount) fine will be executed. The sentence was adjudged on (date sentence adjudged)

(NAME)
(Rank), USAF
Commander

DISTRIBUTION:

Figure 9.15. Format for Notification of Required Excess Leave and Indorsements

MEMORANDUM FOR (Grade, Name, SSN, Losing Unit of Accused)

FROM: (Convening Authority or SJA if excess lease is directed in action)

SUBJECT: Required Excess Leave / Appellate Review Leave

1. On (date of sentence), you were sentenced by (general/special) court-martial. Your sentence, as approved by the court-martial convening authority, included (final action: type of discharge, confinement sentence, grade reduction). You are hereby required, under Article 76a, Uniform Code of Military Justice (UCMJ), to take leave pending completion of appellate review of your conviction by court-martial. The effective date of your appellate review leave will be determined administratively and you will receive an AF Form 899 PCS Orders and AF Form 988 Leave

Request Form through your FSS approved by HQ AFSFC indicating your departure date and your appellate review leave start date . ***(*unless directed by convening authority, this item can be removed or updated)***

2. If you have accrued ordinary leave you can elect to:

a. Receive pay and allowances during the period of accrued leave, then continue on unpaid required excess leave; or

b. Receive a lump sum payment for the accrued leave, as of the day before the required excess leave begins, and serve the entire period of required leave on unpaid excess leave. If you elect this option, you are only entitled to base pay. This entitlement does not extend to allowances or special pay.

3. If you have no accrued leave, the entire period of appellate review leave will be unpaid excess leave.

4. While on required appellate review leave, you remain a member of the United States Air Force, on active duty and subject to UCMJ, to lawful orders and regulations and to recall from required appellate review leave as provided in paragraph 5. While on appellate leave you and your dependents will be entitled to medical care, use of military exchange facilities, commissaries, and other military welfare benefits. These entitlements may be curtailed or terminated for cause; therefore, you and your dependents must follow all applicable rules and maintain proper conduct. In order to make use of these benefits, you and your dependents will be issued appropriate identification cards of limited duration.

5. You are required to provide a correct leave address and report any changes to your address to (Base Military Justice Section) and **HQ AFSFC/SFC 1517 Billy Mitchell Blvd Bldg 954 JB SA Lackland, TX 78236**. Failure to provide a correct address may result in loss of valuable opportunities to recoup any pay and allowances, which you may be entitled to if your sentence is disapproved or set aside. It may also prevent you from receiving important instructions regarding your case while undergoing appellate review. You are also subject to recall from appellate leave. Failure to return promptly to your unit (if directed by order delivered or mailed to your leave address) could result in placement in absent without leave or desertion status and could result in disciplinary action.

6. You will be informed of any significant action or decisions with regard to the appellate review of your conviction. This information and instructions will be sent to you at your leave address. If you have any questions concerning your status or your court-martial, contact the Appellate Defense Division, AFLOA/JAJA, 1500 West Perimeter Road, Suite 1100, Joint Base Andrews Naval Air Facility Washington, MD, 20762 (Phone: (240) 612-4770 or toll free 1-800-414-8847).You may also contact your defense counsel, or any defense counsel or staff judge advocate office at any Air Force Base.

7. You are required to complete the 1st Indorsement to this memorandum. This includes providing an appellate leave address, making your elections regarding accrued leave and acknowledging that you cannot depart on excess leave without out processing through FSS Separations office and without orders from HQ AFSFC/SFC.

8. (Base FSS, SEPARATIONS POC information) will brief you regarding your status, obligations and entitlements while on excess leave and complete all personnel actions in regards to out processing; they will also allow you to ask any questions you may have in this regard.

(Name, Rank, USAF)
(Commander)(Staff Judge Advocate)

1st Ind, (Grade , Name, SSN, Losing Unit of Accused)

MEMORANDUM FOR (Losing Commander)

1. On _____, I received a copy of this document regarding required excess leave. In accordance with paragraph 7 of this memorandum, I provide the following appellate review leave address and contact information:

(Street Address) _____

(City, State) _____

(Zip code) _____

(Phone number) _____

(E-mail address) _____

In regards to my accrued leave, I elect as follows:

_____Receive pay and allowances during the period of accrued leave then continue on unpaid required excess leave.

_____ Receive a lump sum payment for the accrued leave, as of the day before the required excess leave begins, and serve the entire period of required leave on unpaid excess leave. I will only be entitled to base pay. This entitlement does not extend to allowances or special pay.

_____I do not have accrued leave, the entire period of appellate leave will be unpaid excess leave.

I acknowledge that I cannot depart on excess leave without out processing through (FSS).

(Name, Rank, USAF)

Accused

2nd Ind (Losing Commander)

MEMORANDUM FOR (Grade, Name, SSN, Losing Unit of Accused)

1. The (general/special) court-martial convening authority, through (his/her) staff judge advocate, has directed that you be placed on required excess leave pending completion of appellate review of your recent court-martial conviction. During the period of excess leave, you will be administratively assigned to **HQ AFSFC/SFC 1517 Billy Mitchell Blvd Bldg 954 JBSA Lackland, TX 78236.** Upon completion of out-processing, you shall immediately proceed to the leave address you provided where your accrued leave, if elected, and your required excess leave will commence.

2. You are required to complete all base out processing and personnel actions through the local FSS; upon approval of appellate leave package by HQ AFSFC/SFCI you will receive an AF Form 899 Request and Authorization for Permanent Change of Station and AF Form 988 Leave Request Authorization indicating your departure date and your appellate review leave start date.

3. You are required to complete the 3rd Indorsement below, which includes providing both your current leave address and telephone number. You are also required to promptly report any change in that address by first class mail. You must make arrangements for receiving all mail that is addressed to the leave address you provide. Send any change of address to **HQ AFSFC/SFC 1517 Billy Mitchell Blvd Bldg 954 JBSA Lackland, TX 78236.**

4. (Insert name and designation of briefer) briefed you on (Insert date of briefing) regarding your status, obligations, and entitlements while on required leave and on the appeal of your case, and permitted you to ask any questions you had in this regard.

(Name, Rank, USAF)

(Commander)(Title of Representative)

3rd Ind (Grade , Name, SSN, Losing Unit of Accused)

MEMORANDUM FOR (Losing Commander)

On this ___ day of_____20___, I received a copy of the convening authority's letter placing me on excess leave. I have been briefed as noted in paragraph 3 of my current commander's indorsement. I understand that I must provide information as to any change of address without delay and am responsible for receiving mail addressed to me at the address last provided by me. My initial leave address and telephone number, for use until I provide a change as required by

paragraph 2 of the 2nd Indorsement, is as follows:

(Street Address) _____

(City, State) _____

(Zip code) _____

(Phone number) _____

(E-mail address) _____

I also understand that my appellate defense counsel also requests that I provide a long term alternative address and phone number of a relative or other person to contact if I cannot be reached at the above address. That address, the provision of which is optional, is:

(Street Address) _____

(City, State) _____

(Zip code) _____

(Phone number) _____

(E-mail address) _____

Finally, I understand it is critical that I keep my appellate defense counsel informed of my current address.

(Name, Rank, USAF)

Accused

cc:

Losing Unit/ CC
Losing FSS/CC
HQ AFSFC/SFC
Losing Unit / JA
AFLOA/JAJM
AFLOA/JAJA

Figure 9.16. Format for Report of Result of Trial Memorandum (Automated by AMJAMS).

REPORT OF RESULT OF TRIAL
IN THE CASE OF
United States v. ***TSGT JOHN J. SMITH***

Date: 16 May 2012

Name of Accused: John J. Smith Grade: TSgt SSN: 123-45-6789

Organization: 436th Maintenance Squadron, Dover AFB, DE (AMC)

Type of Court: SPCM Forum: Members Enlisted Members Included: No

Summary of charges, specifications, pleas, and findings:

Charges:	Arraigned Offense(s)	Pleas	Findings
Charge I:		NG	NG
Art: 112a Specification 1:	Did, on or about 05 March 2012, wrongfully use phencyclidine, a Schedule II controlled substance.	NG	NG
Specification 2:	Did, on divers occasions between on or about 3 February 2012 and on or about 30 April 2012, wrongfully use cocaine, a Schedule II controlled substance.	G	G
Charge: II		NG	G
Art: 86 Specification :	Did, on or about 6 March 2012, fail to go to your appointed place of duty, to wit: Bldg 45	NG	G

Sentence Adjudged: BCD, 3 months confinement, Red to E-1
Date Sentence Adjudged: 16 May 2012
Pretrial Confinement Credit: N/A
PTA Involved: No Conditions of PTA: N/A
DNA Processing Required Under 10 USC § 1565: Yes
Crime of Domestic Violence: No
Sex Offender Registration Required: No

Name, Grade, and Title of Person Signing Report
Mary B. Imthebest, Major, USAF
Trial Counsel

Distribution:
1 – Unit Commander
1 – MAJCOM
1 - NAF
1 – FSS

Chapter 10

COURT-MARTIAL ORDERS

10.1. General. A Court-Martial Order (CMO) is used to promulgate the result of trial and action by the convening authority (initial action), and any subsequent action the convening authority or higher authorities take on a case after the initial action (supplementary orders), including the final order. Use the guidance in RCM 1114, Appendix 17, and Figures 10.1 through 10.9 to prepare and issue CMOs. See AFMAN 51-203, paragraph 10.5, for guidance on convening authority action in SCMs.

10.2. Separate Orders. Use a separate CMO to announce the results for each accused tried, whether or not they were tried jointly.

10.3. Authority to Publish Orders. This chapter is the sole authority for the publication of CMOs. The appropriate convening authority publishes CMOs, or AFLOA/JAJM may direct publication. Additionally, AFLOA/JAJ publishes final CMOs executing sentences in cases acted on by TJAG, and AFLOA/JAJR publishes final CMOs in cases acted on by SecAF and the President. In the event a convening authority's command is deactivated, responsibility for publication of orders falls to:

10.3.1. The next higher level of command exercising GCMCA;

10.3.2. A re-designated unit, when the initial order was published under its old designation; or

10.3.3. A unit assuming the records, personnel, functions, etc., of an inactivated or transferred unit that published the initial order.

10.4. Authentication (Signature). The authority issuing the CMO signs it personally, or delegates such authority. Paragraph 13.1.1. Do not designate a representative below the grade of master sergeant. Include the signature block of the issuing authority and, if applicable, the signature block of the person authenticating pursuant to a delegation. Only the person actually authenticating the CMO signs it. The convening authority personally must sign a supplemental order that comprises an action subsequent to the initial action. RCM 1114(b)(2).

10.5. Orders Promulgation. See Figures 10.1 through 10.9 for examples.

10.5.1. Promulgate CMOs as follows:

10.5.1.1. For GCMs, use a General Court-Martial Order. For SPCMs, use a Special Court-Martial Order. For SCMs, use a Summary Court-Martial Order. Prepare a summary court-martial order in SCMs resulting in acquittal of all charges and summary cases to promulgate a subsequent action of the convening authority.

10.5.1.2. Number consecutively, starting with number one for each fiscal year.

10.5.1.3. Above the heading of the first order of a fiscal year, cite the number of the last order published in the previous fiscal year. If no orders were published the preceding year, state there were no orders published in the previous fiscal year.

10.5.1.4. Continue CMOs of commands redesignated during a fiscal year in the same series of numbers. Cite the authority for the redesignation above the heading of the first page in the first order published after redesignation.

10.5.1.5. For SCMs, CMOs are required for acquittals when the CA takes action after the initial action.

10.5.2. Orders Logs.

10.5.2.1. Have a separate CMO log for each type of court-martial and each convening authority. For example, a single-base GCMCA will have one log for SPCMs and one log for GCMs. Also, each SPCMCA at a base will each have his/her own log for SPCMs. A CMO log is in addition to the convening orders log.

10.5.2.2. The log should reflect the CMO number assigned to a particular case. Hard copies, as opposed to electronic copies, of the original CMOs are stored with the CMO log.

10.6. Format. Use the following format. See also Figures 10.1 through 10.9:

10.6.1. Single-sided on letter size paper.

10.6.2. Margins. Leave a two-inch margin at the top and bottom of all pages, and a one-inch margin on the left and right side of all pages. On the first page of an order include the order number one-half inch from the bottom of the page at the left margin. Number the second and succeeding pages one-half inch from the bottom of the page at the left margin. On the first line of the second and succeeding pages, state the order number, headquarters and date of the CMO; e.g., SPCMO No. 3, HQ 71 FTW, Vance AFB, OK, 6 May 2011.

10.6.3. Heading. Include "DEPARTMENT OF THE AIR FORCE," the complete unit designation, the name of the MAJCOM abbreviated in parentheses, the mailing address, and the order number and date. See Figures 10.1 through 10.9.

10.6.4. Body. Do not number paragraphs in the body. Center the headings titled "SENTENCE" and "ACTION" and use subparagraphs under each.

10.6.5. Announcement of the Proceedings. State the accused's grade at the time of arraignment, name, social security number, branch of service, and unit. State the location of the arraignment.

10.6.6. Grade, Name. Always reflect the grade and name of an accused in capital letters. The first time the name is used, state the grade or title, first name, middle initial, last name. If the name is used again, use only the grade or title and last name. When referencing the accused after stating a reduction in grade was approved, use the accused's reduced grade (e.g., when directing excess leave in the convening authority's action).

10.6.7. Abbreviations. Abbreviations from a standard dictionary, or AFH 33-337, *The Tongue and Quill*, may be used if they make the order clearer.

10.6.8. Close. In the close, use the appropriate authority line depending on who authenticates the order, followed by the signature block of the person authenticating. For Department of the Air Force, use "BY ORDER OF THE SECRETARY OF THE AIR FORCE." For the Air Force Academy, use "FOR THE SUPERINTENDENT." For TJAG use "FOR THE JUDGE ADVOCATE GENERAL." For all other units, use "FOR THE

COMMANDER." No authority line is required when the convening authority personally signs the CMO. Paralegals in grade E-7 thru E-9 must include duty titles.

10.7. Matters Unfit for Publication and Classified Matters.

10.7.1. Unexpurgated and Expurgated CMOs. When the content of a CMO includes classified or other matters unfit for publication, prepare two versions of the CMO. The version with the content included is called the unexpurgated order. The version with the content replaced is called the expurgated order. Both the unexpurgated and the expurgated orders are the same order, and both carry the same order number and full distribution list. To avoid confusion between the recipients, on both versions mark the addressees of those who are to receive the unexpurgated copies with asterisks next to the number of copies and add, below the distribution list, "Recipients of unexpurgated CMO." Make the following substitutions in the expurgated order:

10.7.1.1. Names of children 16 years and under are always replaced with initials in both expurgated and unexpurgated CMOs (NOTE: Therefore, unless there is an independent reason to create an expurgated CMO, create only an unexpurgated CMO using just initials instead of names and mark the appropriate agencies for distribution for the unexpurgated copies);

10.7.1.2. Names of adult sex offense victims are replaced with initials (regardless of verdict);

10.7.1.3. Obscene language and matters are replaced with asterisks; and

10.7.1.4. Classified information is replaced with asterisks (paragraph 10.7.2.2.)

10.7.2. Distribution.

10.7.2.1. Unexpurgated Orders. AFLOA/JAJM, AFPC/DPSFCM, the authorities of the command where the accused is held in custody or to which transferred, and the commander of the place where the accused is confined receive copies of the unexpurgated CMO.

10.7.2.2. Expurgated Orders. Include the classified information only in the order provided to the command where the accused is held in custody or assigned and one copy of the order accompanying the original ROT forwarded to AFLOA/JAJM.

10.8. Initial Promulgating Orders. Initial CMOs promulgate the results of trial and any initial action taken under Article 60, UCMJ. RCM 1114. It is important they accurately reflect the proceedings of the court-martial.

10.8.1. Preparing Orders. Prepare initial CMOs when the convening authority takes action on a case where the court returned any finding of guilty and a sentence.

10.8.1.1. Orders in Cases without a Guilty Finding. Issue a CMO in trials terminated after arraignment but before findings (i.e., all charges dismissed or withdrawn, including upon declaration of a mistrial), and trials resulting in a finding of not guilty of all charges, including not guilty by reason of lack of mental responsibility and acquittals. Include the date of the termination or not guilty finding. Explain the circumstances of the termination. The date of the CMO is the same date it is published. Do not issue a CMO in trials terminated without findings before arraignment.

10.8.1.2. Rehearing or New Trial. Indicate in an initial CMO whether a case is a rehearing or new trial as shown in Figure 10.5.

10.8.2. Form.

10.8.2.1. Date. The date of the CMO is the same date the convening authority took action. If the convening authority did not take action (e.g., in an acquittal), the date of the CMO is the date it is published.

10.8.2.2. Charges, Specifications, Pleas and Findings. List the charges and specifications on which the accused was arraigned. After each charge and specification, abbreviate the plea and finding. Use "G" for guilty and "NG" for not guilty. If no plea was entered, state "None entered." If an accused's plea changed during trial, explain the circumstances surrounding the change. If no finding was entered, state the reason. The disposition of each charge and specification should be clear, including those amended, merged, withdrawn and/or dismissed.

10.8.2.2.1. Summarized Specifications. RCM 1114(c) requires the promulgating order to contain at least a summary of the charges and specifications on which the accused was arraigned. Therefore, because the accused's personal information is contained in the introductory paragraph of the CMO, it need not be repeated in the specification subparagraph. However, the remainder of the specification on which the accused was arraigned should be verbatim. Consider summarizing lengthy bad check specifications. Ensure any summarized specification includes factors such as value, amount or other such circumstances affecting maximum punishment. See Figures 10.1 through 10.5, 10.9.

10.8.2.2.2. Lesser Included Offense (LIO); Exceptions and Substitutions. The charge should reflect any plea or findings of guilt to an LIO. When an accused pled or was found guilty by exceptions, the language in the specification being excepted should be verbatim. The plea or finding of the specification should accurately reflect the words being excepted and, if applicable, substituted. If found not guilty of the greater offense, but guilty of the LIO, then it should be NG of Art. X, but guilty of Art. Y. See Figures 10.1 and 10.2.

10.8.2.2.3. Amendments. Indicate, in parentheses and after the affected portion of the specification, an amendment to a charge or specification made after arraignment. Figure 10.2.

10.8.2.2.4. Renumbering of Charges. Use care in proofing CMOs involving charges and specifications withdrawn, dismissed or severed that result in renumbering of remaining charges and specifications. Charges and specifications withdrawn before arraignment do not appear in the CMO if the other charges were correctly renumbered. See paragraph 8.2.2; Figure 10.4.

10.8.2.3. Sentence. State the forum that adjudged the sentence, the date the sentence was adjudged, and the adjudged sentence. When the convening authority orders a reprimand executed, place the language of the reprimand after the action and before the distribution. Make sure the reprimand language is included in the CA action.

10.8.2.4. Action. Reflect the action taken by the convening authority under Article 60. On CMOs, the action may be summarized to the extent it does not repeat the accused's personal information (which should be in the introductory paragraph). The remainder of the convening authority's Action should be verbatim. When the convening authority mitigates an Action before publication or before the accused was notified of the action, the initial CMO reflects only the mitigated action. On CMOs, the wording of an action should follow the wording in the Action verbatim excluding the accused's personal information. If an error occurs, CMOs should not be corrected, but rescinded and accomplished again.

10.9. Supplementary Orders. Promulgate any action taken on a case subsequent to the initial action in a supplementary order. For example, use a supplementary order to suspend or remit a sentence (RCM 1108), vacate an earlier suspension (RCM 1109), terminate deferment (RCM 1101(c)(7)), and take final action.

10.9.1. Form. All supplementary orders contain the following:

10.9.1.1. A cite to the initial CMO and any later CMOs modifying the findings, sentence or action.

10.9.1.2. The date the sentence was adjudged and the trial forum.

10.9.1.3. The ACM number assigned to the case.

10.9.2. Convening Authority Signature. The convening authority personally signs all supplementary orders. See RCM 1114(b)(2).

10.9.3. Order Vacating Suspension. To provide necessary data to confinement officers for computation of time to be served in confinement, include in CMOs promulgating the vacation of a suspension of confinement the information in MCM, Appendix 17(d), and the following additional information: the trial forum, the date the sentence was adjudged, the period of any deferment, any modification of confinement, and identifying data of any orders affecting the sentence to confinement.

10.9.4. Article 64 Review. When the GCMCA is required to take action under RCM 1112(e) in a non-BCD SPCM, ensure the CMO states the review is "pursuant to the authority of RCM 1112(f)." Ensure the cover and all CMOs are typed or stamped "64a Review," signed and dated. See paragraph 11.4.

10.9.5. Final Orders. A final order is a supplementary order used after appellate review is complete to promulgate a convening authority's action and/or reflect modifications of findings and sentence. In addition, use a final order after withdrawal of appellate review and when the proceedings are abated upon the death of an accused during appellate review. A final order should reflect the post-trial and appellate history of the case, including actions taken by the convening authority, the appellate courts, SecAF and TJAG. Ensure that the GCMCA orders execute all dishonorable or bad conduct discharges, while SecAF orders execute all dismissals. RCM 1113(c)(1)(B) and (c)(2). In cases involving re-hearings, the final order reflects only modifications of the findings and sentence occurring after publication of the rehearing promulgating order.

10.9.6. International Hold Situations. When the accused is overseas and being retained in a foreign country because of pending foreign criminal proceedings, consult AFJI 51-706 before

issuing a CMO. This includes any order ordering the sentence executed; an initial order where Article 71, UCMJ, does not require further review before it may be ordered executed; or a supplemental order after completion of appellate action when the latter is required. See also AFI 51-703.

10.9.7. Supplementary Orders When the Accused May Be Adjudged Two Punitive Discharges. An accused cannot be discharged twice from the same enlistment. If an accused has an approved punitive discharge from one court-martial and is facing another court-martial which may adjudge a more severe punitive discharge, execute the sentence from the first court-martial, except the discharge. If the accused receives a dishonorable discharge in the second court-martial after receiving a bad conduct discharge in the first court-martial, execute the dishonorable discharge after final appellate review of the second court-martial. If the approved sentence of the second court-martial includes a bad conduct discharge or no punitive discharge, do not delay execution of the first punitive discharge solely to wait for appellate review of the second court-martial. If the accused is discharged using the second punitive discharge, a supplementary order for the first court-martial must address the first discharge (e.g., the bad conduct discharge will not be executed because the accused was previously discharged in GCMO No. 1, this headquarters, dated 1 June 2011).

10.10. Corrected Copies.

10.10.1. Do not amend CMOs. Issue a corrected copy to correct errors in the heading and close, the body of the order, the announcement of the proceedings, the action taken, and errors in typing or printing that make the order ambiguous. To correct a CMO, include the deleted matter with a line through it and leave it legible. If the correction is an addition, underscore the added matters. If the correction is a substitution, include both the deleted and the added matter, with the former lined out and the latter underscored. Identify it as a corrected copy in the heading by using "CORRECTED COPY – DESTROY ALL OTHERS." NOTE: In cases involving sex offense and/or child victims (see paragraph 10.7.1.1), if the corrected copy is expurgating an erroneously unexpurgated matter, do not include the previously unexpurgated text. The order number and date of the corrected copy remains the same as the original order. In the event additional corrections are required, the heading must reflect that the order is the second, third, etc., corrected copy. Incorporate changes from a previous corrected copy by deleting the language lined through and retaining the added language without the underscore. See Figure 10.4.

10.10.2. Do not issue a corrected copy in any case in which a convening authority or reviewing authority withdraws an action and substitutes a new one. Prepare a new CMO rescinding the initial order. See Figure 10.9.

10.11. Distribution and Number of Copies. List recipients of the CMO distribution and the number of copies beginning two spaces below the authentication signature element at the left margin. Include the complete mailing address. For the most current distribution list see Figure 10.10. (*NOTE*: DO NOT mail additional copies of the CMO to AFLOA/JAJM because the copies inserted in the record of trial are sufficient for what is required.)

10.12. Retention and Disposition of Original CMOs. SJAs are responsible for retaining the original of their headquarters' CMOs and retiring the record sets in annual blocks in accordance with Air Force Records Disposition Schedule, Table 51-3.

10.13. Disposition of Stamped Orders. When orders are examined and noted as legally sufficient under Article 64(a), UCMJ, permanently place 4 copies in the ROT. Only the original must have an original signature. The others may be mechanically reproduced. Make distribution in accordance with paragraphs 11.4.4. and 10.11.

Figure 10.1. Court-Martial Orders - Heading - First Order of the Fiscal Year.

DNA PROCESSING REQUIRED. 10 U.S.C. § 1565

GCMO No. 3, 13 September 2011, was the last GCMO of this headquarters published in FY11.

DEPARTMENT OF THE AIR FORCE
HEADQUARTERS NINTH AIR FORCE (ACC)
SHAW AIR FORCE BASE, SOUTH CAROLINA 29152-5002

General Court-Martial Order 18 October 2011
No. 1

AIRMAN FIRST CLASS WILLIAM L. STEWART, 111-22-3333, United States Air Force, 20th Supply Squadron, was arraigned at Shaw Air Force Base, South Carolina, on the following offenses at a court-martial convened by this headquarters.

CHARGE I: Article 85. Plea: NG. Finding: NG, but G of a violation of Article 86.

Specification: Did, on or about 24 June 2011, without authority and with intent to remain away there from permanently, absent himself from his unit, 20th Supply Squadron, located at Shaw Air Force Base, South Carolina, and did remain so absent in desertion until he was apprehended on or about 25 July 2011. Plea: NG. Finding: NG, but G of absence without authority from his unit, from 24 June 2011 to 25 July 2011, in violation of Article 86.

CHARGE II: Article 121. Plea: NG, but G of the LIO of wrongful appropriation. Finding: G.

Specification 1: Did, at Shaw Air Force Base, South Carolina, on or about 30 August 2011, steal a camera of a value of about $95.00, the property of Airman Joseph L. Smith. Plea: NG, but G of the LIO of wrongful appropriation, excepting the word "steal" and substituting therefore the words "wrongfully appropriate." Finding: G (of the charged offense of larceny).

Specification 2: Did, at Shaw Air Force Base, South Carolina, on or about 30 August 2011, steal a camera lens of a value of about $124.00, the property of Colonel Thomas M. Jones. Plea: NG, but G of the LIO of wrongful appropriation, excepting the word "steal" and substituting therefore the words "wrongfully appropriate." Finding: G, except the word "steal," substituting therefore the words "wrongfully appropriate."

SENTENCE

Sentence adjudged by officer members on 10 September 2011: Bad conduct discharge, confinement for 15 months, and reduction to airman basic.

ACTION

In the case of AIRMAN FIRST CLASS WILLIAM L. STEWART, 111-22-3333, United States Air Force, 20th Supply Squadron, only so much of the sentence as provides for a bad conduct GCMO No. 1, HQ 9 AF, Shaw AFB, SC, 18 October 2011.

discharge, confinement for 12 months, and reduction to airman basic is approved and, except for the bad conduct discharge, will be executed, but the execution of that portion of the sentence to bad conduct discharge is suspended until 30 June 2012, at which time, unless the suspension is sooner vacated, the suspended part of the sentence will be remitted without further action. The Air Force Corrections System is designated for the purpose of confinement, and the confinement will be served therein or elsewhere as directed by Headquarters Air Force Security Forces Center, Corrections Division, may direct. Unless competent authority otherwise directs, upon completion of the sentence to confinement, AIRMAN BASIC STEWART will be required under Article 76a, UCMJ, to take leave pending completion of appellate review.

/s/ Robert T. Myers
ROBERT T. MYERS, Major General, USAF
Commander

FOR THE COMMANDER

ANN D. JONES, SMSgt, USAF
Paralegal Manager

DISTRIBUTION:

GCMO No. 1 Personal Data – Privacy Act of 1974 (5 U.S.C. 552a)

Figure 10.2. Court-Martial Orders and Action-Summarized Guilty Plea to Lesser Included Offense.

DNA PROCESSING REQUIRED. 10 U.S.C. § 1565

DEPARTMENT OF THE AIR FORCE
HEADQUARTERS TWELFTH AIR FORCE (ACC)
DAVIS-MONTHAN AIR FORCE BASE, ARIZONA 85707-4100

General Court-Martial Order 13 February 2011
No. 10

STAFF SERGEANT GREGORY BURTON, 111-22-3333, United States Air Force, 358th Fighter Squadron, was arraigned at Davis-Monthan Air Force Base, Arizona, on the following offense at a court-martial convened by this headquarters.

CHARGE: Article 118. Plea: G. Finding: G.

Specification: Did, at Davis-Monthan Air Force Base, Arizona, on or about 4 August 2010, with premeditation (amended after arraignment to delete the words, "with premeditation") murder Staff Sergeant Richard Daum by means of stabbing him with a knife. Plea: G. Finding: G.

SENTENCE

Sentence adjudged by military judge on 6 December 2006: Dishonorable discharge, confinement for 25 years, forfeiture of all pay and allowances, and reduction to airman basic.

ACTION

In the case of STAFF SERGEANT GREGORY BURTON, 111-22-3333, United States Air Force, 358th Fighter Squadron, only so much of the sentence as provides for a dishonorable discharge, confinement for 12 years, forfeiture of all pay and allowances, and reduction to airman basic is approved and, except for the dishonorable discharge, will be executed. The Air Force Corrections System is designated for the purpose of confinement, and the confinement will be served therein or elsewhere as directed by Headquarters Air Force Security Forces Center, Corrections Division, may direct. Unless competent authority otherwise directs, upon completion of the sentence to confinement, AIRMAN BASIC BURTON will be required under Article 76a, UCMJ, to take leave pending completion of appellate review.

/s/ J. A. Marlow
J. A. MARLOW
Major General, USAF
Commander

GCMO No. 10, HQ 12 AF, Davis-Monthan AFB, AZ, 13 February 2011.

FOR THE COMMANDER

ANN D. JONES, SMSgt, USAF
Paralegal Manager

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GCMO No. 10 Personal Data – Privacy Act of 1974 (5 U.S.C. 552a)

Figure 10.3. Court-Martial Orders - Change of Pleas.

DNA PROCESSING REQUIRED. 10 U.S.C. § 1565

DEPARTMENT OF THE AIR FORCE
HEADQUARTERS 35TH FIGHTER WING (PACAF)
APO AP 96319-5000

Special Court-Martial Order 29 December 2010
No. 5

SENIOR AIRMAN MARY J. LUNDY, 111-22-3333, United States Air Force, 35th Civil Engineer Squadron, was arraigned at Misawa Air Base, Japan, on the following offenses at a court-martial convened by this headquarters.

CHARGE I: Article 128. Plea: NG (G plea not accepted by military judge; plea of NG directed to be entered). Finding: G.

Specification: Did, at Misawa AB, Japan, on or about 24 October 2010, unlawfully strike Lisa Green in the face with her fist. Plea: NG (G plea not accepted by the military judge, plea of NG directed to be entered). Finding: G.

CHARGE II: Article 134. Plea: NG (G plea not accepted by military judge, plea of NG directed to be entered). Finding: G.

Specification: Did, at Misawa AB, Japan, on or about 24 October 2010, orally communicate to Joe Smith, certain indecent language. Plea: NG (G plea not accepted by military judge; plea of NG directed to be entered). Finding: G.

CHARGE III: Article 108. Plea: NG (G plea not accepted by military judge; plea of NG directed to be entered). Finding: G.

Specification: Did, at Misawa AB, Japan, on or about 24 October 2010, willfully destroy the Misawa AB NCO Club front door, military property of a value of less than $500.00. Plea: NG (G plea not accepted by the military judge; plea of NG directed to be entered). Finding: G.

SENTENCE

Sentenced adjudged by military judge on 12 December 2010: Hard labor without confinement for 30 days, restriction to the limits of Misawa AB for 60 days, forfeiture of $100.00 pay per month for 8 months, and reduction to airman.

ACTION

In the case of SENIOR AIRMAN MARY J. LUNDY, 111-22-3333, United States Air Force, 35th Civil Engineer Squadron, the sentence is approved and will be executed.

SPCMO No.5, HQ 35 FW, APO, AP, 29 December 2010.

s/Joseph T. Jones
JOSEPH T. JONES, Colonel, USAF
Commander

FOR THE COMMANDER

JOHNATHAN J. SMITH, Lt Col, USAF
Staff Judge Advocate

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Figure 10.4. Court-Martial Orders - Corrected Copy.

DNA PROCESSING REQUIRED. 10 U.S.C. § 1565

CORRECTED COPY - DESTROY ALL OTHERS

DEPARTMENT OF THE AIR FORCE
HEADQUARTERS EIGHTH AIR FORCE (ACC)
BARKSDALE AIR FORCE BASE, LOUISIANA 71110-5002

General Court-Martial Order 10 October 2010
No. 3

~~TECHNICAL~~ STAFF SERGEANT EDWARD MATTHEWS CROWLEY, 111-22-3333, United States Air Force, 28th Maintenance Squadron, was arraigned at McGuire Air Force Base, New Jersey, on the following offenses at a court-martial convened by this headquarters.

CHARGE I: Article 134 (withdrawn after arraignment).

Specification: Did, in the continental United States, on divers occasions, between on or about 15 June 2009 and 15 July 2010, commit indecent acts upon the body of a female under 16 years of age (withdrawn after arraignment).

CHARGE II: (renumbered as CHARGE) Article 120. Plea: NG. Finding: G.

Specification: Did, in the continental United States, on divers occasions from on or about 17 December 2009 to on or about 10 June 2010, commit the offense of carnal knowledge with LJK. Plea: NG. Finding: G.

ADDITIONAL CHARGE: Article 112a. Plea: NG (withdrawn after defense motion to suppress evidence).

Specification: Did, at or near Ellsworth Air Force Base, South Dakota, on or about 16 March 2010, wrongfully use marijuana. Plea: NG (withdrawn after defense motion to suppress evidence).

SENTENCE

Sentence adjudged by officer members on 31 August 2010: Dishonorable discharge, confinement for 5 years, and reduction to airman basic.

ACTION

In the case of STAFF SERGEANT EDWARD MATTHEWS CROWLEY, 111-22-3333, United States Air Force, 28th Maintenance Squadron, the sentence is approved, and except for the dishonorable discharge, will be executed. The Air Force Corrections System is designated for GCMO No. 3, 8 AF, Barksdale, LA, 10 October 2010.

the purpose of confinement, and the confinement will be served therein or elsewhere as directed by Headquarters Air Force Security Forces Center, Corrections Division, may direct. Unless

competent authority otherwise directs, upon completion of the sentence to confinement, AIRMAN BASIC CROWLEY will be required, under Article 76a, UCMJ, to take leave pending completion of appellate review.

/s/ Steven S. McLean
STEVEN S. MCLEAN
Lieutenant General, USAF
Commander

FOR THE COMMANDER

DAVID A. DRAKE, SMSgt, USAF
Paralegal Superintendent

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Figure 10.5. Court-Martial Orders-Rehearing or New Trial.

DNA PROCESSING REQUIRED. 10 U.S.C. § 1565

DEPARTMENT OF THE AIR FORCE
HEADQUARTERS EIGHTEENTH AIR FORCE (AMC)
SCOTT AIR FORCE BASE, ILLINIOS 94535-5002

General Court-Martial Order 3 June 2011
No. 23

SENIOR AIRMAN JANE DOE, 111-22-3333, United States Air Force, David Grant USAF Medical Center, formerly assigned to 375th Maintenance Squadron, Scott Air Force Base, Illinois, was arraigned before a general court-martial convened by this headquarters, a rehearing on the sentence having been ordered in General Court-Martial Order No. 7, Headquarters Fifteenth Air Force (AMC), dated 8 July 2010. The findings of guilt of the former proceedings were affirmed, but the sentence was set aside and a rehearing on the sentence authorized by the Air Force Court of Criminal Appeals, which decision was made final by the United States Court of Appeals for the Armed Forces by order dated 11 February 2011 (ACM 030097). The affirmed findings of the former proceedings are as follows:

CHARGE I: Article 80. Plea: G. Finding: G.

Specification 1: Attempt to wrongfully distribute lysergic acid diethylamide at Belleville, Illinois, on or about 25 February 2010. Plea: G. Finding: G.

Specification 2: Attempt to wrongfully use a substance she intended and believed to be lysergic acid diethylamide at Belleville, Illinois, on or about 25 February 2010. Plea: G. Finding: G.

CHARGE II: Article 112a. Plea: G. Finding: G.

Specification: Wrongful distribution of 50 grams, more or less, of cocaine at Belleville, Illinois, on or about 14 January 2010. Plea: G. Finding: G.

SENTENCE

Sentence adjudged by military judge, upon a rehearing, on 1 April 2011: Bad conduct discharge, confinement for 3 years, forfeiture of all pay and allowances, and reduction to airman basic.

ACTION

In the case of SENIOR AIRMAN JANE DOE, 111-22-3333, United States Air Force, David Grant USAF Medical Center, formerly assigned to 375th Maintenance Squadron, Scott Air Force Base, Illinois, the sentence is approved and, except for the bad conduct discharge, will be executed. The accused will be credited with any portion of the punishment served from 25 April 2010 to 23 January 2011, under the sentence adjudged at the former trial in this case, and for 30 GCMO No. 23, 18 AF, Scott AFB, IL, 3 June 2011.

days for illegal pretrial confinement as directed by the military judge. The Air Force Corrections System is designated for the purpose of confinement, and the confinement will be served therein

or elsewhere as directed by Headquarters Air Force Security Forces Center, Corrections Division may direct. Unless competent authority otherwise directs, upon completion of the sentence to confinement AIRMAN BASIC DOE will be required, under Article 76a, UCMJ, to take leave pending completion of appellate review.

/s/James T. Smith
JAMES T. SMITH, Major General, USAF
Commander

FOR THE COMMANDER

HOWARD JONES, Colonel, USAF
Staff Judge Advocate

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Figure 10.6. Acquittal of all charges.

DEPARTMENT OF THE AIR FORCE
HEADQUARTERS TWELFTH AIR FORCE (ACC)
DAVIS-MONTHAN AIR FORCE BASE, ARIZONA 85707-4100

General Court-Martial Order 13 February 2011
No. 10

STAFF SERGEANT GREGORY BURTON, 111-22-3333, United States Air Force, 358th Fighter Squadron, was arraigned at Davis-Monthan Air Force Base, Arizona, on the following offense at a court-martial convened by this headquarters.

CHARGE: Article 118. Plea: NG. Finding: NG.

Specification: Did, at Davis-Monthan Air Force Base, Arizona, on or about 4 August 2010, with premeditation (amended after arraignment to delete the words, "with premeditation") murder Staff Sergeant Richard Daum by means of stabbing him with a knife. Plea: NG. Finding: NG.

SENTENCE

The findings were announced by (military judge)(officer members) on 6 December 2010.

ANN D. JONES, SMSgt, USAF
Paralegal Manager

DISTRIBUTION:

Figure 10.7. Court-Martial Orders-Final Supplementary Order.

DEPARTMENT OF THE AIR FORCE
HEADQUARTERS NINTH AIR FORCE (ACC)
SHAW AFB SC 29152

Special Court-Martial Order 2 December 2010
No. 7

In the special court-martial case of SENIOR AIRMAN WALTER F. DUNE, 111-22-3333, United States Air Force, 18th Maintenance Squadron, the sentence to bad conduct discharge, confinement for 3 months, forfeiture of $250.00 per month for 3 months, and reduction to airman basic, as promulgated in Special Court-Martial Order No. 10, Headquarters 18th Wing (PACAF), dated 23 March 2009, has been finally affirmed. Article 71(c) having been complied with, the bad conduct discharge will be executed. The unexecuted portion of the sentence to confinement was remitted by Special Court-Martial Order No. 13, Headquarters 18th Wing (PACAF), dated 2 November 2009. The sentence was adjudged by military judge on 12 September 2009 (ACM 30049).

(signature)
W. E. SMITH
Lieutenant General, USAF
Commander

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Figure 10.8. Court-Martial Orders—Final Supplementary Order—Waiver/Withdrawal of Appellate Review.

DEPARTMENT OF THE AIR FORCE
HEADQUARTERS TWELFTH AIR FORCE (ACC)
DAVIS-MONTHAN AIR FORCE BASE, ARIZONA 85707-4100

(General) (Special) Court-Martial Order 12 January 2011
No. ____

In the (general) (special) court-martial case of AIRMAN FIRST CLASS WARREN M. WEST, 111-22-3333, United States Air Force, 355th Support Group, the accused, (having waived his rights to appellate review under Article 61) (having withdrawn his rights to appellate review under Article 61), and Article 71(c) having been complied with, the [entire adjudged sentence] as promulgated in (General) (Special) Court-Martial Order No. ___. (Headquarters _____) (this headquarters), dated _____, will be executed. The sentence was adjudged by (officer members) (officer and enlisted members) (military judge) on _____ (ACM _____).

(signature)
BRUCE M. STRONG
Lieutenant General, USAF
Commander

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Figure 10.9. Court-Martial Orders - New Action.

DNA PROCESSING REQUIRED. 10 U.S.C. § 1565

DEPARTMENT OF THE AIR FORCE
HEADQUARTERS THIRD AIR FORCE (USAFE)
RAMSTEIN AB, GE 09240

General Court-Martial Order 31 May 2011
No. 5

MASTER SERGEANT CURTIS MAYS, 111-22-3333, United States Air Force, 52nd Communications Squadron, was arraigned at Spangdahlem Air Base, Germany, on the following offense at a court-martial convened by this command.

CHARGE. Article 85. Plea: NG, but G of a violation of Article 86. Finding: NG, but G of a violation of Article 86.

Specification: Unauthorized absence from unit from 1 February 2010 to 29 September 2010 with intent to remain away there from permanently in desertion. Plea: G, except the words "and with intent to remain away there from permanently" and "in desertion." Finding: G, except the words "and with intent to remain away there from permanently" and "in desertion."

SENTENCE

Sentence adjudged by officer and enlisted members on 4 November 2010: Bad conduct discharge, confinement for 5 months, forfeiture of $200.00 pay per month for 5 months, and reduction to airman basic.

ACTION

In the case of MASTER SERGEANT CURTIS MAYS, 111-22-3333, the record of trial having been returned by (The Judge Advocate General)(Air Force Court of Criminal Appeals)(Court of Appeals for the Armed Forces) with directions that a new action be accomplished, the action taken by (me) (my predecessor) on 9 March 2011 is withdrawn, and General Court-Martial Order Number 3, Headquarters Third Air Force (USAFE), dated 9 March 2011, is rescinded and the following is substituted for the original action: Only so much of the sentence as provides for a bad conduct discharge, confinement for 82 days, forfeiture of $200.00 pay per month for 5 months, and reduction to airman basic is approved, and, except for the part of the sentence extending to a bad conduct discharge, will be executed. The term of confinement having been served, no place of confinement is designated.

/s/ Thomas J. Jackson
THOMAS J. JACKSON
Major General, USAF
Commander

GCMCO No.5, 3 AF, Ramstein AB, GE, 31 May 2011.

FOR THE COMMANDER

SONIA LEE, Colonel, USAF
Staff Judge Advocate

DISTRIBUTION:

GCMO No. 5 Personal Data – Privacy Act of 1974 (5 U.S.C. 552a)

Figure 10.10. Court-Martial Order Distribution and Miscellaneous Information.

Distribution and Number of Copies: Distribute orders in the number of copies and to the organizations shown below. On the CMO, two spaces below the authentication signature element at the left margin, place number of copies to the left of the distribution line and the complete mailing address. Each addressee should be identified with a complete mailing address. Example below:
Distribution:

1 – AB John D. Smith (Acc), 1532 Shorter Way, Tucson AZ 12345
1 – Lt Col Frederick A. Jones (MJ), 540 Airlift Dr, Ste B-123, Travis AFB CA 94535-2478
4 – AFLOA/JAJM, 1500 West Perimeter Blvd, Ste 1130, JB Andrews NAF Washington, MD 20762

ALL court-martial orders must contain a warning statement that the document contains information protected by the Privacy Act. The warning statement:
Personal Data – Privacy Act of 1974 (5 U.S.C. 552a)
must be one-line, centered, in 14-point boldface type, and ½ inch from the bottom of each page (utilize footer function to include PA warning statement)

Promulgating orders prepared for individuals convicted of a crime of domestic violence must contain the following annotation:
Crime of Domestic Violence. 18 U.S.C. § 922(g)(9)
on one-line, centered, in 14-point boldface type, one inch from top of first page (if individual is convicted of an offense also requiring DNA collection, include the DNA processing language, followed by the crime of domestic violence language on the next line).

Court-martial orders prepared on or after 27 May 2010 on individuals tried by general or special courts-martial require DNA processing. The first page of the CMO should include the heading (centered, 14 point font, boldface):
"DNA processing required. 10 U.S.C. § 1565”
Note: DNA processing IS NOT required on cases with a finding of not guilty of all charges.

Chapter 11

APPEALS AND REVIEWS, REHEARINGS, RETRIALS, DUBAY HEARINGS AND CLEMENCY

Section 11A—General Information

11.1. Request for Appellate Defense Counsel. Include an AF Form 304, *Request for Appellate Defense Counsel*, signed by the accused in every ROT forwarded for review by the Air Force Court of Criminal Appeals or forwarded to The Judge Advocate General (TJAG) for examination. AFMAN 51-203, Figure 4.1. The accused's trial defense counsel assists the accused in filling out the form, obtains the accused's signature and submits it to the trial counsel or appropriate SJA as soon as practicable after sentence announcement. If the member waives appellate counsel, re-serve the AF Form 304 and obtain the member's signature **after** the convening authority has taken action on the case. Both copies of the AF Form 304 are placed in the record of trial. The AF Form 304 provides the accused's preferred mailing address (appellate leave address, etc.) for all appellate review correspondence when the accused is not in a confinement facility. An adequate address must be provided even if the accused waives appellate review. Do not use the ADC office or the base organization address.

11.1.1. If an accused's death sentence by a court-martial has been approved by the President pursuant to Article 71, UCMJ, and the accused seeks to file a post-conviction habeas corpus petition in Federal civilian court concerning his/her court-martial, the accused may request a military defense counsel from The Judge Advocate General (TJAG). Upon receipt of the accused's request, TJAG will detail military counsel under Article 70(e), UCMJ, to represent the accused in such proceedings and any appeals there from.

11.2. Withdrawal of Request for Appellate Defense Counsel. Use the following format to withdraw a request for appellate defense counsel:

I consulted with my [military trial defense counsel] [civilian defense counsel], (insert counsel's name), and have been advised of the action taken by the court-martial convening authority in my case. I received a copy of my record of trial for review. I am aware of my right to representation by appellate counsel. I hereby withdraw the request for appellate counsel executed by me on (insert date).

The accused may also decline appellate representation by checking the appropriate box on the AF Form 304. If the accused initially declines appellate representation after sentence is announced, the accused must be given another opportunity to elect or decline appellate representation after the convening authority's action is served upon the accused. See *United States v. Xu*, 70 M.J. 140 (C.A.A.F. 2011) (Summary Disposition). In situations where the accused has declined appellate representation after having been served the action, include both versions of the AF Form 304 in the ROT. If the accused declines appellate representation, forward only the original ROT to AFLOA/JAJM for appellate review.

11.3. Waiver or Withdrawal of Appellate Review. If an accused wishes to waive or withdraw from appellate review, the procedures outlined in RCM 1110 must be followed. The request to waive or withdraw from appellate review must be filed after the convening authority takes

action. The waiver or withdrawal of appellate review should be accomplished on a DD Form 2330, *Waiver/Withdrawal of Appellate Rights in General and Special Courts-Martial Subject to Review by a Court of Military Review*, or DD Form 2331, *Waiver/Withdrawal of Appellate Rights in General Courts-Martial Subject to Examination in the Office of the Judge Advocate General*. MCM, Appendix 19 & 20. Waiver or withdrawal of appellate review bars review by the Air Force Court of Criminal Appeals and by TJAG under Article 69(a). It does not prevent later submission of an Article 69(b) application. An Article 64(a) review is required for special and general courts-martial where an accused waives appellate review. See Section 11B below for additional information.

11.3.1. A review by a judge advocate is required by RCM 1112. A judge advocate appointed by the SJA of the officer exercising GCM authority over the accused at the time of trial conducts the review. A memorandum must be prepared addressing issues in RCM 1112(d) and inserted in the original record of trial, with copies inserted in all the copies of the record of trial and served on the accused. The case will be forwarded to the GCMCA for a supplemental order if: (1) the judge advocate who reviewed the case recommends corrective action; and, (2) the sentence approved by the convening authority includes a dismissal, a dishonorable or bad-conduct discharge, or more than six months confinement.

Section 11B—Article 64(a), UCMJ, Judge Advocate Reviews (RCM 1112)

11.4. Article 64(a) Review (RCM 1112). An Article 64(a), UCMJ, review is required in two types of cases: 1) in any SPCM in which the approved sentence does not include a bad conduct discharge and/or less than 12 months confinement; and, 2) in all SCMs. A judge advocate appointed by the SJA of the officer exercising GCMCA over the accused at the time of trial conducts the review. No review is required if the accused is found not guilty of all offenses, the convening authority disapproved all findings of guilty or the accused is found not guilty for all offenses only because of lack of mental responsibility for all offenses.

11.4.1. Indicate compliance with Article 64(a) with a stamped or typed notation signed and dated by the reviewing officer on the cover of the first volume of all copies of the ROT and on all copies of the court-martial order. Only the original cover and court-martial order must have an original signature. The others may be mechanically reproduced.

11.4.2. If all judge advocates on the GCM convening authority's staff are disqualified from conducting such a review or the GCM convening authority is disqualified from taking any required action on the case, the MAJCOM SJA will select another GCM convening authority and SJA to perform the review and take any required action. If there is no eligible convening authority in the command, or if the major commander is the convening authority, the MAJCOM SJA may request another MAJCOM commander to act or to designate a commander exercising GCM convening authority within that other MAJCOM to take action on the case. If agreement cannot be reached between MAJCOMs, contact AFLOA/JAJM for assistance in identifying an officer exercising GCM convening authority to act on the case.

11.4.3. Form and Content of the Review.

11.4.3.1. Reviews of these courts-martial will contain only those matters required by Article 64(a). In those cases in which no corrective action is required by the convening authority, the review will consist of a stamped or typed entry on the cover of volume one

of the original ROT, and on the back of the DD Form 2329, *Record of Trial by Summary Court-Martial*, and on all the court-martial orders for non-BCD SPCM cases. The entry shall be entitled, "Article 64(a), UCMJ, Review" and shall consist of the conclusions required in Article 64(a), the command of reviewer, the date, signature of the reviewer, and the reviewer's signature block.

11.4.3.2. In cases where the review addresses allegations of error by the accused, but no corrective action of the convening authority is required; the review will be prepared in writing IAW Article 64(b), dated and signed by the reviewer, will cover the matters required by Art 64(a), and will include a statement that the findings and sentence are correct in law and fact. The review will be attached to the ROT. The cover (DD Form 490) of volume one and all copies of the court-martial order will be annotated with a typed or stamped notation consisting of the date, signature block, the command of the reviewer, and a statement that Article 64(a), UCMJ, has been complied with.

11.4.3.3. When the officer exercising GCM jurisdiction over the accused at the time the court-martial was convened is required to take corrective or further action under Article 64, UCMJ, the judge advocate's review will be in writing, dated and signed by the reviewer, and will address the matters required in Art 64 (b) as well as whether the findings and sentence are correct in law and fact. After the convening authority takes action IAW Article 64(c), the review and action will be included in the ROT.

11.4.3.3.1. In cases where the review stated that corrective action was required as a matter of law, and the convening authority refused to take action that was at least as favorable to the accused as that recommended by the reviewer, the ROT, review and action of the convening authority shall be transmitted to TJAG through AFLOA/JAJM for review under Article 69(b), UCMJ.

11.4.3.3.2. If the officer taking action under Article 64, UCMJ, orders a rehearing, the ROT, action and court-martial order will be sent to the officer who convened the court-martial. That officer will determine whether a rehearing is practicable. See Section 11F. If a rehearing is to be held and the accused has been transferred to another command, the officer who convened the court-martial will make arrangements for the rehearing with the coordination of the officer presently exercising SPCM jurisdiction over the accused.

11.4.3.4. Except cases requiring Article 69, UCMJ, review under RCM 1112(g), Secretarial action under Article 71, UCMJ, or rehearings, cases are final under Article 76, UCMJ, upon completion of the judge advocate's review and any required action by the GCM convening authority. The GCM convening authority's action may execute all unexecuted portions of the sentence except those portions requiring Secretarial approval under Article 71, UCMJ.

11.4.3.4.1. If the GCMCA orders a rehearing, forward the review, ROT, action, and court-martial order to the convening authority that convened the court-martial. This convening authority determines whether a rehearing is practicable.

11.4.4. Distribution of Article 64(a) Reviews. After completing the Article 64(a) review and, when applicable, any action by the GCMCA under RCM 1112(f), forward the original ROT and four copies of the court-martial order and any supplementary orders to

AFLOA/JAJM indicating compliance with Article 64(a) as stated in paragraph 11.4.3. Provide one copy each of the annotated court-martial order indicating compliance with Article 64(a) to each addressee as required by paragraph 10.11, as applicable.

Section 11C—Article 69, UCMJ, Review

11.5. Article 69(a) Review (RCM 1201(b)(1)). The ROT in each GCM that is not otherwise reviewed under Article 66 shall be examined in the Office of The Judge Advocate General if there is a finding of guilty and the accused does not waive or withdraw his right to appellate review under Article 61.

11.5.1. Submission of Matters by the Accused. The accused may submit matters for TJAG's consideration. Any matters must be submitted directly to AFLOA/JAJM on or before the thirtieth (30) day after the date the GCMCA approved the sentence, unless the accused establishes good cause for not filing matters within that time. Submissions must meet the requirements of paragraph 11.6.3.

11.5.2. Notification of Article 69(a) Examination Results. AFLOA/JAJM notifies the convening authority's SJA of the examination results. If TJAG does not direct a review by the Air Force Court of Criminal Appeals (AFCCA), AFLOA/JAJM forwards a copy of the initial promulgating order to the convening authority's SJA, reflecting the results of the review. AFLOA/JAJM serves one copy of the order upon the accused and obtains a receipt for it. If the defense counsel's name and address is included in matters submitted by the accused, AFLOA/JAJM sends a copy of the results to the defense counsel.

11.5.3. Other Action by TJAG. If TJAG orders a rehearing, the procedures in Section 11F will apply. If TJAG forwards the case for review by AFCCA, the GCMCA's SJA will, upon request, send two copies of the ROT to AFLOA/JAJM.

11.6. Application for Relief under Article 69(b) (RCM 1201(b)(3)). The Judge Advocate General may vacate or modify the findings or sentence, or both, reassess the sentence, or set aside the findings or sentence and order a rehearing of a court-martial case which has become final in law but has not been reviewed by the AFCCA or TJAG. RCM 1201(b). This applies to GCMs, SPCMs, and SCMs including those cases forwarded under RCM 1112(g)(1). The findings or sentence, or both, may be reviewed on any ground specified in RCM 1201(b)(3)(A). Review of a finding of not guilty, only by reason of lack of mental responsibility, under this rule may not extend to the determination of lack of mental responsibility. RCM 1201(b)(3)(A), Discussion.

11.6.1. Prerequisite of Finality of Review. An application may not be filed and will not be reviewed under Article 69(b), UCMJ, unless the convening authority has taken action, and a judge advocate completed the review and any other action required by Article 64, UCMJ.

11.6.2. Submission of Application. The member sends the application directly to AFLOA/JAJM, and it is considered filed when received by that office.

11.6.2.1. If the application concerns a trial by SCM with action taken before 1 Jul 96, the GCMCA's SJA obtains the ROT, and any other statements, documents, matters admitted, or, in the alternative, summaries of the substance of such evidence, from the SJA for the installation at which the trial was held and forwards all the documents to AFLOA/JAJM.

11.6.3. Contents of Application. Figure 11.1 is a sample format for applications. In all cases, the application must be written and signed by the accused, or the applicant's legal representative, under oath or affirmation. Defense counsel does not receive a copy of TJAG's action, unless counsel's name is on the application. The application must also contain:

11.6.3.1. The accused's name, social security number, and present mailing address;

11.6.3.2. The date and place of trial and type of court-martial;

11.6.3.3. The sentence of the court as approved and any subsequent reduction by clemency or otherwise;

11.6.3.4. A succinct statement of the specific relief requested and the specific grounds for the relief (a concise brief of the applicable law with appropriate citations is encouraged); and

11.6.3.5. Any documentary or other evidence pertinent to the facts asserted under the specific grounds alleged, including copies of the court-martial order, if available.

11.6.3.6. The application must be notarized.

Section 11D—Review by the Air Force Court of Criminal Appeals (AFCCA), the United States Court of Appeals for the Armed Forces (USCAAF) and the Supreme Court of the United States

11.7. AFCCA Review (RCM 1203). AFCCA reviews cases referred to it by TJAG under RCM 1201(a) or (b)(1).

11.7.1. Notification of the AFCCA's Decision. AFCCA's decision is transmitted to the accused directly from AFLOA/JAJM and the officer exercising GCM convening authority over the accused.

11.8. USCAAF Review (RCM 1204). USCAAF reviews the record in all cases: in which the sentence, as affirmed by AFCCA, extends to death; reviewed by AFCCA which TJAG orders sent to USCAAF for review; and reviewed by AFCCA, except those referred to it by TJAG under RCM 1201(b)(1), in which, upon petition by the accused and on good cause shown, USCAAF has granted a review.

11.9. Petition for Supreme Court Review by Writ of Certiorari. Petitions for Supreme Court review by writ of certiorari may be filed by the accused or the United States in those cases specified in Article 67a(a) and RCM 1205(a). Such petitions will be filed according to the rules of the Supreme Court of the United States.

11.9.1. Military appellate defense counsel may assist the accused in preparing a petition for writ of certiorari and provide representation before the Supreme Court when requested by the accused.

11.9.2. When requested to do so by the Attorney General of the United States, TJAG will appoint appellate government counsel to represent the United States in any cases filed under Article 67a above.

Section 11E—Petitions for New Trial (RCM 1210).

11.10. Petition for New Trial. Petitions for new trial are prepared and processed under RCM 1210, and are filed with AFLOA/JAJM on behalf of The Judge Advocate General. A petition for new trial may be submitted because of newly discovered evidence or fraud on the court in any kind of court-martial within two years after approval of the sentence by the convening authority.

11.10.1. General Information. The petition must be in writing and contain the matters required by RCM 1210(c). When practicable, the petition should be typewritten and double-spaced. The petition will be signed under oath or affirmation by the petitioner, a person possessing the power of attorney of the petitioner for that purpose, or a person with the authorization of an appropriate court of law to sign the petition as the petitioner's representative. The member forwards the original and two copies of the petition and supporting documentation directly to AFLOA/JAJM. An accused may submit only one petition for new trial for the same reason within the two-year limitation period.

11.10.2. Forwarding Copy of the Petition.

11.10.2.1. If the petitioner's case is pending before the AFCCA, AFLOA/JAJM shall forward these documents to the court: the original petition, two copies of the petition, copies of each supporting document, and any prepared briefs. AFLOA/JAJM shall also forward a copy of the petition and all documents to appellate defense and appellate government counsel. RCM 1210(e); AFCCA Rules of Practice and Procedure, Rule 22.

11.10.2.2. If the petitioner's case is pending before USCAAF, AFLOA/JAJM shall forward these documents to the court: the original petition, seven copies of the petition, copies of each supporting document and any prepared briefs. AFLOA/JAJM shall also forward a copy of the petition and all documents to both appellate defense and appellate government counsel. RCM 1210(e); USCAAF Rules of Practice and Procedure, Rule 29.

11.10.3. TJAG Review of the Petition. If the petitioner's case is not pending before a court, TJAG or the officer(s) designated by TJAG shall review the petition. Upon request by the designated officer(s), TJAG shall appoint appellate defense counsel and appellate government counsel to act in the case. Upon such appointment, the designated officer(s) shall forward one copy of the petition and all documents to each appellate counsel. The designated officer(s) may direct appellate defense and government counsel to provide briefs in the case and upon written request or, if the designated officer(s) deem(s) it appropriate, may order oral arguments to be presented before the officer(s).

11.10.3.1. Process for Filing Briefs Requiring TJAG Review of the Petition.

11.10.3.1.1. Form and Number of Briefs. Briefs are to be typewritten, double spaced on letter size white paper in an original and three copies. Counsel shall be limited to filing one brief per side unless TJAG or the designated officer(s) reviewing the petition otherwise permit(s).

11.10.3.1.2. Time for Filing. The brief on behalf of the petitioner shall be filed with AFLOA/JAJM within 20 days after appellate defense counsel has been appointed by TJAG and a copy of the petition and supporting documents have been provided counsel. Appellate government counsel may file a brief within 20 days of when the petitioner's brief has been filed. If counsel for the petitioner has filed no brief, appellate government counsel will file a brief within 20 days after expiration of the time allowed for the filing of a brief on behalf of the petitioner. Upon written request,

the time for filing briefs by either counsel may be extended at the discretion of TJAG or the designated officer(s) reviewing the petition.

11.10.3.2. Oral Arguments. If ordered by the designated officer(s), oral arguments shall be heard after written briefs have been filed.

11.10.3.2.1. Notice. The designated officer(s) shall give appellate counsel at least 10 days notice of the time and place of oral arguments.

11.10.3.2.2. Time Limits. No more than 30 minutes on each side shall be allowed for oral arguments unless the time is extended by the designated officer(s).

11.10.3.2.3. Number of Counsel; Opening and Closing. The designated officer(s) may limit the number of counsel making an oral argument. The counsel for the petitioner has the right to make opening and closing arguments.

11.10.3.2.4. Failure to Appear. Appellate counsel's failure to appear at the time and place set for oral argument may be regarded as a waiver thereof and the designated officer(s) may proceed on the case as submitted without argument or may continue the case for argument at a later date, giving due notice thereof.

11.10.3.2.5. Presence of Petitioner. The petitioner does not have a right to be present at the time of oral arguments before the designated officer(s).

11.10.3.3. Opinion and Action. A memorandum opinion and an action shall be prepared by the designated officer(s) for consideration by TJAG. After the action has been signed, AFLOA/JAJM, shall cause a copy thereof to be served on petitioner and shall take such action as may be necessary to carry out the orders of TJAG as contained in the action.

Section 11F—Rehearings and Other Remedial Actions

11.11. Cases Remanded by the Appellate Courts. When a decision of the Supreme Court, USCAAF, or AFCCA directs or authorizes further proceedings, such as a rehearing, a limited hearing, or a new action by the convening authority (CA), reasonable efforts must be made to locate the accused and provide the accused with a copy of the decision. Further proceedings in AFCCA cases need not be delayed, however, solely to permit an accused to petition for a grant of review or otherwise appeal the matter. Any special instructions deemed necessary to carry out the mandate of the Court will be transmitted by AFLOA/JAJM with the remanded ROT.

11.11.1. Pursuant to Article 76(a), an accused may only be placed on involuntary appellate leave when the approved sentence includes a punitive discharge. When an appellate court sets aside the action or the sentence, the accused should be taken off of appellate leave. Figure 11.2.

11.12. Procedure When Rehearing is Authorized (RCM 810). When an order of a reviewing or convening authority, an order of TJAG, a decision of AFCCA, a mandate issued by USCAAF, or a judgment of the Supreme Court authorizes a rehearing on the findings or sentence, the following procedures apply:

11.12.1. Notification of the CA and Identification of the Responsible CA. AFLOA/JAJM, or the Article 64, UCMJ, reviewing officer, as appropriate, sends a transmittal letter, and a copy of the pertinent decision, mandate, or order to the original CA's SJA (or the current CA

if the original CA no longer exists). If the accused is no longer within the command of the original CA, a courtesy copy will be forwarded to the accused's current CA with jurisdiction to convene the type of court-martial involved.

11.12.1.1. The original court-martial CA is the CA who approved the accused's sentence. The original CA is the responsible CA if the accused is still under his or her jurisdiction.

11.12.1.2. If the accused is no longer under the jurisdiction of the original CA, the original CA decides whether to remain the responsible CA or transfer his or her responsibilities for the case to the officer presently exercising authority over the accused to convene the type of court-martial involved. If transferred, the current CA becomes the responsible CA.

11.12.1.2.1. If the original CA remains the responsible CA and determines that a rehearing should be held, he or she will request that the accused be returned for the purpose of rehearing or will reach an understanding as to situs with the officer presently exercising court-martial CA over the accused or with another officer exercising court martial CA.

11.12.1.3. If the original CA no longer exists, the accused's current CA, exercising authority over the accused to convene the type of court-martial involved, is the responsible CA.

11.12.2. Receipt of Decision and Speedy Trial Clock. Receipt of decision by the original CA's (or the current CA if the original CA no longer exists) SJA triggers the speedy trial clock for both rehearings on findings and rehearings on sentence only. In a sentence-only rehearing, an accused is "brought to trial" at the first Article 39(a) session. *United States v. Becker*, 53 MJ 229 (CAAF 2000); RCM 707(b)(3)(D).

11.12.3. Notification of the Accused and Counsel. When a post-trial review or action directs or authorizes further proceedings, the responsible CA's SJA must make reasonable efforts to locate and provide both the accused and trial defense counsel with a copy of the document requiring additional action. Ensure receipts are accomplished.

11.12.4. Action. The responsible CA should ensure action is taken consistent with the post-trial directions from the reviewing or appellate authority. The responsible CA will publish a supplementary court-martial order indicating either:

11.12.4.1. A rehearing is ordered before another court-martial to be designated. See Figure 10.5 for sample language for rehearing on sentence; or

11.12.4.2. If a rehearing on sentence is impracticable, that the sentence has been set-aside and a sentence of no punishment is approved; or

11.12.4.3. If a rehearing on findings is impracticable, that the findings of guilt and the sentence have been set aside and the charges are dismissed.

11.12.5. Ensure appropriate coordination is made with all counsel, and military judge.

11.12.6. Sentence Reassessment. When partial findings have been approved and a rehearing as to other offenses and the sentence ordered, the convening authority may, if specifically authorized by either AFCCA or USCAAF, reassess the sentence based on the approved

findings of guilty and dismiss the remaining charges, if any. RCM. 1107(e)(1)(B)(iii), Discussion.

11.13. Referral. Whether re-referring the matter to a rehearing in full or for a limited purpose, ensure that the following actions are accomplished:

11.13.1. The responsible CA directs the rehearing. This may be done at any location the convening authority determines to be appropriate. If the rehearing is held at a location requiring the accused to travel, the accused should be placed on TDY. See Figure 6.8.

11.13.2. A military judge is detailed. The military judge may be the same as in the original trial or a new one may be detailed.

11.13.3. A new convening order is published with all new members.

11.13.4. A new referral indorsement in the same form as on page 2 of the Charge Sheet, DD Form 458, is completed following normal rules of referral.

11.13.4.1. The appropriate instructions concerning the rehearing are incorporated on the referral form.

11.13.4.2. The new referral is attached to the original referral. See paragraph 4.9.

11.14. Record of Trial and Post-Rehearing Concerns.

11.14.1. The original ROT and any copies must remain intact, except for documents needed for reintroduction at rehearing, such as the charge sheet and exhibits, if required.

11.14.2. Any documents withdrawn from the original ROT and used at the rehearing should be substituted in the record and all copies with a description of the document, reasons for withdrawal, and new location of the document should be included. Do not withdraw the original copies of a decision of a court, action of a convening authority, post-trial review or recommendation, pretrial advice, and Article 32 report of investigation.

11.14.3. If the accused served confinement resulting from the original trial, the convening authority's new action must reflect that the accused will be credited for the time served.

11.14.4. The promulgating order must indicate the case is a rehearing. See Figure 10.5.

11.14.5. The record of the rehearing is a separate volume from the original ROT. Place the record of rehearing on top of the original ROT. Other volumes are renumbered as appropriate.

11.14.6. A verbatim transcript is required for a rehearing proceeding. Forward the original and two copies of the verbatim rehearing record, along with the original ROT, to AFLOA/JAJM.

11.15. *DuBay* Hearing. A *DuBay* hearing is a post-trial hearing ordered by an appellate court for the limited purpose of obtaining further evidence on a matter under consideration by the court. While the MCM does not explicitly address this type of limited fact-finding hearing, *DuBay* procedure is a well-established means to address an ambiguity or omission in the record; or to dispose of a claim of error before necessary witnesses disperse, memories fade, or witnesses became unavailable. *United States v. DuBay*, 37 C.M.R. 411 (C.M.A. 1967). *DuBay* hearings on various matters may be directed by the CAAF, AFCCA, convening and supervisory authorities, or the detailed military judge on his or her own motion prior to authentication of the

ROT, so long as the subject of the proceeding is "one that can be verified without material prejudice to the substantial rights of the accused." *U.S. v. Brickey*, 16 M.J. 258 (C.M.A. 1983). The following procedures apply when a *DuBay* hearing is ordered:

11.15.1. Notification of CA. AFLOA/JAJM sends a letter of transmittal and a copy of the pertinent mandate or order to the SJA of the CA who exercised such authority over the accused at the time of the trial (or the current CA if the original CA no longer exists). If the accused is no longer within the command of the original CA, a courtesy copy will be forwarded to the accused's current CA who has the authority to convene the type of court-martial involved.

11.15.1.1. The responsible CA, as identified in paragraph 11.13.1, must ensure action is taken consistent with the post-trial directions from the authority directing the *DuBay* hearing. The responsible CA will publish a supplementary court-martial order reflecting post-trial action on the case.

11.15.1.2. Receipt of Decision and Time Standards. There are no formal time standards for completion of the hearing, however the matter should be expedited as appellate review is pending. Additionally, the appellate court directing the hearing generally specifies a date by which the process must be completed. Any time extension requests require coordination with AFLOA/JAJG through AFLOA/JAJM.

11.15.2. Notification of the Accused and Counsel. When a post-trial review or action directs a *DuBay* hearing, the responsible CA's SJA must make reasonable efforts to locate and provide both the accused and trial defense counsel with a copy of the document requiring additional action. Ensure receipts are accomplished.

11.15.2.1. The accused should be returned to active duty status for the limited purpose of participating in the *DuBay* hearing. Figure 11.3.

11.15.2.2. Appointment Letter. The SJA prepares a letter for the responsible CA to sign directing the *DuBay* hearing to take place. Figure 11.4.

11.15.3. Detail of a Military Judge. After appropriate coordination, the SJA drafts a letter for the CA requesting a military judge be detailed and directing a hearing date to be scheduled. A military judge is detailed to a *DuBay* hearing in the same manner as detailed to any court-martial.

11.15.4. *DuBay* hearings are conducted in accordance with Article 39(a), UCMJ.

11.15.5. Exhibits. Number items admitted as evidence at the hearing numerically, beginning with "Hearing Exhibit 1."

11.15.6. Record of Hearing and Post Hearing Action. Prepare a verbatim record of the hearing, unless otherwise directed by the authority ordering the hearing. Authenticate the transcript of the hearing in the same format as required for ROTs. Return the original ROT and the original *DuBay* transcript and two copies of the *DuBay* transcript to AFLOA/JAJM.

Section 11G—Remission and Suspension Under Article 74, UCMJ

11.16. General Information. After the action is published or the accused has been officially notified of the action, the SecAF has the authority to remit or suspend any part or amount of the

unexecuted part of any sentence, except one approved by the President, unless the SecAF delegated such authority in this section.

11.16.1. The term "unexecuted part of a sentence" includes that part which has been approved and ordered executed but which has not been carried out (e.g., punitive discharges or dismissals not ordered into execution, unserved confinement, hard labor without confinement or restriction, and uncollected forfeitures).

11.17. Authority Reserved to SecAF. Only SecAF may remit or suspend, any part or amount of the unexecuted part of the sentences listed below. This limitation does not apply to the convening authority's powers under RCM 1107; Article 60, UCMJ.

11.17.1. Any sentence of a person convicted by a military tribunal, under SecAF's jurisdiction, resulting from the President's commutation of a sentence of death to a lesser punishment (RCM 1206 (b)(3);

11.17.2. Any sentence SecAF approved and ordered into execution;

11.17.3. A dismissal, dishonorable discharge, or bad conduct discharge that is imposed for the conviction of an offense when a sentence to death is authorized by the MCM;

11.17.4. Those referred to SecAF for action by commanders authorized to exercise Article 74, UCMJ, authority. Commanders are encouraged to forward to AFLOA/JAJR for SecAF decision those cases involving issues most appropriate for resolution at the Air Force policy level.

11.18. Authority of TJAG. TJAG may exercise SecAF authority under Article 74(a), UCMJ, and remit or suspend in whole or in part any unexecuted part of a sentence, with the exception of those cases specified in paragraph 11.17. The Director, USAF Judiciary, may act for TJAG to remit or suspend up to 90 days of an approved sentence to confinement.

11.19. Authority of the Accused's Commander. Except in cases listed in paragraph 11.17 and where TJAG has not acted, the commander of the accused who has the authority to convene a court-martial of the kind which adjudged the sentence may suspend or remit any part or amount of the unexecuted part of an accused's sentence adjudged by a summary court-martial or a SPCM, except for a BCD, regardless of whether the person acting has previously approved the sentence.

11.19.1. A commander exercising only SPCMCA over the command to which the accused is assigned may not remit a BCD, but may suspend a BCD only in the initial action.

11.19.2. A commander exercising GCMCA over the command to which the accused is assigned may remit or suspend any part or amount of the unexecuted part of any sentence except in cases listed in paragraph 11.17.

11.19.3. If the accused is transferred to a Level II Regional Confinement Facility or a long-term corrections facility, as defined in AFI 31-205, or to the Federal Bureau of Prisons, and the accused has been assigned to HQ AFSFC/SFC, this authority will be exercised only by the Commander, AFDW, the officer exercising GCMCA over Air Force personnel in those institutions.

11.20. Publication of SecAF Actions under Article 74, UCMJ. Promulgate actions taken by the SecAF in cases specified in paragraph 11.17 in appropriate GCM orders. RCM 1114(b).

The Director, Air Force Personnel Council and TJAG are authorized to announce the action taken by SecAF in all other cases.

Figure 11.1. Sample Format for Defense Submission (Article 69, UCMJ).

(SUMMARY) (SPECIAL) (GENERAL) COURT-MARTIAL

UNITED STATES) (Application for Relief

)
)
v.)
)
)

Under Article 69(b), UCMJ) or (Matter for Consideration on Examination under Article 69(a), UCMJ)

(GRADE AND NAME OF) (Date)
ACCUSED))

TO: The Judge Advocate General, United States Air Force

The following information is provided under AFI 51-201, paragraph 11.6.3.:

1. The accused's name, service number and present mailing address: (Grade and Name of Accused), (SSN), (Present Mailing Address), and (Base of assignment (if applicable)).

2. Date, place and type of court-martial: (indicated information).

3. The sentence of the court as approved and any subsequent reduction by clemency or otherwise: (indicated information).

4. The accused requests vacation of the court's findings and sentence. The specific ground upon which the accused requests relief is as follows:

(succinct statement of the specific relief requested and the specific grounds for the relief)

NAME, Grade, USAF
(Defense Counsel) (Accused)

Subscribed and sworn to before me this __ day of _____, 20__.
Judge Advocate or Notary Public

Figure 11.2. Sample Memorandum When Accused Can No Longer Remain on Involuntary Excess Leave.

MEMORANDUM FOR (Accused)

FROM: HQ 11 WG/CC
(Address)

SUBJECT: Required Excess Leave for (accused)

1. On 15 May 2009, your sentence to a bad-conduct discharge was approved by the convening authority for 11 WG and you were directed to take involuntary leave pursuant to Article 76(a), Uniform Code of Military Justice. On 6 July 2011, the [Air Force Court of Criminal Appeals][United States Court of Appeals for the Armed Forces] set aside the [action of the convening authority][findings of guilt and the sentence][sentence].

[Set aside action of the convening authority]

2. Because the Court set aside the action of the convening authority, you must elect one of the following options:

a. Continue on voluntary appellate leave, in a non-pay status, until a new action of the convening authority is taken in your case; or

b. Be restored to active duty and placed in a casual status at HQ 11 Wing, Joint Base Andrews Naval Air Facility Washington.

3. If your sentence, which included a bad-conduct discharge, is approved, your voluntary excess leave, should you elect it, will be cancelled and you will then be required, under Article 76(a), Uniform Code of Military Justice (UCMJ), to take involuntary leave pending completion of appellate review of your conviction by court-martial.

4. While on voluntary excess leave, you will remain a member of the United States Air Force on active duty and subject to the UCMJ, to lawful orders and regulations, and to recall from required leave as provided in paragraph 5. You and your family members are entitled to medical care, use of military exchange facilities and commissaries, and other military welfare benefits. Because these entitlements may be curtailed or terminated for cause, you and your family members must maintain proper conduct while using them and follow all applicable rules. In order for you to make use of these benefits, you and your family members will be issued appropriate identification cards of limited duration.

5. It is important that you provide a correct leave address and report any changes in address. Failure to do so may result in loss of valuable opportunities to recoup pay and allowances to which you may be entitled if your sentence is disapproved or set aside, and it could prevent you from receiving important instructions. Further, you are subject to recall from voluntary excess leave. Failure to return promptly to your unit, if so directed by order delivered to you in person

or mailed to you at your leave address, could result in your being placed in absent without leave or desertion status.

Convening Authority signs

[Set aside findings of guilt and sentence][sentence]

2. Because the [Air Force Court of Criminal Appeals][United States Court of Appeals for the Armed Forces] set aside the [findings and sentence][sentence] in your case, you are no longer on required excess leave and will be restored to active duty. You are required to contact the Force Support Flight at JB Andrews on (date). If you have any questions, contact 11 FSS/DPM, at (phone number).

Convening authority signs

Figure 11.3. Sample Convening Authority's Memorandum Directing Limited Hearing.

(Date)

MEMORANDUM FOR (JA Office)

FROM: (Convening Authority)

SUBJECT: Hearing - *United States v. (Grade and Name of Accused)*

1. On (Date), the (United States Supreme Court)(United States Court of Appeals for the Armed Forces)(Air Force Court of Criminal Appeals)(The Judge Advocate General) set aside the (action) (findings of guilt and the sentence)(sentence)(the decision of the United States Court of Appeals for the Armed Forces)(the decision of the Air Force Court of Criminal Appeals). The (United States Supreme Court)(United States Court of Appeals for the Armed Forces)(Air Force Court of Criminal Appeals)(The Judge Advocate General) decision became final on (date). The record of trial was returned for submission to an appropriate convening authority for a hearing before a military judge as set forth in the decision. (On (date), the case was then transferred from (old convening authority) to (new convening authority) for appropriate action.) As the designated convening authority in this case, I direct a hearing to take place at the (appropriate unit and legal office) at (Air Force base), (state), date and time to be determined.

2. A military judge will be appointed to conduct a hearing in accordance with the (United States Supreme Court's) (United States Court of Appeals for the Armed Forces') (The Judge Advocate General's) decision.

(NAME)
(Grade), USAF
Commander

Attachment:
(Decision)

Figure 11. 4 Sample Legal Office Notification of *DuBay* Hearing.

(Date)

MEMORANDUM FOR AF TRIAL JUDICIARY

FROM: (Convening Authority)

SUBJECT: *DuBay* Hearing - *United States v. (Grade and Name of Accused)*

1. As the (general) (special) court-martial convening authority in the case of *United States v. (Name of Accused)*, I request that you convene a limited hearing at (Air Force Base and State) in the above styled case. The hearing should be conducted in accordance with Article 39(a), UCMJ, to receive evidence and make findings on the issues.

2. The scope of the post-trial hearing should be limited to the matters outlined by the (United States Court of Appeals for the Armed Forces)(Air Force Court of Criminal Appeals) in its (date) opinion. You should conduct the hearing as soon as practicable setting out specific findings of fact. The (CAAF)(AFCCA) opinion is attached for guidance in conducting your hearing.

3. The hearing shall be recorded verbatim and attached to the record of trial and be conducted in the manner contemplated by *U.S. v. DuBay*, 37 C.M.R. 411 (C.M.A. 1967). As the military judge in this case, you should set the date for the hearing and notify the accused and counsel for the government and defense.

4. The following have been detailed as counsel in this case:

a. Trial Counsel: (Grade and Name)
b. Military Defense Counsel: (Grade and Name)

(NAME)
(Grade), USAF
Commander

2 Attachments:
1. Record of Trial w/Atchs, *United States v. (Name of Accused)*
2. (CAAF)(AFCCA) Opinion

Chapter 12

AUTOMATED MILITARY JUSTICE ANALYSIS AND MANAGEMENT SYSTEM (AMJAMS)

Section 12A—General Information

12.1. Purpose. The purpose of AMJAMS is to collect data pertaining to investigations, nonjudicial punishment imposed pursuant to Article 15, UCMJ, trials by court-martial, and related military justice activity. The information collected is required:

12.1.1. To conduct statistical studies that measure disciplinary rates and trends and evaluate military justice involvement as it affects the quality of the force and the personnel needs of the service;

12.1.2. To provide various management reports to judge advocate personnel at all levels;

12.1.3. To provide statistical data to the Department of Defense concerning military justice;

12.1.4. To provide raw data to the Defense Incident Based Reporting System (DIBRS); and,

12.1.5. To reply to inquiries concerning military justice.

12.2. Program Uses. AMJAMS collects detailed information on offenses and processing timelines as well as demographic information on the participants in the judicial and nonjudicial punishment process. The information from AMJAMS provides effective management tools for use by Headquarters USAF, major commands, general and special court-martial jurisdictions, the judiciary, and the appellate divisions. When used properly, the information will assist in eliminating or highlighting excessive processing delays and in monitoring the current status of military justice actions from the investigation stage through to completion of the appellate process.

12.3. Policy. AMJAMS inputs are to be timely, complete, and accurate. Timely collecting, reporting, and processing of military justice information is essential to staff judge advocates at all levels. Inputs are to be completed as soon as possible after a military justice "event" occurs in a case, beginning with the Investigation Module. For the purpose of this Instruction, "events" are defined as data fields in AMJAMS. If the data field is applicable to a case, an input should be made as soon as the data is available and updated as the need arises. Refer to the online Help Topics in AMJAMS for detailed instructions on data entry.

Section 12B— Data Entry

12.4. Responsibilities.

12.4.1. Base and GCM staff judge advocate personnel are primarily responsible for all AMJAMS data entry except appellate data. AMJAMS data should be complete and accurate upon input.

12.4.2. GCM staff judge advocate personnel are primarily responsible for reviewing all AMJAMS inputs for completeness and accuracy with regard to those entries for which they are responsible, not to include appellate data.

12.4.3. AFLOA/JAJM and appellate court personnel are primarily responsible for data entry in the TJAG and appellate folders.

Section 12C—Investigations

12.5. Investigations. New cases should be opened in AMJAMS as investigations immediately upon becoming aware of a potential Article 15, court-martial, or circumstances reportable as a special interest case. When data entry would potentially compromise an investigation, delayed data entry is authorized. Report circumstances of incident via email.

12.5.1. Member data. This section has six tabs: Member, Race, Career/Pay, Duty Status, Prior Actions, and Commander. All of them are equally important and for the most part, self-explanatory. The information found in these tabs is pulled into AMJAMS from a file that is loaded from AFPC monthly. These fields should be edited or manually entered if changes have occurred in personal data since the AFPC update or if an area is left blank by AFPC. Fields not populated by the AFPC data pull may require user inputs. Manual input of Reserve members will likely be required.

12.5.2. Text Fields. Three text fields are provided for specific types of data. Information that is or should be entered in a specific field elsewhere in the database should not be entered in any text field.

12.5.2.1. Case Status. Enter data describing the current status of the case. Valid data for this field may include information regarding situations that may delay or otherwise affect the processing of the case, i.e. "Commander TDY until_____; Accused hospitalized until; Defense counsel unavailable until;" etc. Enter a "Current as of" date each time this field is updated.

12.5.2.2. Case Notes. Legal offices may enter day-to-day notes in this field that provide useful information in the administrative processing of the case. Text fields, if applicable, should be entered in reverse chronological order (i.e. current information on top).

12.5.2.3. Narrative Description. Enter enough information in sufficient detail to provide a clear understanding of the facts and circumstances involved in the case (who, what, when, where, how) for each offense investigated. This field should be updated as significant events occur. Also, do not put any information in this field that could compromise an ongoing investigation.

12.5.3. Special Interest Cases. If the case contains one of the qualifying criteria listed in Section 13E of this Instruction, designate the case as a special interest case by selecting "YES," NAF/MAJCOM reporting required. If the case is disposed of through an Article 15 and falls within the reporting requirements of Section 13E, report the case to AFLOA/JAJM by SIR until punishment is imposed. If the case is disposed of through court-martial and falls within the reporting requirements of Section 13E, report the case to AFLOA/JAJM by SIR until sentence is announced or other terminating disposition. If the case does not qualify for special interest reporting to AFLOA/JAJM, but does meet MAJCOM or NAF special interest reporting requirements, select "YES" NAF/MAJCOM reporting required on the NAF/MAJCOM Reporting pane. Even if the case is disposed of by an administrative action (separation, LOR, LOA, etc.) continue to report the case to AFLOA/JAJM by SIR until completion.

12.5.4. Investigative Info. Add the appropriate investigating agency, jurisdiction, date of the report of investigation, and date the offense was discovered.

12.5.5. Pending Offenses. All offenses and violations being investigated must be entered in this module regardless of jurisdiction. For civilian investigations, input offenses that closely coincide with the civilian code violations. Offenses should not be deleted from this area once the case has been disposed.

12.5.5.1. Case Information. Complete each field to include the STC Consultation on Sexual Assault Cases. Consultation with STC/JAJG is encouraged prior to the preferral or disposition of the allegation in sexual assault cases. If Other/No contact reason is marked, enter the reason in the text field.

12.5.6. Investigation Personnel. The folder has three tabs – Defense Counsel, Investigation POC, and Base POC. Use the local look-up tables to add these persons under their affiliated tabs. If there is more than one counsel, add them as appropriate. When the investigation is converted to an Article 15 or court-martial, these names will copy down to Article 15 personnel folder or trial personnel folder. Do not delete personnel from this folder if they had any involvement in the case. If personnel are later replaced, add new personnel and indicate on the tab that they are the current contact person.

12.5.7. Restraint. If restraint is imposed on the member (military or civilian) during the investigation phase, add this folder and enter the type of restraint imposed, dates imposed, and date of the pretrial hearing if applicable. Keep in mind that restriction imposed as a result of an investigation is considered a form of restraint.

12.5.8. Case Disposition. Cases must be disposed of immediately upon the commander's determination of forum. For cases processed by civilian authorities, the cases will remain in the investigation status until resolution of alleged offenses.

Section 12D—Pretrial

12.6. Pretrial. All folders and corresponding fields that apply to a particular case must be completed in their entirety. AMJAMS report criteria and logic may be dependent upon any number of fields in AMJAMS and not necessarily those used at base or NAF level. It is imperative for database integrity that the fields within the area of control at base and NAF level be completed if applicable to the case.

12.6.1. Folders. Add folders to the AMJAMS case tree as cases progress through the military justice process. Do not add folders that do not apply (e.g. If the member did not request IMDC, do not add that folder, etc.).

12.6.1.1. Pretrial Information. This folder contains the Case Ready Date. The date is copied to this folder from the Investigation module and can only be edited in the Investigation module. It also calculates the Speedy trial date. Input fields that recalculate the speedy trial date are located in the Trial delay folder.

12.6.1.2. Discharge Request. Annotate whether the member requested discharge in lieu of trial or for officers, resignation for the good of the service (RILO). This field is mandatory even if the member does not request discharge. If the member initially does

not request discharge, but later changes his option, update the discharge fields using the same discharge folder to reflect the request and the action taken.

12.6.1.3. Pretrial Restraint. The restraint folder may be added at any time the need arises. Add every instance of pretrial restraint, reflect all hearing dates, and the date restraint was terminated in this folder. If pretrial restraint does not terminate until the date of sentence or acquittal, the termination date will be entered automatically.

12.6.1.4. Charges Preferred. Pending offenses from the Investigation module will be copied to the Charges Preferred folder. If an offense entered in Pending Offenses will not be preferred, delete that offense from Charges Preferred. If an offense will be added that was not in Pending Offenses, add the offense in the Charges Preferred module. Once an offense has been preferred, only AMJAMS Administrators can delete the preferral date and offense. After all applicable data is entered in the "Charges Preferred" module, print the Charge Sheet (DD Form 458) from AMJAMS.

12.6.1.4.1. Accuser. Enter data on the accuser (individual causing charges to be preferred) and the officer that administered the oath.

12.6.1.5. Special Offense Identifiers. Offenses requiring separate, individualized tracking have been assigned special offense identifiers. If the case involves offenses falling within the special offense category, please identify the offense by selecting the corresponding special offense identifier. A drop down list of potential identifiers is available for your convenience. Note: More than one special offense identifier may apply to each offense, i.e., 120-A, Rape, could use both "40" sex offender registration and "45" DNA processing required.

12.6.1.6. Trial Personnel. Enter data pertaining to all trial participants in their respective categories (i.e., Defense Counsel, Trial Counsel, Court Reporter, etc.). Add as many participants as applicable, with the exception of the military judge. Use this tab first to reflect the military judge assigned to the case. If you need to add another military judge, add a separate JUDGE item. The Central Docketing Office (CDO) will complete the judge's information. Do not delete personnel that participated in any part of the case if they are subsequently replaced or removed from the case. Ensure "current" is checked if the person is the current participant. Mark this block even if the participant is the only one in their category.

12.6.1.7. Judge. This input is normally completed by the CDO.

12.6.1.8. Article 32 Investigations. (General courts-martial only). If the accused waives the Article 32 hearing, annotate the date waived in this module. Enter the applicable dates of the Article 32 hearing from the date the Investigating Officer is appointed to the date the report was completed. If additional charges are later preferred and a second Article 32 is convened, add a separate Article 32 folder. In cases where an Article 32 is reopened, change the date completed on the original Article 32 folder.

12.6.1.8.1. Referral Package. Enter the date the referral package was forwarded to the GCM SJA and the date the referral package was received by the GCM SJA. Enter the date the GCM SJA completed the pretrial advice to the general court-martial convening authority.

12.6.1.8.2. Investigating Officer. Enter data pertaining to the Investigating Officer appointed by the convening authority on this tab.

12.6.1.9. Charges Referred. Convening Order. Enter data for the convening order number, date and MAJCOM issuing the order.

12.6.1.9.1. All current charges preferred (unless dropped prior to this event date), should be entered for referral at this time. Input the date the convening authority referred the charges and the date the referred charges were served on the accused for each specification. The date of service is a mandatory field.

12.6.1.9.2. Convening Authority. Enter court-martial convening authority data.

12.6.1.9.3. Special Instructions. Any special instructions from the convening authority concerning referral to a court should be reflected in this module (i.e., charges referred as capital or none.).

12.6.1.10. Circuit Information. CDO inputs the entries into this folder.

12.6.1.11. Pretrial Agreement. Add this folder only if the accused submits a pretrial agreement and it is accepted by the Government. Annotate all conditions of the agreement. If the pretrial agreement is subsequently withdrawn, enter the date withdrawn and by whom (Government or Defense).

12.6.1.12. Request for Individual Military Defense Counsel. Add this folder only if the accused requests an Individual Military Defense Counsel (IMDC). Input whether the request was granted or denied.

12.6.1.13. Additional Charges Preferred. If additional charges are preferred, they should be added in this folder. DO NOT attempt to add them to the original preferral. Ensure all fields are completed to include the specification text. Again, fill in accuser data as you would in the original preferral.

12.6.1.14. SPCMCA Disposition. If the special court-martial convening authority dismisses or changes the forum of the case prior to referral, use this module to reflect the disposition. Contact AFLOA/JAS to change the forum of the case.

12.6.1.15. GCMCA Disposition. If the general court-martial convening authority dismisses or changes the forum of the case prior to referral, use this module to reflect the disposition. Contact AFLOA/JAS to change the forum of the case.

12.6.1.16. Charges Dropped. If charges are dropped after preferral, but before referral, use this module to clear them from the list. DO NOT delete them from the Charges Preferred module. Annotate the date the charges were dropped.

12.6.1.17. Referral Withdrawn. If referred charges are withdrawn, add this folder and enter the date that the referral was withdrawn by the convening authority. If the charges are later re-referred, there is no need to re-prefer unless the charges are dropped subsequent to withdrawing the referral.

12.6.1.18. Offenses Under Article 15. If member refuses nonjudicial punishment and charges are preferred, list the offenses that were charged under nonjudicial punishment in this module.

12.6.1.19. Trial Delay. List all delays during trial in this module. The base office enters delays approved by the convening authority prior to referral. Personnel enter delays approved by the military judge subsequent to referral. Indicate whether the delay days are excluded from the speedy trial rule.

Section 12E—Trial

12.7. Trial. All folders that apply to your case must be added as the event occurs (i.e., Article 39(a) Session, Trial Information, Adjudged Sentence), in the order that it occurs. Adding folders out of sequence could affect some of the system logic and cause incorrect data to be displayed on the AMJAMS reports.

12.7.1. Article 39(a) Session. Record the arraignment 39(a) session convened in courts-martial. If motions occur during the arraignment session, there is no need to add an additional Article 39(a). These sessions are recorded and reflected as arraignment sessions. If the military judge has arraignment sessions and motions sessions that result in separate TDYs, add another Article 39(a) folder to reflect the separate sessions. (For SCM add the preliminary proceedings folder to indicate the date of arraignment.)

12.7.1.1. Prior to Pleas. Motions to dismiss one or more offenses submitted prior to pleas should be reflected in this tab. If a motion is granted, annotate the event and reflect the date of the dismissal. Add the charges dismissed to this module by clicking the "View charges dropped" link and selecting the dismissed offenses from the list.

12.7.1.2. Subsequent to Pleas. Motions submitted subsequent to pleas to dismiss or for a finding of not guilty for one or more offenses, or for a mistrial should be reflected on this tab. Charges withdrawn, dropped, or dismissed subsequent to pleas must be listed on the promulgating order. Therefore, you must completely annotate any of the above applicable actions on this tab. Enter the date the military judge granted the motion. Add the charges dismissed to this module by clicking the "View charges dismissed or finding of not guilty granted" link and selecting the dismissed offenses from the list. If the military judge declares a mistrial in the case after pleas, annotate the date in this section.

12.7.2. Trial Information. Indicate whether the case is a single trial or joint trial, if any conditional pleas have been filed, and whether the accused elected to be tried by military judge alone, officers, or a panel with enlisted members.

12.7.2.1. Conditional Pleas. With the approval of the military judge and the consent of the Government, an accused may enter a conditional plea of guilty, reserving the right, on further review or appeal, to review of the adverse determination of any specified pretrial motion. If the accused prevails on further review or appeal, the accused shall be allowed to withdraw the plea of guilty. (This is not to be confused with a PTA).

12.7.3. Adjudged Sentence.

12.7.3.1. Pleas and Findings. Enter pleas and adjudged findings in this section. Any charges dismissed or withdrawn subsequent to pleas will automatically be included in this section with the applicable result.

12.7.3.1.1. Lesser Included Offenses (LIO). If the accused entered a plea to a lesser included offense, select the "Guilty of lesser included offense" in the plea drop down

box and enter the offense code, level of involvement, and completed or attempted for the offense to which they pled. If the accused was found guilty of a lesser included offense, enter the offense code, level of involvement, and completed or attempted for the offense to which they were found guilty.

12.7.3.1.2. Not Guilty by Reason of Insanity. If the accused pled and/or was found guilty by reason of insanity (NG-Ins), indicate the plea and findings to the applicable offense.

12.7.3.1.3. Deletions and Substitutions. If the pleas or findings included deletions and substitutions, check the D&S box at the bottom of the screen. Enter the deletions and substitutions verbatim from the transcript for the specific specifications and in the appropriate plea or finding field.

12.7.3.2. Adjudged sentence. Enter the sentenced adjudged by the court in this section.

12.7.4. DIBRS. In 1996 the Department of Defense (DoD) established a comprehensive database called the "Defense Incident-Based Reporting System (DIBRS)" to track criminal and other high interest incidents involving personnel from "cradle to grave." The authority for this system is DoD Directive 7730.47, 15 Oct 96 and its implementing guidance is DoD 7730.47-M, *Manual for Defense Incident-Based Reporting System*. The system was designed to meet the reporting requirements mandated by Congress in the Uniform Federal Crime Reporting Act of 1988; the Brady Handgun Violence Prevention Act of 1994; and recurring requests for overall DoD law enforcement data.

12.7.4.1. DIBRS/VWAP Reporting. Within DIBRS there are eight reporting segments: administrative, offense, property, victim, offender/arrestee, commander's action, results of trial, and corrections. SF and AFOSI are primarily responsible for the segments and, in most cases, will initiate the reporting process when they receive a credible report of a criminal incident. JA is only responsible for the "results of trial" segment. The data for this segment is gathered through the use of AMJAMS and most of it is already entered by a paralegal. There is also data that is required for VWAP reporting.

12.7.4.1.1. DIBRS. Enter the Originating Agency Identifier (ORI) number used by the FBI to identify the base responsible for investigating the incident, the Incident number, offender ID, and the Federal Identifier (FID) that designates the investigating activity. Data for these fields may be obtained from the lead agency investigating the case. If more than one incident occurred and was investigated separately, add another incident.

12.7.4.1.2. VWAP.

12.7.4.1.2.1. Trial Results Details. Enter the Unit Identification Code (UIC) that corresponds with the location of the court-martial and the UIC of the convening authority. Be aware that these codes may differ. Enter the promulgating order number and date of the order. If the investigated offenses resulted in disposition other than trial, indicate the disposition in the trial clearance field. Enter the number of days of judicially ordered credit for pretrial confinement and enter the number of pretrial confinement days.

12.7.4.1.2.2. Enter the number of victims and witnesses electing to be notified

before and after trial.

12.7.5. Article 62 Appeals. Add this tab if the government appeals any ruling by the military judge during trial. Record the date of the appeal, the issues raised by the government and the date the appeal was forwarded to AFLOA/JAJG.

12.7.6. Writs. Writs will be added to the case if applicable, by the division filing the Writ. Enter all corresponding data (date filed, type, relief requested, etc.)

Section 12F—Post-Trial

12.8. Post-Trial. All AMJAMS entries must be complete and timely through the entire court-martial process prior to forwarding the ROT to AFLOA/JAJM.

12.8.1. Submission of Matters. Enter the legal office representative and address.

12.8.2. ROT Authentication. The ROT complete date is the date the court reporter completes the transcription of the ROT or the date signed in block 12 of the DD Form 2329 for SCMs. The base office enters the date ROT complete, the number of pages in the transcript, the number of volumes, the date the ROT is authenticated and whether the case was authenticated by Military Judge. The CDO will complete the remaining fields.

12.8.3. Post-Trial Action. Enter applicable data in all fields on this tab including whether or not the sentence was mitigated by the convening authority. The modified field is used at the appellate level only. Ensure the CA action text is entered verbatim.

12.8.3.1. Suspension. If the convening authority suspends any portion of the punishment, enter the suspension data and when the suspension ends in this section.

12.8.3.2. Approved Findings. Enter the findings approved by the convening authority in this section. If the approved findings include lesser included offenses, enter the offense code, level of involvement, and completed or attempted for the offense approved by the convening authority in this section.

12.8.3.3. Approved Sentence. If the adjudged sentence is approved by the convening authority it is automatically copied to this section and no other entry is necessary. If the convening authority mitigated any portion of the sentence, the mitigated portion of the sentence will be entered here.

12.8.4. 14-Day Letters. Enter the date notification was sent to the Finance and Personnel Office of cases with adjudged forfeitures or reductions.

12.8.5. Post-Trial Progress. If the accused waives appellate review or appellate counsel, enter the selection in this section. Enter the date the ROT was reviewed for accuracy and completeness. Enter the date the AMJAMS inputs on the case were reviewed for accuracy and completeness. Enter the date the ROT was forwarded to AFLOA/JAJM for appellate review and/or filing.

12.8.6. Member Addresses. Enter the accused's address used on the CMO in the CMO Address section and when the accused is required to take excess leave, enter the excess leave address in the Excess Leave section. The recipient (base, NAF, or appellate divisions), of updated leave address information is responsible for updating the folder in AMJAMS.

12.8.7. Article 64 Review. Enter the date the ROT was forwarded to the GCM SJA for the supervisory review (Article 64(a), UCMJ). NAF personnel will enter the date received by the GCM SJA, the date of the review and indicate if the court-martial was found legally sufficient.

12.8.8. Article 64(b) Review. Enter the date the ROT was forwarded to the court-martial convening authority for an Article 64(b) review. NAF personnel will enter the date of the GCMCA action, order number, and indicate if the convening authority mitigated or modified the adjudged sentence.

Section 12G—Appellate Processing

12.9. Appellate Inputs. AFLOA/JAJM is the disposition authority for all records of trial. The record of trial is assigned an ACM number upon receipt of the completed ROT by AFLOA/JAJM. The ACM number is displayed in the case window of AMJAMS.

12.10. Appellate Process. The approved sentence determines the level of appellate review. Each appellate office will input data into AMJAMS as it applies to their responsibility for the case. Base offices may check the status of appellate review for their respective cases at any time during the appellate process.

12.11. Appellate Review.

12.11.1. ROT Information. This folder contains the ACM number assigned to the ROT, date the ROT was received, date the record was forwarded to the Air Force Court of Criminal Appeals (AFCCA), number of volumes, transcript pages, audio and/or video tapes, and DVDs. The current convening authority and current physical location of the record of trial is also maintained in this folder. The Appellate Records division is responsible for entries in this folder.

12.11.2. Subsequent ROT Information. If the ROT is returned to the convening authority, this folder will be used to show the record's return for completion of the appellate process. The Appellate Records division is responsible for entries in this folder.

12.11.3. Appellate Personnel. This folder contains all appellate personnel assigned or participating in the appellate process of a case. Identify personnel by the participating role (Appellate Defense Counsel, Appellate Government Co-Counsel, Appellate Judge, etc.), and annotate whether the person is the current POC. All appellate divisions are responsible for entries in this folder.

12.11.4. Article 69(a). If the record of trial is subject to Article 69(a) review, add this folder and annotate the date of review and indicate whether relief was granted to the accused. The Appellate Records division is responsible for entries in this folder.

12.11.5. Article 69(b). If the record of trial is subject to Article 69(b) review, add this folder and annotate the date of review and indicate whether relief was granted to the accused. The Appellate Records division is responsible for entries in this folder.

12.11.6. Article 73. If the member requests a new trial, this folder should be added to show the processing of the request and the determination by the appropriate appellate court or TJAG. The Appellate Records division is responsible for adding this folder. Each appellate division is responsible for entries on briefs and enlargements.

12.11.7. Rehearings. If the case is sent back for a rehearing from the appellate courts, the appellate records personnel will add a Rehearing folder.

12.11.7.1. Rehearing on Sentence. If the rehearing is ordered on sentence alone, base personnel should add the Trial and Post Trial Folder only and enter all applicable data in the fields as they pertain to the rehearing including participating trial personnel.

12.11.7.2. Rehearing on Findings and Sentence. If the rehearing is ordered on findings and sentence, base personnel should add Pretrial, Trial, and Post Trial folders. Previously preferred charges that will carry forward to the rehearing can be copied from the original preferral using the original preferral date. A new referral folder should be added to reflect the new referral data.

12.11.8. *DuBay* Hearings. If a *DuBay* Hearing is ordered, add the *DuBay* folder and Summary and any other applicable folders at the point in the court-martial proceeding when the hearing takes place.

12.11.9. Writs. Writs will be added to the case if applicable, by the division filing the Writ. Enter all corresponding data (date filed, type, relief requested, etc.).

12.11.10. Air Force Court of Criminal Appeals. This folder is added by appellate personnel.

12.11.11. United States Court of Appeals for the Armed Forces. This folder is added by appellate personnel.

12.11.12. United States Supreme Court. This folder is added by appellate personnel.

12.11.13. The Judge Advocate General. This folder is added by appellate personnel.

12.11.14. Clemency. This folder is added by AFLOA/JAJR personnel.

Section 12H—Reports

12.12. Management Reports. AMJAMS reports are generated and run on a monthly basis. There are two ways to access the reports – through AMJAMS – or go directly through the FLITE. If you are in the AMJAMS program, select “Reports.” This will automatically open up your web browser to the AMJAMS reports page. If you are in FLITE, go to the “Reports” drop-down and select “AMJAMS.”

12.13. Article 6 Processing Slides. These Article 6 slides can be accessed through the internet and are created in Microsoft PowerPoint. Also, the slides can be retrieved for all levels, from the base level to the Air Force level. You may access them through AMJAMS or go directly through FLITE. If you are in the AMJAMS program, select “Reports” and then “Slides.” Select “Article 6 slides” and input your criteria to run the slides. This will automatically open up your web browser to the AMJAMS reports page. If you are in FLITE, go to the “Reports” drop-down and select “AMJAMS” and continue as above.

Chapter 13

MISCELLANEOUS MILITARY JUSTICE MATTERS

Section 13A—Staff Judge Advocate

13.1. Staff Judge Advocate Title. Unless otherwise specified by TJAG, the senior officer of TJAG's Corps on a commander's staff is designated the "Staff Judge Advocate" of that command. All other judge advocate officers assigned to a command are designated "Assistant Staff Judge Advocates." Use these titles for pretrial advice, post-trial recommendations and court-martial orders. The Senior Assistant Staff Judge Advocate signs "Acting as the Staff Judge Advocate" when the Staff Judge Advocate is absent or ineligible to act in a particular case. In all other matters, titles such as "Deputy Staff Judge Advocate," "Chief, Military Justice Division," and "Executive Officer," may be used.

13.1.1. Convening authorities may delegate military justice administrative duties to the Staff Judge Advocate (SJA) or any other attorney assigned to the servicing SJA's office. Figure 13.1 is a sample delegation letter. In addition to the duties listed in Figure 13.1, convening authorities may delegate any other military justice administrative duties not expressly requiring convening authority action. When signing a military justice matter for the convening authority, use the signature element, "FOR THE COMMANDER."

Section 13B—Explanation of the UCMJ (Article 137)

13.2. Required Explanation of Specified UCMJ Articles.

13.2.1. In General. Brief personnel on the UCMJ, as required by Article 137.

13.2.2. SJA Responsibilities:

13.2.2.1. A judge advocate, a Department of the Air Force civilian attorney, or a 7-level or higher paralegal, shall brief personnel on the requirements of Article 137, UCMJ. Instructional aids may be used, provided a qualified briefer is present to answer questions.

13.2.2.2. The SJA for 802 MSG must ensure trainees receive the required briefing from regular instructors at the Air Force Military Training Center within 14 calendar days of entry on active duty.

13.2.2.3. Record attendance at such training, including number of people trained and time spent in training, so that unit training monitors can provide this information to MAJCOM and Air Staff Ancillary Training Program OPRs for biennial review. See AFI 36-2201, *Air Force Training Program*, Chapter 4.

13.2.3. Unit Responsibilities. Upon receipt of the monthly list of personnel required to receive training, the unit commander or designated representative contacts the SJA's office to schedule personnel for the briefing and ensures each person scheduled attends.

13.2.4. Frequency, Content and Duration. The SJA determines the frequency, content and duration of training sessions to meet the following requirements:

13.2.4.1. Complete the initial explanation within 14 calendar days of entry on active duty;

13.2.4.2. Complete the 6-month explanation within 30 calendar days of the last day of the month in which the individual completed six months of active duty; and

13.2.4.3. Complete the reenlistment explanation within 30 calendar days of an individual's reenlistment.

13.2.4.4. Members of a reserve component (AFRES and ANG) receive the initial explanation within 14 calendar days of initial entrance on a duty status with a reserve component, again after completing basic training, and at the time of reenlistment.

13.2.5. Explain the following topics:

13.2.5.1. Types of punitive and administrative discharges;

13.2.5.2. Bases for characterizing service;

13.2.5.3. Articles 2, 3, 7-15, 25, 27, 31, 37, 38, 55, 77-134, and 137-139, UCMJ;

13.2.5.4. The benefits, disadvantages, and possible future effects of each type of service characterization;

13.2.5.5. The denial of certain benefits to most persons who fail to complete at least two years of an original enlistment (38 U.S.C. § 5303A); and

13.2.5.6. A detailed explanation of the applicable laws and regulations governing sexual conduct by members of the armed forces.

Section 13C—Direct Communications and Reports

13.3. AFLOA/JAJM Requests for Information.

13.3.1. In General. AFLOA/JAJM routinely receives inquiries concerning military justice actions against Air Force members and relies heavily on information from bases to answer the inquiries. A complete, accurate and timely response to requests for information is critical. Do not construe requests as criticism of case handling, nor view them as a mandate for particular action. AFLOA/JAJM may communicate directly with any organizational level. When providing information, send informational copies of replies to intermediate levels of command and through MAJCOM level to AFLOA/JAJM to ensure all are informed.

13.3.2. All Responses. Respond to AFLOA/JAJM via e-mail directly to the requestor or to **AFLOAJAJMworkflow@pentagon.af.mil.** In all responses include:

13.3.2.1. A detailed response to specific inquiries;

13.3.2.2. Narrative of the activity, including dates, resulting in the action in question; and,

13.3.2.3. Any other unique or significant aspects of the case.

13.3.3. Responses Involving Courts-Martial. In addition to paragraph 13.3.2, provide the following information, as appropriate:

13.3.3.1. Dates and nature of pretrial restraint and associated proceedings;

13.3.3.2. Type of court-martial and summary of charges and specifications;

13.3.3.3. Date and source of preferral as well as referral and trial date;

13.3.3.4. Information about the Article 32 investigation, including by whom directed, identity of accused's counsel, a listing of Government witnesses, any defense witnesses that appeared, a brief synopsis of all witness testimony, and the investigating officer's recommendations;

13.3.3.5. Summary of the evidence, including whether the accused testified;

13.3.3.6. Pleas, findings, sentence, and court composition;

13.3.3.7. Prior disciplinary record considered;

13.3.3.8. Date and action of the convening authority;

13.3.3.9. Date and disposition of Article 64, UCMJ, review;

13.3.3.10. Date ROT is expected to be sent to AFLOA/JAJM;

13.3.3.11. Information concerning post-trial confinement; and

13.3.3.12. Information concerning accused's excess leave.

13.3.4. Responses Involving Article 15 Actions. In addition to matters in paragraph 13.3.2, provide all pertinent names, dates, and individual elections throughout the Article 15 process from notification of intent to punish through appeal (essentially the information required on the AF Form 3070, Record of Nonjudicial Punishment Proceedings); and discharge action contemplated, if any.

13.3.5. Responses Regarding Civilian Charges. In addition to matters in paragraph 13.3.2, provide the following as appropriate:

13.3.5.1. Jurisdiction involved (if in a foreign jurisdiction, indicate whether a waiver of jurisdiction has been requested).

13.3.5.2. Charges;

13.3.5.3. Place and dates of pretrial confinement;

13.3.5.4. Name of individual's defense counsel, if any;

13.3.5.5. Summary of the evidence;

13.3.5.6. Maximum authorized punishment;

13.3.5.7. Pleas, findings, and sentence;

13.3.5.8. Appeals filed; and

13.3.5.9. Administrative or disciplinary action taken or contemplated by military authorities.

13.4. Local Responses to High Level Inquiries. When Members of Congress inquire directly to field commanders concerning disciplinary action against a member, retain a copy of the inquiry and reply in the office administrative file for the action. AFI 90-401, *Air Force Relations with Congress*, Chapter 3, provides additional guidance.

Section 13D—Extrajudicial Statements to the Public Relating to Criminal Proceedings and Release of Court-Martial Records

13.5. General. Information may not be disseminated if it could reasonably be expected to interfere with law enforcement proceedings or deprive a person of a right to a fair trial or an impartial adjudication in a criminal proceeding. The determination of whether a release is permissible includes an assessment of the type and details of information to be released and its source, the type of proceeding, and the stage of the proceeding. The release of information relating to a criminal proceeding is subject to the Air Force Rules of Professional Conduct, the Air Force Standards for Criminal Justice, implementing directives, security requirements, judicial orders protecting information, and applicable laws such as the Privacy Act, the Freedom of Information Act (FOIA), and the Victim and Witness Protection Act. See paragraph 13.6.1.1 with respect to the FOIA's balancing test concerning the privacy rights of an accused.

13.5.1. Air Force representatives must not encourage or assist news media in photographing or televising an accused being held or transported in custody.

13.5.2. This section does not apply to the release of information by military or civilian defense counsel. However, defense counsel, both military and civilian, must comply with the Air Force Rules of Professional Conduct and the Air Force Standards for Criminal Justice, portions of which address trial publicity by defense counsel. Military defense counsel must comply with the requirements and restrictions of the FOIA and the Privacy Act with respect to the release of Air Force records.

13.6. Extrajudicial Statements. Extrajudicial statements are oral or written statements made outside of a criminal proceeding that a reasonable person would expect to be disseminated by means of public communication. There are valid reasons for making certain information available to the public in the form of extrajudicial statements, when such release otherwise complies with applicable rules and regulations as described in paragraph 13.5. However, extrajudicial statements should not be used for the purpose of influencing the course of a criminal proceeding. Usually, extrajudicial statements should include only factual matters and should not offer subjective observations or opinions. The question of whether a statement is extrajudicial will depend upon the circumstances.

13.6.1. Under the Privacy Act, information from a system of records, such as a court-martial file maintained in a JA office about an individual, may not be released to the public without the individual's consent unless release is required by the FOIA. FOIA requires release except when specified circumstances exist, one of which is when release would constitute an unwarranted invasion of an individual's personal privacy. (See 5 U.S.C. § 552a(b) and 5 U.S.C. § 552(b)(6) & 552(b)(7)(C).)

13.6.1.1. An unwarranted invasion of personal privacy exists when an individual's privacy interests outweigh the public's interest in disclosure of the information. *See Chang v. Dep't of the Navy*, 314 F. Supp. 2d 35 (D.D.C. 2004); *Schmidt v. Dep't of the Air Force*, 2007 WL 2812148 (C.D. Ill 2007). The public's interest portion of the balancing test is defined as the degree to which disclosure sheds light on the performance of an agency's statutory function. *Dep't of Justice v. Reporters Comm.*, 489 U.S. 749, 773 (1989). This can include information about how the government holds its employees accountable. *See Schmidt* at 11.

13.6.1.2. Whether disclosure of data regarding the accused and his alleged offenses constitutes an unwarranted invasion of privacy depends upon the assessment of whether the accused has a reasonable expectation of privacy as measured by various factors, including, but not limited to, the accused's rank, duties, alleged offense(s), existing publicity about the allegation(s), and stage of the proceedings. Considering the fact that anyone subject to the UCMJ can act as an accuser under the UCMJ, the accused normally retains a reasonable expectation of privacy upon preferral of charges. When the convening authority directs the charges toward a public forum, such as an Article 32 hearing or referral to trial, the accused's reasonable expectation of privacy begins to decline.

13.6.2. Extrajudicial Statements That Generally May Be Made Only After Disposition Decision by the Convening Authority (CA) Directing an Article 32 Investigation or Directing Referral. Following the FOIA balancing test above, the following information may normally be provided after a CA has disposed of preferred charges by directing an Article 32 investigation or has referred the charges to a court-martial (exceptional cases may warrant earlier release but only after applying a public interest balancing test; assessing the reasonable expectation of privacy factors; and exercising due caution):

13.6.2.1. The accused's name, unit and assignment;

13.6.2.2. The substance or text of charges and specifications, provided there is a statement included explaining that the charges are merely accusations and that the accused is presumed innocent until and unless proven guilty. As necessary, redact all Victim and Witness Protection Act and Privacy Act protected data from the charges and specifications (such as the names of all victims, signature of the accuser, and SSN of the accused).

13.6.2.3. The scheduling or result of any stage in the judicial process;

13.6.2.4. Date and place of trial and other proceedings, or anticipated dates, if known;

13.6.2.5. Identity and qualifications of appointed counsel;

13.6.2.6. Identities of convening and reviewing authorities;

13.6.2.7. A statement, without comment, that the accused has no prior criminal or disciplinary record or that the accused denies the charges; and

13.6.2.8. The identity of the victim where the release of that information is not otherwise prohibited by law. Generally, however, do not release the names of victims of sex offenses, the names of children or the identity of any victim when release would be contrary to the desire of the victim or harmful to the victim.

13.6.3. Disclosing the Identities of Court Members and the Military Judge. Do not volunteer the identities of the court members or the military judge in material prepared for publication. This information may normally be released, if requested, after the court members or the military judge have been identified in the court-martial proceeding and the SJA to the convening authority determines release would not prejudice the accused's rights or violate the member's or the military judge's privacy interests.

13.6.4. Requests for Information from Law Enforcement Agencies: Disclose data about the accused, the charges, and the evidence in accordance with Blanket Routine Uses and System

of Records Notice (SORN) Routine Uses concerning military justice records. See **http://dpclo.defense.gov/privacy/SORNs/component/airforce/index.html**; F051 AFJA I, *Military Justice and Magistrate Court Records*.

13.6.5. A written or oral request for information from the media or public is not required prior to release, nor does a media request indicate that information is automatically releasable.

13.6.6. Extrajudicial Statements That May Be Made Under Some Circumstances Regardless of the Stage of the Proceedings. The following extrajudicial statements may be made when deemed necessary regardless of the stage of the proceeding:

13.6.6.1. General information to educate or inform the public concerning military law and the military justice system;

13.6.6.2. If the accused is a fugitive, information necessary to aid in apprehending the accused or to warn the public of possible dangers;

13.6.6.3. Requests for assistance in obtaining evidence and information necessary to obtain evidence;

13.6.6.4. When requested or otherwise in the best interest of the Air Force, after applying FOIA exemption principles, as appropriate: facts and circumstances of an accused's apprehension, including the time and place of apprehension;

13.6.6.5. The identities of investigating and apprehending agencies, and the length of the investigation, only if release of this information will not impede an ongoing or future investigation, and the release is coordinated with the affected agencies;

13.6.6.6. Information contained in a public record, without further comment; and

13.6.6.7. Information that protects the military justice system from matters that have a substantial likelihood of materially prejudicing the proceedings. Information in the form of extrajudicial statements shall be subject to paragraph 13.6.1 and limited to that which is necessary to correct misinformation or to mitigate the substantial undue prejudicial effect of information or publicity already available to the public. This can include, but is not limited to, information that would have been available to a spectator at an open Article 32 investigation or an open session of a court-martial. Unless The Judge Advocate General (TJAG) has withheld the authority to coordinate on command release of this information for individual cases or types of cases, the MAJCOM SJA (or equivalent) shall coordinate on release of this information by the appropriate command authority. If TJAG has withheld the authority to coordinate on release of extrajudicial statements, requests for TJAG coordination shall be forwarded through the MAJCOM SJA to AFLOA/JAJM by the most expeditious means appropriate to the sensitivity of the information.

13.6.7. Extrajudicial Statements Which Generally May Not Be Made. Extrajudicial statements relating to the following matters ordinarily have a substantial likelihood of prejudicing a criminal proceeding and generally should not be made:

13.6.7.1. The existence or contents of any confession, admission or statement by the accused or the accused's refusal or failure to make a statement;

13.6.7.2. Observations about the accused's character and reputation;

13.6.7.3. Opinions regarding the accused's guilt or innocence;

13.6.7.4. Opinions regarding the merits of the case or the merits of the evidence;

13.6.7.5. References to the performance of any examinations, tests or investigative procedures (e.g., fingerprints, polygraph examinations, and ballistics or laboratory tests), the accused's failure to submit to an examination or test, or the identity or nature of physical evidence expected to be presented;

13.6.7.6. Statements concerning the identity, expected testimony, disciplinary or criminal records, or credibility of prospective witnesses;

13.6.7.7. The possibility of a guilty plea or other disposition of the case other than procedural information concerning such processes;

13.6.7.8. Before sentencing, facts regarding the accused's disciplinary or criminal record, including nonjudicial punishment, prior court-martial convictions, and other arrests, indictments, convictions, or charges. Generally, do not release information about nonjudicial punishment or administrative actions even after sentencing unless admitted into evidence. This rule does not prohibit, however, a statement that the accused has no prior criminal or disciplinary record; and

13.6.7.9. Information that trial counsel knows or has reason to know would be inadmissible as evidence in a trial.

13.6.8. Responsibility for Extrajudicial Statements. The release of extrajudicial statements is a command responsibility. The convening authority responsible for the criminal proceeding makes the ultimate decision about release of extrajudicial statements relating to that criminal proceeding. MAJCOM (or equivalent) commanders may withhold release authority from subordinate commanders

13.6.8.1. The installation SJA and the installation public affairs officer (PAO) must work closely together to provide informed advice to the commander. SJAs should consult with their MAJCOM SJAs when there is a question about the nature of a statement proposed for release. If the extrajudicial statement is based on information contained in agency records, the OPR for the record should also coordinate on the extrajudicial statement prior to release. In high interest cases, the SJA and the PAO should consult with their MAJCOM representatives, and AFLOA/JAJM and AFLOA/JAA as necessary.

13.6.8.2. The SJA, trial counsel and defense counsel must ensure investigators, law enforcement personnel, employees and other persons assisting or associated with the respective counsel do not make extrajudicial statements counsel are prohibited from making.

13.7. Release of Information from Records of Trial or Related Records: Once a completed record is forwarded, AFLOA/JAJM is the disclosure authority for all records and associated documents. This subsection does not apply to documents or records that originate outside the military justice system of records (e.g., AFOSI reports). The disclosure authority for such documents and records is the OPR for those records under the provisions of the, AFI 33-332, *Privacy Act Program*, and/or DoD 5400.7-R_AFMAN 33-302, *DoD Freedom of Information Act (FOIA) Program*.

13.7.1. Release of Court-Martial Record of Trial. RCM 1103(b)(2) defines a court-martial record of trial. The court-martial record of trial is subject to release determination under the Privacy Act and Freedom of Information Act. Information marked as classified, controlled, or sealed by judicial order should not be released absent an authoritative determination of releasability. A transcript of oral proceedings is not a record until authentication. When releasing records of trial under this paragraph, redact all Victim and Witness Protection Act and Privacy Act protected data, to include the names of victims of sex offenses, the names of children (under the age of 18), and the identity of victims who could be harmed by disclosure of their identity.

13.7.2. Release of Other Military Justice Documents or Records. All other documents or records, including documents which will become part of a record of trial, and including those which are attached to the court-martial record of trial but not made a part of the record of trial under the provisions of RCM 1103 (for example, an Article 32 report and its attachments) are also subject to release determination under the Privacy Act and Freedom of Information Act. However, due regard will be given to the potentially heightened privacy interests of an accused where a case has not been fully adjudicated as well as to whether any exemption, such as those included to protect ongoing deliberative processes or investigative processes should be invoked. Information marked as classified, controlled, or sealed by judicial order should not be released absent an authoritative determination of releasability. When releasing military justice documents or records under this paragraph, redact all Victim and Witness Protection Act and Privacy Act protected data, to include the names of victims of sex offenses, the names of children, and the identity of victims who could be harmed by disclosure of their identity.

13.7.3. Cases Disposed of by Acquittal or Action Other Than Court-Martial. When the charges against an accused were disposed of by an action other than court-martial, or when a court-martial results in an acquittal, due consideration must be given to the likelihood that the accused may have increased privacy interests in the protection of information contained in military justice documents or records. Less serious misconduct, which is handled administratively rather than judicially, generally is not considered of sufficient public interest to outweigh the privacy interest of the individual.

Section 13E—Special Interest Reports (SIRs)

13.8. Reporting Special Interest Cases to HQ USAF. Certain offenses committed by Air Force members generate requests for information within HQ USAF, regardless of the member's grade or disposition by military or civilian authorities. Similarly, an accused's grade itself may generate requests for information, or necessitate HQ USAF knowledge of an alleged offense. SJAs must be sensitive to reporting requirements in this chapter, and make complete and timely reports. Reporting Special Interest cases is a base level responsibility. Reports should be prepared and forwarded within 24 hours of learning of the incident to AFLOA/JAJM by the base legal office prosecuting the case or, if the case is in a civilian court, the base legal office servicing the unit where the accused is assigned. None of the reporting requirements are intended to preclude a commander's complete evaluation of a case before deciding what action, if any, to take.

13.8.1. Officer, Cadet, CMSgt and SMSgt Cases. Regardless of offense, report all investigations into allegations involving officers, cadets, CMSgts, and SMSgts.

13.8.2. Serious Crimes. Regardless of grade, report cases involving the following crimes, including attempts, conspiracies, and solicitations to commit these crimes:

13.8.2.1. homicide;

13.8.2.2. sexual assault;

13.8.2.3. espionage, subversion, aiding the enemy, sabotage, spying, or violations of punitive regulations or statutes regarding the handling of classified information or the foreign relations of the United States;

13.8.2.4. environmental crimes, including civilian felony prosecution;

13.8.2.5. fraternization and unprofessional relationships; and

13.8.2.6. anthrax or smallpox refusals.

13.8.3. Cases with Command or Media Interest.

13.8.3.1. Report any case where the local chain-of-command for the accused or subject would likely provide information about the case to the MAJCOM commander and/or Headquarters Air Force (HAF). SJAs should also work with their respective command post to ensure they are made aware of criminal activity and other legal-related events or incidents reported to higher headquarters via OPREP3 as provided for in AFI 10-206, *Operational Reporting.*

13.8.3.2. Report any other case with potential community reaction, or potential or actual media coverage.

13.8.4. Report Format. Use the Special Interest Report in AMJAMS to generate reports. Ensure the initial report includes a detailed summary of the case by filling in all AMJAMS data fields. Include a thorough description of offenses, dates, UCMJ articles allegedly violated, the number of specifications under each offense, sufficient detail to provide senior leadership with a clear understanding of the facts and circumstances involved, whether media attention is anticipated, and any other unusual or significant features of the case. Identify incomplete facts in the report and follow-up as soon as possible.

13.8.4.1. Ensure sensitive investigative information is not included in the SIR without concurrence of the AFOSI Detachment Commander/Special Agent-in-Charge (SAC) or other investigating agency. See paragraph 13.31 for examples of sensitive investigative information.

13.8.4.2. For matters investigated by commander-directed investigation (CDI), IG or MEO, summarize the allegations, and when final, identify both substantiated and unsubstantiated findings.

13.8.4.3. For cases disposed of by NJP or administrative action (e.g. LOR or LOC), identify the wrongdoing or offenses alleged (e.g. “On (date), Subject served NJP/LOR for…”).

13.8.4.4. For cases disposed of by civilian authorities, include information that identifies the court and jurisdiction and summarize the charges, pleas, findings and sentence.

13.8.4.5. If a matter was disposed of without action, explain why.

13.8.4.6. With sexual assault cases, make sure to put whether or not an STC was consulted under the "Pending Offense" subfolder, "Case Information" tab.

13.8.5. When to Report. Submit reports:

13.8.5.1. Within 24 hours after learning of an incident in any of the above-mentioned categories;

13.8.5.2. When a significant event in a reported case occurs after initial reporting. Significant events include disposition of investigation, when jurisdiction is obtained from civilian authorities, preferral of charges, trial, results of trial, Convening Authority action, date Article 15 offered, date Article 15 punishment imposed, and media interest;

13.8.5.3. Continue to submit reports until completion of administrative or disciplinary action, to include the decision whether to file the action in an OSR, or as directed by AF, MAJCOM or NAF legal offices. Exception: in officer cases involving involuntary separation, continue to report until completion of discharge processing.

13.8.6. When updating or reporting initial SIRs in accordance with triggering events listed in the previous paragraph, use the following format for the e-mail subject line as appropriate: (FOUO) NEW SIR: CASE ID # - RANK SURNAME – BASE; (FOUO) UPATED SIR: CASE ID # - RANK SURNAME – BASE.

13.8.6.1. All current event updates to a SIR should be completed no later than the 25th of each month.

13.8.7. AMJAMS Process. All special interest reporting should be accomplished via AMJAMS using the reports located on the AMJAMS reports page. Reporting special interest cases is a base responsibility. Updates should be made after every significant event until final disposition (e.g., Article 15, administrative action, preferral, Article 32, referral).

13.8.7.1. SAF and NAF/MAJCOM SIR buttons are located in the Special Interest Folder of AMJAMS. Click the "Special Interest reporting required" button for all cases listed in the paragraphs 13.8.1 to 13.8.4. The "NAF/MAJCOM SIR" button is selected when a NAF/MAJCOM requires additional reporting not required by this AFI and the information is for use by each individual NAF and MAJCOM.

13.8.7.2. Transmitting SIRs to AFLOA/JAJM. In addition to the requirement in paragraph 13.8.4, updates are made in AMJAMS by going to the AMJAMS Reports page on the web and selecting Special Interest Report. Next, put in the case ID and select case notes and run the report. Save a "pdf" copy of the SIR and send it to AFLOA/JAJM via e-mail to **JAJM.SIR@pentagon.af.mil.**

Section 13F—Reporting Referral of Additional Charges in Cases Pending Review

13.9. Reporting Referral of Additional Charges in Cases Pending Review. If a case is pending review under Articles 66, 67 or 69, UCMJ, the headquarters referring new charges must notify AFLOA/JAJM of the facts relating to the new charges.

Section 13G—Reporting Foreign National USAF Member Cases

13.10. Foreign National USAF Member. A foreign national USAF member is a member of the USAF who is a national of a foreign country and who is not a citizen or national of the United States. For purposes of this section, any USAF member who claims to be a foreign national shall be considered so.

13.10.1. Notification. Notify HQ USAF/JAO when a foreign national USAF member is:

13.10.1.1. Apprehended under circumstances likely to result in confinement or trial by court-martial and states that he/she is a foreign national;

13.10.1.2. Ordered into arrest or confinement;

13.10.1.3. Held for trial with or without any form of restraint; or

13.10.1.4. Pending court-martial charges which have been referred for trial.

13.10.2. The notification shall include:

13.10.2.1. The name, grade, SSN, organization and station of the foreign national USAF member;

13.10.2.2. Any evidence, including information from the member's military record, which is inconsistent with a claim of foreign nationality;

13.10.2.3. A thorough description of offenses, including dates, UCMJ articles allegedly violated, the number of specifications under each offense, and sufficient detail to provide clear understanding of the facts and circumstances involved, and any other unusual or significant features of the case;

13.10.2.4. The name of the military and/or civilian defense counsel, if any; and

13.10.2.5. The exact location of the foreign national USAF member (e.g., JB Andrews confinement facility).

13.10.3. Whenever charges against a foreign national USAF member are referred for trial, the SJA of the SPCMCA shall have the member's military records examined to ascertain the member's nationality even if that member has not entered a claim of foreign nationality.

13.10.4. Notification is not required:

13.10.4.1. When disciplinary action under Article 15, UCMJ, or administrative action is taken; or

13.10.4.2. If the foreign national USAF member is apprehended or confined in anticipation that only such actions will be taken.

13.10.5. The section does not apply when a foreign national is charged with a crime, arrested, confined or detained in custody by the civil authorities of the United States, or any political subdivision, possession or territory thereof, or by the authorities of any foreign government. AFJI 51-707, *Consular Protection of Foreign National Subject to the Uniform Code of Military Justice*.

Section 13H—Time Management of Case Processing

13.11. Case Processing Time.

13.11.1. In General. SJAs must give managerial attention to all time standards prescribed by the MCM, statutes, case law and regulations.

13.11.2. Coordination with AFOSI. SJAs should develop local procedures with their servicing AFOSI detachment commander to coordinate with agents as early as possible in the investigative stages of a case.

13.11.3. Time Management. Expeditious processing of courts-martial is essential to minimize disruptions in the Air Force mission, the lives of victims, witnesses, and the accused, and to minimize Air Force costs. The impartial and timely administration of military justice helps sustain good order and discipline. SJAs and chiefs of military justice, at all levels of command, should regularly analyze available AMJAMS data relating to each segment of court processing over which they have significant control to determine specific areas for improvement and implement appropriate management measures to maximize effectiveness and efficiency. The following Air Force court-martial metrics are established to assist in expediting the administration of justice.

13.11.3.1. Prefer charges in 80% of all general and special courts-martial within 30 days of the date the AFOSI, SFOI, or CDI Report of Investigation (ROI) is published. NOTE: Charges may always be preferred prior to the publication of the ROI. If charges are preferred prior to the publication of the ROI, AMJAMS should reflect “0” days between publication of the ROI and preferral.

13.11.3.2. Convene 80% of all courts-martial (arraignment) on a Docketed Trial Date within 45 days after the accused is served (RCM 602).

13.11.3.3. Complete 80% of all GCM (Preferral Date - CA Action Date) within 160 days.

13.11.3.4. Complete 80% of all SPCM (Preferral Date - CA Action Date) within 75 days.

13.11.3.5. Complete 80% of all SCM (Date of Discovery - CA Action Date) within 60 days.

13.11.3.6. Forward all court-martial ROTs to AFLOA/JAJM within 14 days of CA action.

13.11.3.7. Complete 80% of all Article 66, UCMJ, appellate reviews within 270 days (Date AFLOA/JAJM receives the ROT - Air Force Court of Criminal Appeals Decision Date).

13.11.3.8. SJAs are expected to enable expeditious processing of all cases by closely monitoring activities and providing legal guidance to investigative agencies from the date of discovery of the offense through preferral. Early and regular SJA assistance to investigative agencies is essential in helping to foster efficient processes while ensuring sufficient investigative results and ROIs. In cases in which an ROI is published, the following measures have been established for purposes of calculating the date of discovery to convening authority action. In general courts-martial, the measure for completing the ROI is within 75 days of the date of discovery of the offense. In special courts-martial, the measure is for completing the ROI within 30 days of the date of discovery of the offense. These are internal JAGC measures to assist in the efficient and expeditious investigation of cases.

13.11.3.9. The following measures have been established to assist in expediting the administration of justice. In GCMs, CA Action should be completed within 265 days of the date of discovery of the offense. In SPCMs, CA Action should be completed within 135 days of the date of discovery of the offense.

13.11.3.10. The date of discovery of the offense is defined as the date when an investigative agency (e.g., AFOSI, SFOI, IG), legal office, commander, supervisor, or first sergeant becomes aware of an allegation and a subject has been identified, including when notification is made by civilian authorities. In a case involving a CDI, the date of discovery of the offense is when a commander is notified of an allegation that an offense has been committed and a subject has been identified. If an allegation is investigated by CDI and is subsequently turned over to an investigative agency for further investigation, use the date the commander first became aware of the allegation and initiated the CDI. In all cases where additional allegations against an identified subject are discovered, use the earliest date of discovery of all offenses.

Section 13I—Status of Discipline

13.12. Status of Discipline Meetings. Status of Discipline (SOD) meetings, run by the wing commander or equivalent authority, shall be conducted on at least a quarterly basis.

13.12.1. The SJA will facilitate SOD meetings and invite the following personnel to participate at the meetings: group commanders, squadron commanders, and first sergeants. Other legal office staff will attend SOD meetings at the direction of the SJA.

13.12.2. On all closed cases, the following items must be discussed at SOD meetings:

13.12.2.1. Court-martial processing times from discovery of offense to CA action for all squadrons.

13.12.2.2. NJP processing times from discovery of offense to SJA legal review for all squadrons.

13.12.2.3. The average NJP processing time from discovery of offense to SJA legal review for each squadron (including tenant squadrons) for the current calendar year.

13.12.3. On all closed cases, the following items may be discussed at SOD meetings (this is not an exhaustive list):

13.12.3.1. Type of offense(s) and demographic data on individuals who were court-martialed. Do not disclose individuals' names.

13.12.3.2. Type of offense(s) and demographic data on individuals who received NJP. Do not disclose individuals' names.

13.12.3.3. Number of driving under the influence incidents and whether the incidents occurred on-base or off-base. Do not disclose individuals' names.

13.12.3.4. Special interest items as identified by the wing commander or equivalent authority or the SJA.

Section 13J—Specific Search, Seizure, and Apprehension Matters

13.13. Authorization to Administer Oaths for Search, Seizure, and Apprehension. Air Force commanders and military magistrates are authorized to administer oaths or affirmations for purposes of authorizing searches, seizures, and apprehensions based upon probable cause. Use the AF Form 3226, *Authority to Apprehend in Private Dwelling*, to document authorization to apprehend someone from a private dwelling. When required by the circumstances of a particular case, oral authorization may be given.

13.14. U.S. Mail and Government Information Systems.

13.14.1. U. S. Mail. Refer to DoD 4525.6-M, *Department of Defense Postal Manual*, paragraph C10.7, for procedures for the inspection, search, and seizure of mail in the custody of the military postal service. The U.S. Postal Service operates post offices on CONUS installations and opening of mail is allowed only pursuant to a valid search warrant executed by a federal magistrate or judge.

13.14.2. Government Information Systems. Government information systems are subject to monitoring, interception, search, and seizure for all authorized purposes in accordance with the DoD Consent Banner placed on government computer systems.

13.14.2.1. The DoD Consent Banner does not extend to include the content of privileged communications or work product related to personal representation or services by attorneys, psychotherapists, or clergy, to include their assistants. Users should annotate their privileged communications in e-mails and documents to ensure such information is kept confidential and not inappropriately accessed or read during authorized search, seizure, interception, or monitoring activities. Investigators should consult with the appropriate legal office or AFOSI/JA prior to and during such activities to ensure privileged communications are appropriately protected and remain confidential.

13.14.2.2. Under normal circumstances, a person does not have a reasonable expectation of privacy in government property that is not issued for personal use. M.R.E. 314(d). Furthermore, the presence of the DoD Consent Banner and/or subject's user agreement is evidence of implied consent to monitoring on the government information system. *United States v. Larson*, 66 M.J. 212, 216 (C.A.A.F. 2008). See also *United States v. Milian-Rodriguez*, 759 F.2d 1558, 1563-64 (11th Cir. 1985). Implied consent exists when circumstances indicate a party to a communication was "in fact aware" of monitoring and nevertheless proceeded to use the system. See *United States v. Workman*, 80 F.3d 688 (2d Cir. 1996). Government employees may waive some of their Fourth Amendment rights pursuant to the conditions of employment. See, e.g., *United States v. Simons*, 206 F.3d 392, 398 (4th Cir. 2000) (government employee had no reasonable expectation of privacy in computer in light of computer use policy); *American Postal Workers Union, Columbus Area Local AFL-CIO v. United States Postal Service*, 871 F.2d 556, 559-61 (6th Cir. 1989) (postal employees retained no reasonable expectation of privacy in government lockers after signing waivers). Only if the totality of the facts and circumstances indicate that the subject has a reasonable expectation of privacy (for example, no DOD banner in place, no user agreement, or local policy inadvertently creates an expectation of privacy) is obtaining a search authorization warranted.

13.15. Military Defense Counsel. If a search authorization is to be issued against an ADC or SDC, or his/her house or office, precautions must be taken to protect the confidentiality of attorney-client materials to the maximum extent possible. Obtaining a search authorization

against defense personnel or their quarters, property, or offices, is an action warranting special consideration and guidance. A search authorization against defense personnel should only be pursued when there is no other feasible alternative for securing critical evidence.

13.15.1. SJAs will inform the commander, Air Force Legal Operations Agency (AFLOA/CC), or the Director, USAF Judiciary (AFLOA/JAJ), before such search authorizations are executed or as soon as practicable if exigent circumstances exist.

13.15.2. If a search authorization is not required due to exigent circumstances IAW MRE 315(g), notify AFLOA/CC or AFLOA/JAJ of the search as soon as practicable.

13.15.3. The purpose of this notification is to provide information—not to seek assistance in obtaining or authorizing a search or other process against defense personnel. If a search authorization is granted, its execution should be planned to minimize disruption to the operation of the defense office and should occur at a time when defense clients are unlikely to be present.

13.15.4. If this situation arises, review *United States v. Calhoun*, 49 M.J. 485 (1998), where a base SJA contacted AFLOA/CC and discussed searching an ADC office. In upholding the case, the court found that AFLOA/CC's role was limited to being informed of the search and discussing it with the SJA, not in seeking or authorizing it. The court further found the Air Force took extraordinary precautions to ensure that only independent personnel would be involved in the search and subsequent review of materials seized. These precautions included: (1) having an investigator from another base, assisted by a reserve judge advocate, conduct the search; (2) ordering the searchers not to disclose the matter with anyone else and to seal any evidence recovered; and (3) having a reserve military judge review papers seized to determine what material was responsive to the warrant and how to handle other seized material.

Section 13K—Appointment of Judges to the Air Force Court of Criminal Appeals

13.16. Appointing Judges to AFCCA. Pursuant to Article 66, UCMJ, TJAG appoints judge advocates to the AFCCA.

Section 13L—Crimes Against Children and Sexually Violent Offender Registration under Federal Law

13.17. General Provision. If the member has been convicted of a sexually violent offense or certain offenses against a minor, the Air Force is required to provide notice to state and local officials prior to the member's release from confinement, and the member may be required to register as a sex offender under state law. *See the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act (1994); Pub. L. 105-119, Title I, § 115(a)(8(C)(i), 111 Stat. 2466 (1997);Megan's Law (1996); the Final Guidelines for the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act and Megan's Law (1998); Pam Lyncher Sex Offender Tracking and Identification Act (1996); Jacob Wetterling Improvements Act (1997); Protection of Children from Sexual Predators Act (1998); and, Adam Walsh Child Protection and Safety Act (2006).* The Acts are available at the United States Department of Justice (DOJ) website **http://www.ojp.usDoJ.gov/smart/legislation.htm**.

13.18. Compliance With Federal/State Laws. The Security Forces (SF) corrections officer, or designee at the facility in which the prisoner is detained ensures compliance with federal/state laws. See AFI 31-205, *The Air Force Corrections System*. This includes the corrections officer notifying appropriate state and local law enforcement officials and state sex offender registration officials using the DD Form 2791, *Notice of Release/Acknowledgement of Convicted Sex Offender Registration Requirements*. It also includes the corrections officer notifying the member about his or her registration responsibilities and obtaining the member's acknowledgment of these responsibilities.

13.19. Base-Level SJA Responsibilities. If a member is convicted of an offense that triggers the notification requirement, indicate on the Report of Result of Trial, that compliance with this section is required. A determination that a member committed a qualifying offense has important consequences. **Figure 13.3** is a list of offenses which trigger sex offender notification requirements. It should be noted, however, that sex offender registration requirements vary by state and may be triggered by offenses not listed in **Figure 13.3**. Therefore, a member convicted of an offense that does not trigger sex offender notification requirements may nonetheless be required to register as a sex offender under state law. When a question arises whether a conviction triggers notification requirements, SJAs should seek guidance from a superior command level legal office. Further questions about whether an offense triggers notification requirements may be directed to AFLOA/JAJM.

13.19.1. No Post-trial Confinement. When compliance with Section 13L is required, but confinement is not part of the adjudged punishment (or sufficient pretrial or illegal pretrial confinement credit completely offsets the term of confinement imposed at trial), the SJA will notify the appropriate corrections officer (or the Security Forces commander, if there is no corrections officer), in writing, within 24 hours of the member's conviction. For purposes of this section, conviction includes announcement of the sentence. The corrections officer, or the Security Forces commander, as appropriate, will ensure that the notifications required in paragraph 13.17 and AFI 31-205 are made.

13.19.2. Convictions by a Host Country. Service members, military dependents, DoD Contractors, and DoD Civilians can be convicted of a sex offense outside normal DoD channels by the host nation while assigned overseas. When compliance with Section 13L is required of the aforementioned individuals, the SJA will notify the appropriate individuals. It is the SJA's responsibility to ensure the individual completes the DD Form 2791 (or equivalent document) upon release from the host nation. Furthermore, the DD Form 2791 and copies of the ROT should be provided to federal, state, and local law enforcement by the DoD.

Section 13M—Compliance with DNA Collection under Federal Law

13.20. General Provision. DNA collection is required when: a person subject to the UCMJ has been apprehended for an offense which makes DNA collection mandatory; fingerprints are taken in connection with an investigation for offenses listed in DoDI 5505.11, *Fingerprint Card and Final Disposition Report Submission Requirements*, and where the investigator concludes there is probable cause that the subject committed the offense; charges are preferred; after completion of the 72-hour commander's memorandum approving continued pretrial confinement; and upon an accused's entry into confinement as a result of a general or special court-martial conviction.

IAW DoD Instruction 5505.14, *Deoxyribonucleic Acid (DNA) Collection Requirements for Criminal Investigations, Enclosure 3*, the military criminal investigator must consult with a judge advocate prior to making a probable cause determination. Note: collection of a DNA sample is not required if a DNA sample has already been collected and submitted to the USACIL.

13.21. Base-Level SJA Responsibilities. Base-level SJAs will brief their commanders about the new DNA processing requirements. DNA collection is mandatory under the following circumstances.

13.21.1. Pretrial confinement. If a 72-hour commander's memorandum (RCM 305(h)(2)(C)) has approved continued pretrial confinement (whether or not charges have been preferred) and a DNA sample has not already been collected from the accused and submitted to the USACIL, the SJA uses Figure 13.2 (Notification of DNA Processing Responsibilities) to notify immediate commanders about their responsibilities.

13.21.2. Preferral. If charges are preferred and a DNA sample has not already been collected from the accused and submitted to the USACIL, the SJA uses Figure 13.2 (Notification of DNA Processing Responsibilities) to notify immediate commanders about their responsibilities.

13.21.3. Conviction. If an accused is convicted of any offense at a general or special court-martial, indicate "DNA PROCESSING REQUIRED" in the SENTENCE block of the Report of Result of Trial memorandum.

13.21.3.1. SJAs must ensure promulgating orders prepared for individuals convicted of an offense contain the annotation "DNA Processing Required. 10 U.S.C. § 1565 and 42 U.S.C. § 14135a." in 14-point boldface type on the first page of the order. The annotation must be one line, centered, and one inch from the top of the page. If a DNA sample has not already been collected from the accused and submitted to the USACIL, or the adjudged confinement, if any, would not allow sufficient time to collect a DNA sample, the SJA uses Figure 13.2 (Notification of DNA Processing Responsibilities) to notify immediate commanders about their responsibilities.

13.21.4. Other Disposition. When a court-martial results in an acquittal of all charged offenses, or findings of guilty are disapproved or set aside, or the case is disposed of by referral to summary court-martial, Article 15, or administrative action, the SJA will advise commanders and military criminal investigators whether expungement is authorized, if a member submits a request for expungement.

Section 13N—Compliance with the Domestic Violence Amendment to the Gun Control Act of 1968 (known as "The Lautenberg Amendment")

13.22. General Provision. The Lautenberg Amendment makes it a felony for any person to sell or otherwise dispose of firearms or ammunition to any person whom he or she knows or has reasonable cause to believe has been convicted of a "misdemeanor crime of domestic violence." Additionally, persons convicted of such crimes are also prohibited from: (1) shipping or transporting in interstate commerce or foreign commerce, (2) possessing in or affecting commerce, any firearm or ammunition, or (3) receiving any firearm or ammunition which has been shipped or transported in interstate or foreign commerce. A "crime of domestic violence" is an offense that has as its factual basis one of the following: (1) the use or attempted use of

physical force, or (2) the threatened use of a deadly weapon. One of the factors must be coupled with a crime committed by a current or former spouse, parent or guardian of the victim; by a person with whom the victim shares a child in common; by a person who is cohabitating with or has cohabitated with the victim as a spouse, parent, or guardian; or, by a person similarly situated to a spouse, parent or guardian of the victims. Qualifying convictions include a "crime of domestic violence" tried by general or special court-martial which otherwise meets the elements of a crime of domestic violence even though not classified as a misdemeanor or felony. 18 U.S.C. § 922(d) and (g). The term "qualifying conviction" does not include summary courts-martial or the imposition of nonjudicial punishment under Article 15, UCMJ.

13.23. Base-Level SJA Responsibilities. If an accused is convicted at a special or general court-martial of an offense constituting a crime of domestic violence, indicate this on the Report of Result of Trial. SJAs must also ensure promulgating orders prepared for individuals convicted of a qualifying offense contain the annotation "Crime of Domestic Violence. 18 U.S.C. § 922(g)(9)." The annotation must be one line, centered, in 14-point boldface type, and one inch from the top of the page. SJAs are responsible for informing commanders of the impact of the conviction on the accused's ability to handle firearms or ammunition as part of their official duties; briefing commanders on retrieving all Government-issued firearms and ammunition and suspending the member's authority to possess Government-issued firearms and ammunition; and advising members of their commands to lawfully dispose of their privately owned firearms and ammunition. For additional guidance addressing qualifying offenses, as well as substantive and procedural requirements under the Act, See 18 U.S.C. §§ 921 and 922.

Section 13O—Staff Judge Advocate's Responsibilities to Defense Counsel

13.24. The ADC Program. The ADC Program is one of the great strengths of the Air Force military justice system and will continue to be so as long as the defense function is, and is perceived to be, independent. A critical responsibility of the SJA is to foster that independence in words and actions and to treat the ADC as an equal at the bar of justice with the prosecution function.

13.25. SJA Responsibilities.

13.25.1. A primary responsibility of the SJA is to ensure that the military justice system is fair in perception and in fact. It is important to keep in mind that although the SJA is the senior attorney in an office that administers military justice, he or she is not the "chief prosecutor." While it is the SJA's responsibility to ensure that the government is well represented and prepared, the SJA must also see to it that the entire process is properly administered, including maintaining a professional relationship with defense counsel. In that regard, SJAs should periodically ask defense counsel about their opinions and perceptions regarding the various aspects of the military justice system.

13.25.2. The SJA's position and seniority demands that he or she take the primary role in setting the tone of the relationship with the ADC. This includes promoting civility in the relationship with the ADC and in the trial process. The SJA must never make denigrating, demeaning, or hostile comments about the ADC, especially in public, nor condone such comments by others. Instead, when the SJA considers it necessary to question or criticize the actions of the ADC, he or she must raise such matters through the ADC's supervisory and command chain. At all times, the SJA must remember that professionalism requires civility,

a continuous, cordial relationship with the defense bar, vigorous promotion of defense independence, and appropriate recognition of the ADC's achievements.

13.25.3. The quality of the ADC's facility and equipment must be equal to or better than that of the base legal office. Clients and others who visit ADC offices will not perceive that the system is operating on a level playing field unless defense facilities and equipment achieve this standard. SJAs are responsible for assisting ADCs in obtaining and maintaining suitable facilities and equipment.

Section 13P—Facilitating the Investigation to Disposition Process

13.26. General Provision. An effective military justice process starts with a timely, thorough, and accurate investigation. JA and investigative personnel, particularly AFOSI, must develop a collaborative relationship focused on integrating investigative efforts and the legal process. The goal is thorough, case-ready Reports of Investigation (ROIs), robust litigation preparation, and timely resolution of military justice cases. Although the remainder of this Section applies primarily to AFOSI and JA procedures, SJAs will establish local procedures to implement these goals for all investigations.

13.27. Initial Process. An effective team approach starts at the beginning of the military justice process. In matters involving alleged violations of the UCMJ or where MEJA may apply, the AFOSI detachment will notify the local JA when substantive criminal investigations are initiated. At a minimum, the SJA will designate an attorney to provide initial counsel to the AFOSI case agent on the new investigation.

13.28. Investigative Support Team. The SJA will designate an investigative support team as early as practicable in the investigative process. The investigative support team will be composed of judge advocate(s), as well as civilian attorney(s) and paralegal(s) when appropriate, who will work with the AFOSI case agent(s) during the investigation to provide legal support. Members of the investigative support team are not investigators and they must be careful not to depart from their role. The team should properly safeguard all attorney work-product material. *Hickman v. Taylor*, 329 U.S. 495 (1947); *United States v. Romano*, 46 M.J. 269 (C.A.A.F. 1997); *United States v. Vanderwier*, 25 M.J. 263, (C.M.A. 1987).

13.29. Investigative Plan Development. The attorney designated by the SJA and/or the investigative support team will receive a briefing on the initial investigative steps. The designated attorney or the investigative support team will continue the collaborative process during the development of the Investigative Plan and work with the AFOSI case agent in identifying potential criminal offenses for investigation, comparing the evidence in the case with the elements of proof for a given offense. JA will coordinate with the AFOSI case agent on subject interviews.

13.30. Case Development.

13.30.1. The investigative support team and AFOSI case agents will continue their collaborative efforts as the investigation proceeds. As appropriate, designated investigative support team members or JA staff members will attend AFOSI case review meetings. Likewise, AFOSI personnel are encouraged to attend relevant JA military justice meetings.

13.30.2. The investigative support team will review and update the initial proof analysis crafted by trial counsel to address the elements, evidence, anticipated objections, and

potential defenses for each specification as appropriate, but at least on a monthly basis, for JA use. JA will discuss the results of the analysis with AFOSI. A final proof analysis is typically attorney work-product material, and will be completed contemporaneously with the publication of the ROI. This will also assist in pre-trial preparation efforts.

13.30.3. In accordance with AFI 51-1001, the SJA will initiate the coordination process as early as possible for MEJA cases.

13.31. Disclosure and Reporting of Sensitive Case Information. As a case develops, both the SJA and AFOSI are required to provide case information and status to higher commands through their respective reporting channels. To avoid compromising an on-going investigation, the SJA will not allow disclosure of sensitive investigative information without the AFOSI Detachment Commander's/SAC's concurrence. Some examples of sensitive investigative information would include AFOSI investigative techniques, case leads, and confidential source information. Once a case proceeds to trial, the rules of discovery will control the release of any sensitive investigative information. In addition, AFOSI Form 40s should not be released outside of JA channels without prior detachment concurrence.

13.32. Lessons Learned. Within 30 calendar days of the conclusion of trial, the SJA and available members of the trial team will conduct a "hot wash" with AFOSI to review case lessons learned. Other legal office personnel may attend at the SJA's and AFOSI detachment commander's/SAC's discretion.

Section 13Q—Support of Defense Sexual Assault Incident Database (DSAID)

13.33. Defense Sexual Assault Incident Database (DSAID). DSAID is a centralized, case-level DoD database for the uniform collection of data regarding sexual assaults involving persons covered by DoD Directive 6495.01, *Sexual Assault Prevention and Response (SAPR) Program*, and DoD Instruction 6495.02, *Sexual Assault Prevention and Response Program Procedures*. DSAID captures available information, not limited by Restricted Reporting or otherwise prohibited by law, about the nature of the assault, the victim, the offender, and the disposition of reports associated with the assault. DSAID is intended to implement congressional reporting requirements. DSAID is maintained at base level by the installation Sexual Assault Response Coordinator and requires information, as necessary, from appropriate base agencies to complete designated data fields.

13.33.1. The base SJA will provide the SARC with disposition data on cases entered into DSAID. Data to be provided will include information on pretrial confinement, whether the case was substantiated as defined in DoDI 6495.02, command action, and the relevant dates. Other DSAID data may also be required as necessary.

13.33.2. The requested DSAID data will be accurate and complete and provided to the SARC as soon as possible after the triggering event occurs.

Figure 13.1. Delegation of Military Justice Administrative Duties.

(date)

MEMORANDUM FOR (JA Office)

FROM: (Convening Authority)

SUBJECT: Delegation of Military Justice Administrative Duties

The Staff Judge Advocate, Deputy Staff Judge Advocate, and all Assistant Staff Judge Advocates assigned to the Office of the Staff Judge Advocate, (Unit), are hereby delegated the authority to receipt for court-martial charges, authenticate the referral of court-martial charges, authenticate court-martial convening orders and promulgating orders for this (special)(general) court-martial jurisdiction and perform all other military justice administrative duties not requiring my personal attention. (In addition paralegals in the grade of master sergeant and above assigned to the Office of the Staff Judge Advocate, (Unit), are hereby delegated the authority to authenticate court-martial promulgating orders.) The Staff Judge Advocate or person acting as the Staff Judge Advocate is delegated the authority to detail personnel to take depositions under Article 49, Uniform Code of Military Justice (UCMJ), and to detail counsel to represent the United States at investigations convened under Article 32, UCMJ.

(NAME), (Grade), USAF
Convening Authority

Figure 13.2. Notification of DNA Processing Responsibilities.

(Date)

MEMORANDUM FOR (UNIT CC)

FROM: (JA Office)

SUBJECT: Notification of DNA Processing Responsibilities

1. In accordance with 10 U.S.C. § 1565, 42 U.S.C. § 14135a, 28 C.F.R. § 28.12, and DOD Instruction 5505.14, Deoxyribonucleic Acid (DNA) Collection Requirement for Criminal Investigations, Enclosure 3, a DNA sample must be collected from (Rank/Full Name of Member). DNA collection is required because [(charges were preferred) (a 72-hour commander's memorandum has approved continued pretrial confinement)(the accused was convicted by general or special court-martial)].

2. As this member's immediate commander, you must:

a. Obtain a DNA collection kit from [(Security Forces) (the Air Force Office of Special Investigations)(the Air Force Correctional Facility at _____ AFB)(a facility designated by HQ AFSFC/SFC to maintain such kits, by calling DSN 945-5608 or (210) 925-5608)].

b. Ensure a DNA sample is obtained using the U.S. Army Criminal Investigative Laboratory (USACIL) DNA collection kit and instructions contained therein. Utilize local

Security Forces (SF) personnel and local medical personnel (as necessary), to process the collection of the DNA sample. This includes requesting local SF personnel assistance in completing pertinent items on the USACIL collection card and mailing the sample to the USACIL.

c. When the DNA sample is collected, ensure the member is provided with the Privacy Act statement and the notice of rights for requesting expungement that are included in the kit.

d. Ensure the required DNA sample is collected and mailed to USACIL before the member is permitted to begin excess appellate leave or before the member is administratively discharged from the Air Force. DNA samples cannot be collected from members who are no longer subject to military jurisdiction. If the member is no longer in the immediate area, you may arrange for the DNA processing at a military installation closer to the member's location. If a member does not comply with a recall to duty from appellate leave status or otherwise refuses to cooperate in providing a DNA sample, contact my office for guidance.

e. Notify my office of the date the DNA sample for the above member was sent to USACIL by completing the indorsement below. If a DNA sample cannot be obtained, state the reason in the indorsement (i.e., member discharged from active duty on_____).

f. If more than 90 days is required to obtain the sample, please advise.

3. If you have any questions regarding the foregoing, contact (Grade and Name) at (XXX) XXX-XXXX (Commercial) or DSN XXX-XXXX.

(NAME), (Grade), USAF
Staff Judge Advocate

1st Ind (Unit CC)

MEMORANDUM FOR (JA Office)

In accordance with the above notification, [(a DNA sample was obtained from (Grade)(Name of Accused) and sent to the USACIL for processing on (Date)) (a DNA sample could not be obtained from (Grade)(Name of Accused) for the following reason: _____)].

NAME, Grade, USAF
Commander

Figure 13.3. Listing of Offenses Requiring Sex Offender Processing in accordance with DoDI 1325.07, Appendix 4 to Enclosure 2

LIST OF OFFENSES REQUIRING SEX OFFENDER PROCESSING

A Service member who is convicted in a general or special court-martial of any of the offenses listed below must register with the appropriate authorities in the jurisdiction (State, the District of Columbia, the Commonwealth of Puerto Rico, Guam, American Samoa, the Northern Mariana Islands, the United States Virgin Islands, and Indian Tribes) in which he or she will reside, work, or attend school upon leaving confinement, or upon conviction if not confined. Generally, this registration must take place within three days of release from confinement or within three days of conviction if not confined.

Appropriate DoD officials, as designated in implementing Service regulations, must inform the person so convicted of his or her duty to register and must inform the appropriate officials in the offender's stated jurisdiction of residence as soon as possible after conviction (if not confined) and prior to the prisoner's release (if confined). Any failure of the appropriate DoD officials to notify offenders required to be notified of their duty to register will not relieve those offenders of their duty to register.

A Service member convicted of any offenses listed below or convicted of offenses similar to those offenses listed below, shall be advised that the individual jurisdictions in which the offender might live, work, or attend school may require registration for offenses not listed below. Each registration jurisdiction sets its own sex offender policy and laws.

Effective immediately, reporting (and notice to convicted persons) is required based on a conviction of any offense listed below, without regard to the date of the offense or the date of the conviction for anyone currently incarcerated or under supervision (parole or mandatory supervised release).

The offenses defined before 1 October 2007, are also included to facilitate identification of those prisoners who were convicted of offenses occurring before 1 October 2007; however, reporting could still be required if the offense for which convicted occurred before 1 October 2007, but contained elements that would require reporting if the offense had occurred on or after 1 October 2007.

Notwithstanding the offenses listed below, offense under Article 120 or 134 of the UCMJ that constitute only public sex acts between consenting adults do not require sex offender registration (i.e. indecent exposure). An offense involving consensual sexual conduct between adults is not a reportable offense, unless the adult victim was under the custodial care of the offender at the time of the offense. Additionally, an offense involving consensual sexual conduct is not a reportable offense if the victim was at least 13 years old and the offender was not more than 4 years older than the victim (as determined by date of birth).

Offenses Defined before 1 October 2007

UCMJ Article	DIBRS Code	Offense
120	120A	Rape
120	120B1/2	Carnal Knowledge
125	125A	Forcible Sodomy
125	125B1/2	Sodomy of a Minor
133	133D	Conduct Unbecoming an Officer (involving any sexually violent offense or criminal offense of a sexual nature against a minor or kidnapping of a minor)
134	134-B6	Prostitution Involving a Minor
134	134-C1	Indecent Assault
134	134-C4	Assault with Intent to Commit Rape
134	134-C6	Assault with Intent to Commit Sodomy
134	134-R1	Indecent Act with a Minor
134	134-R3	Indecent Language to a Minor
134	134-S1	Kidnapping of a Minor (by a person not the parent)
134	134-Z	Pornography Involving a Minor
134	134-Z	Conduct Prejudicial to Good Order and Discipline (involving any sexually violent offense or a criminal offense of a sexual nature against a minor or kidnapping of a minor)
134	134-Y2	Assimilative Crime Conviction (of a sexually violent offense or a criminal offense of a sexual nature against a minor or kidnapping of a minor)
80		Attempt (to commit any of the foregoing)
81		Conspiracy (to commit any of the foregoing)
82	082-A	Solicitation (to commit any of the foregoing)

Offenses Defined on or after 1 October 2007 and Before 28 June 2012

UCMJ Article	DIBRS Code	Offense
120(a)(1)	120-A1	Rape. Using Force
120(a)(2)	120-A2	Rape. Causing Grievous Bodily Harm
120(a)(3)	120-A3	Rape. Threatening Death, Grievous Bodily Harm, Kidnapping
120(a)(4)	120-A4	Rape. Rendering Unconscious
120(a)(5)	120-A5	Rape. Administering Drug, Intoxicant, Or Similar Substance
120(b)(1)	120-B3	Rape Of Child. Under 12 Years Old
120(b)(2)	120-B4	Rape Of Child. 12 - Under 16 Years Old
120(b)(2)	120-B5	Rape Of Child. 12 - Under 16 Years Old. Causing Grievous Bodily Harm
120(b)(2)	120-B6	Rape Of Child. 12 - Under 16 Years Old. Threatening Death, Grievous Bodily Harm, Kidnapping
120(b)(2)	120-B7	Rape Of Child. 12 - Under 16 Years Old. Rendering Unconscious

120(b)(2)	120-B8	Rape Of Child. 12 - Under 16 Years Old. Administering Drug, Intoxicant, Or Similar Substance. On / After 1 Oct 07.
120(c)(1)(A)	120-C1	Aggravated Sexual Assault. Threatening Or Placing In Fear (Other Than Fear Of Death, Grievous Bodily Harm, Kidnapping)
120(c)(1)(B)	120-C2	Aggravated Sexual Assault. Causing Bodily Harm
120(c)(2)	120-C3	Aggravated Sexual Assault. When Victim Is Substantially Incapacitated / Unable To Appraise Act, Decline Participation, Or Communicate Unwillingness
120(d)	120-D1	Aggravated Sexual Assault Of A Child. 12 - Under 16 Years Old
120(e)	120-E1	Aggravated Sexual Contact. Using Force
120(e)	120-E2	Aggravated Sexual Contact. Causing Grievous Bodily Harm
120(e)	120-E3	Aggravated Sexual Contact. Threatening Death, Grievous Bodily Harm, Kidnapping
120(e)	120-E4	Aggravated Sexual Contact. Rendering Unconscious
120(e)	120-E5	Aggravated Sexual Contact. Administering Drug, Intoxicant Or Similar Substance
120(f)	120-F1	Aggravated Sexual Abuse Of A Child
120(g)	120-G1	Aggravated Sexual Contact With A Child. Under 12 Years Old
120(g)	120-G2	Aggravated Sexual Contact With A Child. 12 - Under 16 Years Old. Using Force
120(g)	120-G3	Aggravated Sexual Contact With A Child. 12 - Under 16 Years Old. Causing Grievous Bodily Harm
120(g)	120-G4	Aggravated Sexual Contact With A Child. 12 - Under 16 Years Old. Threatening Death, Grievous Bodily Harm, Kidnapping
120(g)	120-G5	Aggravated Sexual Contact With A Child. 12 - Under 16 Years Old. Rendering Unconscious
120(g)	120-G6	Aggravated Sexual Contact With A Child. 12 - Under 16 Years Old. Administering Drug, Intoxicant, Or Similar Substance
120(h)	120-H1	Abusive Sexual Contact
120(h)	120-H2	Abusive Sexual Contact. Causing Bodily Harm
120(h)	120-H3	Abusive Sexual Contact. When Victim Is Substantially Incapacitated / Unable To Appraise Act, Decline Participation, Or Communicate Unwillingness
120(i)	120-I1	Abusive Sexual Contact With A Child. 12 - Under 16 Years Old
120(j)	120-J1	Indecent Liberty With A Child
120(k)	120-K1	Indecent Acts
120(l)	120-L1	Forcible Pandering
120(m)	120-M1	Wrongful Sexual Contact
125	125A	Forcible Sodomy
125	125B1/2	Sodomy of a Minor

133	133D	Conduct Unbecoming an Officer that describes conduct set out in any provision of this Appendix
134	134-B6	Prostitution Involving a Minor
134	134-C4	Assault with Intent to Commit Rape
134	134-C6	Assault with Intent to Commit Sodomy
134	134-S1	Kidnapping of a Minor (by a person not the parent)
134	134-Z	Pornography Involving a Minor

Offenses Defined on or after 28 June 2012

UCMJ Article	DIBRS Code	Offense
120(a)	120AA1	Rape
120(b)	120AA2	Sexual Assault
120(c)	120AA3	Aggravated Sexual Assault
120(d)	120AA4	Abusive Sexual Contact
120b(a)	120BB1	Rape of a Child (Under 12 years of age)
120b(b)	120BB2	Rape of a Child (Has attained the age of 12)
120b(c)	120BB3	Sexual Assault of a Child
120b(d)	120BB4	Sexual Abuse of a Child
120c(a)	120CC1	Indecent Viewing, Visual Recording, or Broadcasting
120c(b)	120CC2	Forcible Pandering

Chapter 14

AIR FORCE STANDARDS FOR CRIMINAL JUSTICE AND JUDICIAL CONDUCT AND DISCIPLINE OF AIR FORCE TRIAL AND APPELLATE MILITARY JUDGES

Section 14A—Air Force Standards for Criminal Justice; Uniform Rules of Practice Before Air Force Courts-Martial

14.1. Summary. This section transmits the *Air Force Standards for Criminal Justice (*AFSCJ, or The *Standards*) and the *Uniform Rules of Practice Before Air Force Courts-Martial* (*Rules of Court*) which are contained at Attachments 2 and 3 of this Instruction, respectively.

14.2. Background.

14.2.1. *Air Force Standards for Criminal Justice*. The *Standards* have been specifically adapted to the unique needs and demands of Air Force legal practice. Although counsel are still obligated to their licensing bar authorities, the *Standards* govern Air Force practice. They were adapted from the *American Bar Association Standards for Criminal Justice* in order to minimize inconsistent ethical requirements. However, when there is a difference between state and Air Force standards, the Air Force provisions will control. The AFSCJ was first issued by the Corps on 4 December 1989.

14.2.2. *Uniform Rules of Practice Before Air Force Courts-Martial*. The Rules of Court provide rules for the conduct of Air Force general and special courts-martial and the orderly administration of justice by stating in a more formal manner the practices and procedures now followed in Air Force courts-martial.

14.3. Applicability.

14.3.1. The AFSCJ applies to all military and civilian lawyers, paralegals, and nonlawyer assistants in the Judge Advocate General's Corps, USAF. This includes host nation lawyers, paralegals, and other host nation personnel employed overseas by the Department of the Air Force; to the extent the *Standards* are not inconsistent with their domestic law and professional standards. They also apply to all lawyers, paralegals and nonlawyer assistants who practice in Air Force courts and other proceedings, including civilian defense counsel (and their assistants) with no other connection to the Air Force. SJAs and Air Force military defense counsel are aware of the *Standards* and have ready access to them.

14.3.1.1. Be sensitive to the potential for conflict with the expansion of legal assistance for victims of crime. See AFI 51-504, paragraph 1.4.16.

14.3.2. The *Rules of Court* apply to all military judges and counsel in all general and special courts-martial involving Air Force accuseds, including those in which military judges assigned to other Services preside.

Section 14B—Judicial Conduct and Discipline of Air Force Trial and Appellate Military Judges; Air Force Uniform Code of Judicial Conduct; Regulations and Procedures for Judicial Discipline; Air Force Judicial Ethics Advisory Council Charter

14.4. Summary. This section transmits the *Air Force Uniform Code of Judicial Conduct* (the *Code*), the *Regulations and Procedures for Judicial Discipline* (RPJD), and the Air Force Judicial Ethics Advisory Council Charter, which are contained at Attachments 4, 5, and 6, respectively. These three documents provide the framework for establishing and enforcing standards of conduct among Air Force trial and appellate military judges.

14.5. Background. Respect for the judiciary is essential to maintaining confidence in, and a high regard for, the military justice system. Therefore, the proper administration of military justice demands that trial and appellate military judges abide by the law and ethical standards, which include standards that apply to them due to their judicial duties.

14.6. Applicability. Pursuant to Rule for Courts-Martial 109, *Manual for Courts-Martial*, The Judge Advocate General (TJAG) has adopted the *Code* and the RPJD for Air Force trial and appellate military judges. The canons and sections of the *Code* establish mandatory standards unless otherwise indicated. Where conflicts exist, the more restrictive provisions of law, regulation, directive, or the *Code*, shall control.

14.7. Overview.

14.7.1. Air Force Uniform Code of Judicial Conduct. Attachment 5 requires a judge to maintain the integrity and independence of the judiciary, avoid behaving with impropriety or the appearance of impropriety, perform judicial duties diligently and impartially, preside or participate in a professional and orderly court, determine and apply justice promptly, and ensure the preservation of the rights of individual service members.

14.7.2. Regulations and Procedures for Judicial Discipline. Attachment 6 provides a framework for investigating and disposing of allegations of misconduct by Air Force trial or appellate military judges.

14.7.3. Air Force Judicial Ethics Advisory Council Charter. Attachment 7 contains the charter for the Air Force Judicial Ethics Advisory Council. This council is established to provide a means of obtaining advisory opinions on questions relating to the propriety of judicial conduct under the *Code*.

14.8. Responsibilities.

14.8.1. The Judge Advocate General.

14.8.1.1. Reliance on the *Code* and RPJD. TJAG designates judge advocates as military trial and appellate judges pursuant to the provisions of Article 26, Uniform Code of Military Justice. Inherent within this authority is TJAG's obligation to properly investigate and fairly dispose of allegations of misconduct or impropriety against any trial or appellate military judge. Accordingly, TJAG will be guided by the *Code* and the RPJD in the exercise of this important discretionary function and the provision of due process protections to the judges and other persons who are affected by actions taken under this policy memorandum.

14.8.1.2. Establishment of the Air Force Judicial Ethics Advisory Council. By separate directive, TJAG establishes the Air Force Judicial Ethics Advisory Council, appoints members, and designates a chairman.

14.8.2. The Chief Judge, United States Air Force Court of Criminal Appeals. The Chief Judge shall comply with the provisions of this section and shall ensure that each appellate

military judge is provided a copy. The Chief Judge shall also perform the actions required under the RPJD.

14.8.3. The Chief Trial Judge, USAF Trial Judiciary (USAF/JAT). The Chief Trial Judge shall comply with the provisions of this section and shall ensure that each Air Force trial judge is provided a copy. The Chief Trial Judge shall also perform the actions required under the RPJD.

14.8.4. Each Trial or Appellate Military Judge. Each trial or appellate military judge shall become familiar with the terms of the *Code* and shall exert his or her best efforts to comply with its provisions. Each judge shall also perform the actions required under the RPJD.

RICHARD C. HARDING
Lieutenant General, USAF
The Judge Advocate General

Attachment 1

GLOSSARY OF REFERENCES AND SUPPORTING INFORMATION

References

AFPD 51-10, *Making Military Personnel, Employees and Dependents Available to Civilian Authorities*, 19 October 2006

AFI 10-206, *Operational Reporting*, 6 September 2011

AFI 31-201, *Security Forces Standards and Procedures*, 30 March 2009

AFI 31-205, *The Air Force Corrections System*, 7 April 2004

AFI 31-401, *Information Security Program Management*, 1 November 2005

AFI 31-501, *Personnel Security Program Management*, 27 January 2005

AFI 33-328, *Administrative Orders*, 16 January 2007

AFI 33-332, *Air Force Privacy Program*, 16 May 2011

AFI 36-2102, *Base-Level Relocations Procedures*, 18 September 2006

AFI 36-2110, *Assignments*, 22 September 2009

AFI 36-2134, *Air Force Duty Status Program*, 8 October 2004

AFI 36-2201, *Air Force Training Program*, 15 September 2010

AFI 36-2604, *Service Dates and Dates of Rank*, 5 October 2012

AFI 36-2911, *Desertion and Unauthorized Abse*nce, 15 October 2009

AFI 36-3003, *Military Leave Program*, 26 October 2009

AFI 36-3009, *Airman and Family Readiness Centers*, 18 January 2008

AFI 36-3024, *Transitional Compensation for Abused Dependents*, 15 September 2003

AFI 36-3109, *Air Force Aid Society (AFAS)*, 5 March 2004

AFI 36-3208, *Administrative Separation of Airmen*, 9 July 2004

AFI 36-6001, *Sexual Assault Prevention and Response (SAPR) Program*, 29 September 2008

AFI 38-101, *Air Force Organization*, 16 March 2011

AFI 40-301, *Family Advocacy*, 30 November 2009

AFI 41-210, *Tricare Operations and Patient Administrative Functions*, 6 June 2012

AFI 44-109, *Mental Health and Military Law*, 1 March 2000

AFI 44-120, *Military Drug Demand Reduction Program*, 3 January 2011

AFI 51-103, *Designation and Certification of Judge Advocates*, 7 December 2004

AFI 51-202, *Nonjudicial Punishment*, 2 November 2003

AFI 51-501, *Tort Claims*, 15 December 2005

AFI 51-502, *Personnel and Government Recovery Claims*, 1 March 1997

AFI 51-504, *Legal Assistance, Notary and Preventive Law Programs*, 27 October 2003

AFI 51-703, *Foreign Criminal Jurisdiction*, 6 May 1994

AFI 51-1001, *Delivery of Personnel to United States Civilian Authorities for Trial*, 20 October 2006

AFI 52-101, *Planning and Organizing*, 10 May 2005

AFI 65-601, Vol. I, *Budget Guidance & Procedures*, 16 August 2012

AFI 71-101V1, *Criminal Investigations Program*, 8 April 2011

AFI 90-401, *Air Force Relations With Congress*, 14 June 2012

AFJI 51-706, *Status of Forces Policies, Procedures and Information*, 15 December 1989

AFJI 51-707, *Consular Protection of Foreign Nationals Subject to the Uniform Code of Military Justice*, 5 November 1968

AFMAN 51-203, *Records of Trial*, 17 November 2009

AFH 33-337, *The Tongue & Quill*, 1 August 2004

DA PAM 27-9, *Military Judge's Benchbook*, 1 January 2010

DOD 4525.6-M, *Department of Defense Postal Manual*, 15 August 2002

DOD 5200.1-R, *Information Security Program Regulation*, 14 January 1997

DOD Directive 1010.1, *Military Personnel Drug Abuse Testing Program*, 9 December 1994

DOD Directive 1030.1, *Victim and Witness Assistance*, 13 April 2004

DOD Directive 4500.54E, *DoD Foreign Clearance Program (FCP)*, 28 December 2009

DOD Directive 6495.01, *Sexual Assault Prevention and Response (SAPR) Program*, 23 January 2012, and AFD-071001-025, *Department of the Air Force Policies and Procedures for the Prevention of and Response to Sexual Assault*, 6 October 2005

DOD Directive 7730.47, *Manual for Defense Incident-Based Reporting System*, 15 October 1996

DOD Instruction 1030.2, *Victim and Witness Assistance Procedures*, 4 June 2004

DOD Instruction 1325.07, *Administration of Military Correctional Facilities and Clemency and parole Authority*, 11 March 2013

DOD Instruction 1342.24, *Transitional Compensation (TC) for Abused Dependents*, 23 May 1995

DOD Instruction 5505.11, *Fingerprint Card and Final Disposition Report Submission Requirements*, 9 July 2010

DOD Instruction 5505.14, *Deoxyribonucleic Acid (DNA) Collection Requirement for Criminal Investigations*, 27 May 2010

DOD Instruction 5525.07, *Implementation of the Memorandum of Understanding (MOU) Between the Departments of Justice (DoJ) and Defense Relating to the Investigation and Prosecution of Certain Crimes*, 18 June 2007

DOD Instruction 5525.11, *Criminal Jurisdiction Over Civilians Employed by or Accompanying the Armed Forces Outside the United States, Certain Service Members, and Former Service Members*, 3 March 2005

DOD Instruction 6495.02, *Sexual Assault Prevention and Response Program Procedures*, 13 November 2008

DOD Regulation 7000.14-R, *DoD Financial Management Regu*lation, date varies by volume

DOD Regulation 5400.7-R, *DoD Freedom of Information Act Program*, 11 April 2006

Joint Federal Travel Regulations, Vol. II, 1 August 2011

Manual for Courts-Martial

Uniform Code of Military Justice

Prescribed Forms

AF Form 304, *Request for Appellate Defense Counsel*

AF Form 835, *Sentence Worksheet (General Court-Martial)*

AF Form 1092, *Court-Martial Findings Worksheet*

AF Form 1093, *Sentence Worksheet (Special Court-Martial)*

AF Form 3226, *Authority to Apprehend in Private Dwelling*

Adopted Forms

AF IMT 366, *Record of Proceedings of Vacation of Suspended Nonjudicial Punishment*

AF Form 3070A, *Record of Nonjudicial Punishment Proceedings (AB thru TSgt)*

AF Form 3070B, *Record of Nonjudicial Punishment Proceedings (MSgt thru CMSgt)*

AF Form 3070C, *Record of Nonjudicial Punishment Proceedings (Officer)*

AF IMT 847, *Recommendation for Change of Publication*

DD Form 453, *Subpoena*

DD Form 453-1, *Travel Order*

DD Form 454, *Warrant of Attachment*

DD Form 455, *Report of Proceedings to Vacate Suspension of a General Court-Martial Sentence or of a Special Court-Martial Sentence Including a Bad-Conduct Discharge Under Article 72, UCMJ, and R.C.M. 1109*

DD Form 456, *Interrogatories and Depositions*

DD Form 457, *Investigating Officer's Report*

DD Form 458, *Charge Sheet*

DD Form 490, *Record of Trial*

DD Form 493, *Extract of Military Records of Previous Convictions*

DD Form 553, *Deserter/Absentee Wanted by the Armed Forces*

DD Form 1351, *Travel Voucher*

DD Form 1351-2, *Travel Voucher or Subvoucher*

DD Form 1610, *Request and Authorization for TDY Travel of DoD Personnel*

DD Form 1722, *Request for Trial Before Military Judge Alone*

DD Form 2701, *Initial Information for Victims and Witnesses of Crime*

DD Form 2702, *Court-Martial Information for Victims and Witnesses of Crime*

DD Form 2703, *Post-Trial Information for Victims and Witnesses of Crime*

DD Form 2704, *Victim/Witness Certification and Election Concerning Inmate Status*

DD Form 2705, *Victim and Witness Notification of Inmate Status*

DD Form 2706, *Annual Report on Victim and Witness Assistance*

DD Form 2707, *Confinement Order*

DD Form 2329, *Record of Trial by Summary Court-Martial*

DD Form 2330, *Waiver/Withdrawal of Appellate Rights in General and Special Courts- Martial Subject to Review by a Court of Military Review*

DD Form 2331, *Waiver/Withdrawal of Appellate Rights in General Courts-Martial Subject to Examination in the Office of the Judge Advocate General*

DD Form 2791, *Notice or Release/Acknowledgement of Convicted Sex Offender Registration Requirements*

SF Form 1034, *Public Voucher for Purchases and Services Other than Personal*

SF Form 1164, *Claim for Reimbursement for Expenditures on Official Business*

Abbreviations and Acronyms

ACM—AFLOA/JAJM General Court-Martial Reference Number

ACMR—Army Court of Military Review

ACMS—AFLOA/JAJM Special Court-Martial Reference Number

ADC—Area Defense Counsel

AF—Automatic Forfeitures

AFCCA—Air Force Court of Criminal Appeals

AFCMR—Air Force Court of Military Review

AFDW—Air Force District of Washington

AFELM—Air Force Element

AFI—Air Force Instruction

AFIT—Air Force Institute of Technology

AFLOA—Air Force Legal Operations Agency

AFMAN—Air Force Manual

AFOSI—Air Force Office of Special Investigations

AFPC—Air Force Personnel Center

AFPD—Air Force Policy Directive

AFSFC—Air Force Security Forces Center

A&FRC—Airman and Family Readiness Center

AFRC—Air Force Reserve Command

AMJAMS—Automated Military Justice Analysis and Management System

ANG—Air National Guard

AOR—Area of Operations

ARC—Air Reserve Component

AWOL—Absent Without Leave

BCD—Bad Conduct Discharge

CC—Commander

CCDR—Combatant Commander

CFR—Code of Federal Regulations

CMO—Court Martial Order

CMR—Court Martial Reporter

COMA—Court of Military Appeals

CONUS—Continental United States

CSDC—Chief Senior Defense Counsel

CSTC—Chief Senior Trial Counsel

CWF—Central Witness Funding

DAF—Department of the Air Force

DFAS—Defense Finance & Accounting Services

DJAG—The Deputy Judge Advocate General

DNA—Deoxyribonucleic Acid

DoD—Department of Defense

DoDD—Department of Defense Directive

DoDI—Department of Defense Instruction

DOJ—Department of Justice

DRU—Direct Reporting Unit

DTS—Defense Travel System

ETS—Expiration of Term of Service

FLITE—Federal Legal Information Through Electronics

FOA—Field Operating Agency

FOIA—Freedom of Information Act

GCM—General Court-Martial

GCMCA—General Court-Martial Convening Authority

HC—Installation Chaplain

HQ AFSFC—Headquarters Air Force Security Forces Center

IAW—In accordance with

IMDC—Individual Military Defense Counsel

IO—Investigating Officer

ITO—Invitational Travel Order

JAC—Civil Law and Litigation Directorate

JAJ—Judiciary Directorate

JAJA—Appellate Defense Division

JAJD—Trial Defense Division

JAJG—Government Trial and Appellate Counsel Division

JAJM—Military Justice Division

JAJR—Clemency, Corrections and Officer Review Division

JAS—Legal Information Services

JAT—Air Force Trial Judiciary

JFTR—Joint Federal Travel Regulations

LIO—Lesser Included Offense

LLM—Master of Laws

LPSP—Limited Privilege Suicide Prevention Program

LRO—Local Responsible Official

MAJCOM—Major Command

MCM—Manual For Courts-Martial

MEJA—Military Extraterritorial Jurisdiction Act

MF—Mandatory Forfeitures

MJ—Military Judge

MRE—Military Rules of Evidence

NCOIC—Non-Commissioned Officer in Charge

NJP—Nonjudicial Punishment

PA—Public Affairs

PCR—Pretrial Confinement Review

PCRO—Pretrial Confinement Review Officer

PDS—Personal Data Sheet

PIF—Personnel Information File

PTA—Pretrial Agreement

RCF—Regional Confinement Facility

RCM—Rules for Courts-Martial

RILO—Officer Resignation for the Good of the Service

RIP—Report on Individual Personnel

RO—Responsible Official

ROI—Report of Investigation

ROT—Record of Trial

RTDP—Return to Duty Program

SAC—Special Agent-in-Charge

SAPR—Sexual Assault Prevention and Response Program

SARC—Sexual Assault Response Coordinator

SCM—Summary Court-Martial

SCMCA—Summary Court-Martial Convening Authority

SDC—Senior Defense Counsel

SecAF—Secretary of the Air Force

SF—Security Forces

SG—Medical Facility Commander

SIR—Special Interest Report

SJA—Staff Judge Advocate

SJAR—Staff Judge Advocate Recommendation

SPCM—Special Court-Martial

SPCMCA—Special Court-Martial Convening Authority

SSN—Social Security Number

STC—Senior Trial Counsel

TC—Trial Counsel

TDY—Temporary Duty

TJAG—The Judge Advocate General

TR—Transportation Request

USACIL—U.S. Army Criminal Investigation Laboratory

UCMJ—Uniform Code of Military Justice

USC—United States Code

USCAAF—United States Court of Appeals for the Armed Forces

USSS—United States Secret Service

VA—Victim Advocate

VWAP—Victim and Witness Assistance Program

WFMS—Witness Funding Management System

Attachment 2

GENERAL COUNSEL OF THE DEPARTMENT OF DEFENSE
1600 DEFENSE PENTAGON
WASHINGTON, DC 20301-1600

GENERAL COUNSEL

JAN 20 2012

MEMORANDUM FOR (SEE DISTRIBUTION)

SUBJECT: Policy and Procedures Applicable to DoD and United States Coast Guard (USCG) Civilian Personnel Subject to Uniform Code of Military Justice (UCMJ) Jurisdiction in Time of Declared War or a Contingency Operation

References: See Attachment 1

Purpose. This memorandum:

- Replaces Directive Type Memorandum 09-015 on the same subject.
- Clarifies when "covered civilian employees" are subject to military jurisdiction pursuant to section 552 of Public Law 109-364 (Reference (a)) and Article 2(a)(10) of sections 801 – 846 of title 10, United States Code (U.S.C.) (also known as "The Uniform Code of Military Justice" and hereafter referred to as "UCMJ") (Reference (b)).
- By authority granted by Secretary of Defense Memorandum (Reference (c)), establishes additional implementing guidance applicable to cases involving covered civilian employees.
- Is effective immediately; it shall be incorporated into the next revision of DoD Instruction 5525.11 (Reference (d)). DoD regulations and other guidance, the regulations and other guidance of the Military Departments (including the USCG), and the publications and other guidance of the Joint Chiefs of Staff shall incorporate this memorandum's guidance and its attachments.

Applicability. This memorandum:

- Applies to OSD, the Military Departments (including the Coast Guard at all times, including when it is a Service in the Department of Homeland Security (DHS) by agreement with that Department), the Office of the Chairman of the Joint Chiefs of Staff and the Joint Staff, the Combatant Commands, the Office of the Inspector General of the Department of Defense, the Defense Agencies, the DoD Field Activities, and all other organizational entities within the Department of Defense (hereafter collectively referred to as the "DoD Components").

- Applies to all DoD Component civilian employees and, in particular, those DoD Component civilian employees who constitute covered civilian employees, as defined in the Glossary.

- Does not provide guidance regarding the exercise of UCMJ jurisdiction over DoD Component civilian employees on any basis other for reasons other than Article 2(a)(10) of the UCMJ.

Definitions. See Glossary.

Policy. This memorandum clarifies DoD policy and provides additional guidance with respect to covered civilian employees, consistent with References (a) through (c), the Manual for Courts-Martial (MCM) (Reference (e)), and chapter 75 of title 5, U.S.C. (Reference (f)).

- DoD Component civilian employees, at specified times and under specific circumstances, become covered civilian employees who are subject to military jurisdiction under Article 2(a)(10) of the UCMJ. Effective October 16, 2006, section 552 of Reference (a) amended Article 2(a)(10) of the UCMJ and extends UCMJ jurisdiction in time of declared war or a contingency operation over persons who serve with or accompany an armed force in the field. Reference (e) implements the UCMJ.

- Those specified times when DoD Component civilian employees are subject to Article 2(a)(10), UCMJ, jurisdiction are during time of declared war or a contingency operation, as defined in the Glossary.

- Those certain circumstances required for Article 2(a)(10), UCMJ, jurisdiction over DoD Component civilian employees are when the employees are serving with or accompanying the Armed Forces in the field, as those terms are defined in the Glossary. Only military contingency operations that constitute being in the field are considered qualifying contingency operations for the purpose of Article 2(a)(10), UCMJ, jurisdiction.

- Reference (c) established general policies and procedures applicable to DoD and USCG contractor personnel and civilian employees subject to Article 2(a)(10), UCMJ, jurisdiction. In so doing, the Secretary of Defense premised those policies and procedures on the unique nature of the Article 2(a)(10) extension of UCMJ jurisdiction over civilians and

the Secretary's assessment that this jurisdiction will require sound management over when, where, and by whom such jurisdiction is exercised.

- Consistent with the Secretary's policies and guidance in reference (c), it is appropriate that additional guidance now be given that is tailored for DoD Component civilian employees.
    - Each of the offenses enacted within the UCMJ and listed as "Punitive Articles" within Part IV of Reference (e) is written in one of three ways and directed toward a specified population. Depending on the offense at issue and to whom the offense applies, as enacted, an act may constitute an offense if it is committed by: "any person"; "any member of the armed forces"; or "any person subject to this chapter" (meaning the UCMJ). In addition, the offense's specified terms or elements may further limit its applicability to misconduct committed by military personnel (e.g., commissioned officers, warrant officers, enlisted members). Consultation with staff judge advocates, or their designated representatives, is necessary to determine if a specific UCMJ offense applies to a covered civilian employee.
    - Other than a limitation resulting from the language of the particular UCMJ or "Punitive Article" regarding who may be punished for committing the offense, neither reference (b) nor (e) renders a UCMJ offense inapplicable to a covered civilian employee.
- The guidance in Attachment 3 to Reference (c), and the definitions of terms in the Glossary of this memorandum, provide additional considerations on when and whether to apply the Article 2(a)(10), UCMJ, provisions to DoD and USCG civilian employees who are serving with the Armed Forces during a declared war or a qualifying contingency operation.
- The exercise of UCMJ jurisdiction for crimes committed by covered civilian employees does not preclude appropriate adverse action that may normally be applicable under the provisions of Reference (f) or other applicable law or regulations.
- It is imperative when addressing a situation involving a covered civilian employee's misconduct that may be subject to Article 2(a)(10), UCMJ, jurisdiction that, to the extent practicable, combatant command theater

commanders and their servicing staff judge advocates promptly notify and consult available combatant command civilian human resources (HR) officials to assess possible options and applicable procedures of Reference (f) or other applicable law or regulations as an administrative action consideration under Rule for Courts-Martial 306(c) of Reference (e). Consulting HR officials affords the commander the opportunity to obtain information before the commander exercises his or her discretion in disposing of an offense in accordance with Rule for Courts-Martial 306(a) and (b) of Reference (e).

- Commanders, supervisors, staff judge advocates, and all others who are required to complete documentation associated with UCMJ actions as applied to covered civilian employees shall use existing forms and requirements for documenting UCMJ actions in accordance with Reference (e).

- As stated in Reference (c), only the commanders of geographic combatant commands and those commanders assigned or attached to the combatant command who possess general court-martial convening authority, may exercise Article 2(a) (10), UCMJ, court-martial jurisdiction over covered civilian employees. Such authority has been withheld from all other commanders and commanders who do not possess general court-martial convening authority in accordance with Reference (c). The power to convene courts-martial may not be delegated (Rule for Courts-Martial 504(b)(4) of Reference (e)).

- Only persons occupying positions designated in Article 22(a), UCMJ, and commanders designated by the Secretary concerned or empowered by the President may convene courts-martial in accordance with the Rule for Courts-Martial 504(b) of Reference (e). Civilian supervisors do not possess such authority and are precluded from exercising UCMJ authority.

- In accordance with Reference (c), within the Department of Defense, the Secretary of Defense has withheld authority to exercise Article 2(a)(10), UCMJ, jurisdiction as a court-martial convening authority over, and withheld authority to initiate nonjudicial punishment pursuant to Article 15, UCMJ against, a covered civilian employee:

    - When the alleged offense is committed, in whole or in part, within the United States, as defined in the Glossary;

- Who is not at all times during the alleged misconduct located outside the United States, as defined in the Glossary; or

- Who is, at the time court-martial charges are preferred pursuant to RCM 307 of reference (e) or notice of proposed nonjudicial punishment proceedings pursuant to Article 15, UCMJ is given, located within the United States, as defined in the Glossary.

- Before combatant command theater commanders intending to exercise Article 2(a)(10), UCMJ, jurisdiction prefer UCMJ charges pursuant to RCM 307 of reference (e) against a covered civilian employee, notice of the alleged offense shall be given to the Department of Justice (DoJ), in accordance with the procedures established by References (c) and (d). By agreement between the two departments, DoJ shall be afforded 14 days to determine whether Federal criminal jurisdiction will be exercised pursuant to sections3261-3267 of title 18, U.S.C. (also known at the Military Extraterritorial Jurisdiction Act of 2000 (MEJA) (Reference (g)) or another Federal statute.

Releasability. UNLIMITED. This memorandum is approved for public release and is a military justice document maintained within the Office of the Deputy General Counsel (Personnel and Health Policy) and is available on the Internet from the OGC Web Site at www.dod/mil/dodgc.

Jeh Charles Johnson
General Counsel of the Department of Defense

Attachments:
As stated

DISTRIBUTION:
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DIRECTORS OF THE DoD FIELD ACTIVITIES

ATTACHMENT 1

REFERENCES

(a) Section 552 of Public Law 109-364, "John Warner National Defense Authorization Act for Fiscal Year 2007," October 17, 2006
(b) Sections 101(a)(13), 101(a)(4), 801-946 of title 10, United States Code (also known as the "Uniform Code of Military Justice" (UCMJ))
(c) Secretary of Defense Memorandum, "UCMJ Jurisdiction Over DoD Civilian Employees, DoD Contractor Personnel, and Other Persons Serving With or Accompanying the Armed Forces Overseas During Declared War and in Contingency Operations," March 10, 2008
(d) DoD Instruction 5525.11, "Criminal Jurisdiction Over Civilians Employed By or Accompanying the Armed Forces Outside the United States, Certain Service Members, and Former Service Members, " March 3, 2005
(e) Manual for Courts-Martial, United States, 2008
(f) Chapter 75 of title 5, United States Code
(g) Sections 3261-3267 of title 18, United States Code (also known as the "Military Extraterritorial Jurisdiction Act of 2000" (MEJA))
(h) Sections 3371-3375 of title 5, United States Code (also known as the "Intergovernmental Personnel Act"

ATTACHMENT 2

RESPONSIBILITIES

1. GENERAL COUNSEL OF THE DEPARTMENT OF DEFENSE (GC, DoD). The GC, DoD shall:

a. Transmit, as appropriate, to DoJ cases subject to Article 2(a)(10), UCMJ, jurisdiction that may also be subject to Federal criminal jurisdiction under Reference (g) or other Federal statutes.

b. Provide notice to the Combatant Commands of DoJ determinations of Federal criminal jurisdiction over such cases pursuant to Reference (g) and other Federal criminal statutes, as applicable, in accordance with the procedures of References (c) and (d).

c. Advise the Secretary of Defense regarding the withholding of Article 2(a)(10), UCMJ, authority pursuant to this memorandum and References (c) and (e).

d. Incorporate policies and guidance provided in Reference (c) and this memorandum into the next revision of Reference (d).

2. UNDER SECRETARY OF DEFENSE FOR PERSONNEL AND READINESS (USD(P&R)). The USD(P&R) shall:

a. Establish and oversee the implementation of the policy and guidance for the exercise of UCMJ authority as it applies to DoD Component civilian employees.

b. Ensure that servicing DoD civilian HR officials are adequately trained on the requirements of this memorandum and prepared to appropriately advise DoD Component civilian employees and management officials.

c. Establish policy to ensure that DoD Components document position descriptions and vacancy announcements when DoD Component civilian employees are in positions that they may potentially be deployed in support of a contingency operation and become covered civilian employees subject to UCMJ jurisdiction. Include this statement on the position descriptions and vacancy announcements: "This position may require deployment in support of a contingency operation where such deployment may subject the incumbent to Uniform Code of Military Justice jurisdiction."

d. Establish policy to ensure that, prior to departing on the deployment from the home station and upon arrival in the deployed location, DoD Component civilian employees who are subject to deployment as a covered civilian employee in support of a qualifying contingency operation are notified that they may be subject to UCMJ jurisdiction. At the time this memorandum is issued, take immediate action to notify those deployed DoD Component civilian employees who are a covered civilian employees and who may be unaware that they are subject to Article 2(a)(10), UCMJ, jurisdiction.

e. Establish policy to ensure that DOD Components document travel orders of deploying DoD Component civilian employees when their deployment potentially subjects them to UCMJ jurisdiction as a covered civilian employee. Include this statement on the official travel orders: "Employee is required to deploy to, serve, or accompany an Armed Force in the field in support of a contingency operation, and may be subject to UCMJ jurisdiction while deployed. Employee is under the command of [insert appropriate Combatant Commander] for purpose of UCMJ jurisdiction while deployed."

f. Ensure that procedures enable DoD and USCG civilian HR officials to file in a covered civilian employee's official personnel file a record of any UCMJ action that is taken against the employee.

g. Ensure compliance with this memorandum and incorporate, as applicable, its policy and guidance into DoD issuances applicable to DoD Component civilian employees.

3. HEADS OF THE DoD COMPONENTS. The Heads of the DoD Components shall:

a. Ensure compliance with this memorandum and incorporate, as applicable, its policy and guidance into DoD Component issuances that are applicable to DoD Component civilian employees.

b. Ensure documentation of position descriptions and vacancy announcements when DoD Component civilian employees are in positions that they may potentially be deployed in support of a contingency operation and become covered civilian employees subject to UCMJ jurisdiction. Include this statement on the position descriptions and vacancy announcements: "This position may require deployment in support of a contingency operation where such deployment may subject the incumbent to Uniform Code of Military Justice jurisdiction."

c. Provide notice of Article 2(a)(10), UCMJ, jurisdiction over covered civilian employees and provide any necessary training to DoD Component civilian employees,

supervisors, and commanders regarding DoD policy and guidance, as provided in this DTM, Reference (c), and applicable provisions of the UCMJ and Reference (e).

d. Provide commanders, supervisors, and civilian HR officials training, by a judge advocate or DoD civilian attorney experienced in military justice and military law and who has a substantive knowledge of the UCMJ, regarding the UCMJ provisions applicable to covered civilian employees in accordance with References (b), (c) and (e).

e. Require civilian HR officials to ensure that DoD Component civilian employees who are subject to deployment as a covered civilian employee in support of DoD contingency operations receive training regarding the provisions of this memorandum, the UCMJ, and References (c) and (e) that are applicable to covered civilian employees. Such training shall include the UCMJ offenses potentially applicable to covered civilian employees and those that are not, and the rights afforded covered civilian employees during UCMJ proceedings, including any associated apprehension, detention, or investigative activities.

f. Ensure travel orders of deploying DoD Component civilian employees document that their deployment potentially subjects them to UCMJ jurisdiction as a covered civilian employee. Include this statement on the official travel orders: "Employee is required to deploy to, serve, or accompany an Armed Force in the field in support of a contingency operation, and may be subject to UCMJ jurisdiction while deployed. Employee is under the command of [insert appropriate Combatant Commander] for purpose of UCMJ jurisdiction while deployed."

g. Provide commanders with information on possible adverse actions and procedures applicable to covered civilian employees, and other authorities and requirements applicable to disciplinary actions pursuant to Reference (f) or other applicable laws or regulations.

h. When deploying HR officials as resources to combatant command theater commanders, ensure the HR officials are trained and prepared to consult with combatant command theater commanders and their servicing staff judge advocates on possible options and applicable procedures of Reference (f) or other applicable laws or regulations as an administrative action for consideration under Rule for Courts-Martial 306(c) of Reference (e). Consulting HR officials affords the commander the opportunity to obtain information before the commander exercises his or her discretion in disposing of an offense in accordance with Rule for Courts-Martial 306(a) and (b) of Reference (e).

4. COMMANDERS OF THE GEOGRAPHIC COMBATANT COMMANDS. The Commanders of the Geographic Combatant Commands, in addition to the responsibilities in section 3 of this attachment, shall ensure that theater commanders and servicing staff judge advocates:

a. When addressing a situation involving a covered civilian employee's misconduct that may be subject to Article 2(a)(10), UCMJ, jurisdiction, to the extent practicable, promptly notify and consult available combatant command civilian HR officials to assess possible options and applicable procedures of Reference (f) or other applicable laws or regulations as an administrative action for consideration under Rule for Courts-Martial 306(c) of Reference (e). Consulting HR officials affords the commander the opportunity to obtain information before the commander exercises his or her discretion in disposing of an offense in accordance with Rule for Courts-Martial 306(a) and (b) of Reference (e).

b. If the covered civilian employee is also a member of a Reserve Component of the Armed Forces, or a member of the Army or Air National Guard of the United States, the convening authority initiating Article 2(a)(10), UCMJ, jurisdiction shall notify the member's reserve or National Guard commander for further action as may be appropriate.

5. Failure to provide any notifications required by this memorandum (including, but not limited to, statements in position descriptions, vacancy announcements, or travel orders) that a person, group of people, or position may be subject to UCMJ jurisdiction shall not affect or preclude the exercise of UCMJ jurisdiction over any person.

6. COMMANDANT, UNITED STATES COAST GUARD. By agreement of the DHS and consistent with the applicability of References (c) and (d) to the United States Coast Guard, the Commandant, United States Coast Guard, shall, to the extent practicable, comply with this memorandum and incorporate its provisions in applicable United States Coast Guard regulations.

GLOSSARY

DEFINITIONS

Unless otherwise noted, these terms and their definitions are for the purpose of this memorandum.

Armed Forces. Defined in section 101(4) of Reference (b).

contingency operation. Defined in section 101(a)(13)(A) or 101(a)(13)(B) of Reference (b).

covered civilian employee. A DoD Component civilian employee who, pursuant to References (a) and (b), becomes subject to military UCMJ jurisdiction during a declared war or a qualifying contingency operation, when serving with or accompanying the Armed Forces in the field.

declared war. A term that has been judicially construed to mean a congressionally-declared war. (See Analysis to Rule 202, Appendix 21, "Analysis of Rules for Courts-Martial," of Reference (e).)

DoD Component civilian employee. DoD and USCG civilian employees (including the Coast Guard at all times, including when it is a Service in the DHS by agreement with that Department), including civilians paid with non-appropriated funds, direct and indirect hire foreign national employees, other U.S. Government personnel assigned or detailed under an Intergovernmental Personnel Act (Reference (h)) arrangement, and military technicians if working in their civilian capacity.

in the field. A term judicially construed to mean a military operation with a view toward engaging the enemy or a hostile force. It is not determined by the locality in which the Armed Force is found, but rather by the activity in which the Armed Force is engaged. (See Analysis to Rule 202, Appendix 21, "Analysis of Rules for Courts-Martial," of Reference (e).)

qualifying contingency operation. For the purposes of Article 2(a)(10), UCMJ, jurisdiction, a contingency operation, which by its purpose meets the Glossary definition of "in the field."

serving with or accompanying an Armed Force. Terms judicially construed, as explained in the Analysis to Rule 202, Appendix 21, of Reference (e), to mean a connection with or dependence upon the activities of the Armed Forces or its personnel. A person's presence must be more than merely incidental. A person may be "accompanying" an

Armed Force although not directly employed by it or the Government. A person "accompanying" an Armed Force may be "serving with" it as well, but the distinction is important because even though a civilian's contract with the Government ended before the commission of an offense, and hence the person is no longer "serving with" an Armed Force, jurisdiction may remain on the basis that the person is "accompanying" an Armed Force because of his or her continued connection with the military.

subject to this chapter. A general term used in the UCMJ and Reference (e) to refer to persons who are subject to UCMJ jurisdiction (Reference (b)).

United States. As defined in Reference (c), the several States of the United States, the District of Columbia, and the commonwealths, territories, and possessions of the United States.

OPR: AFLOA/JAJ

Attachment 3

AIR FORCE STANDARDS FOR CRIMINAL JUSTICE

The *Air Force Standards for Criminal Justice* (AFSCJ or the *Standards*) are directly adapted from the *American Bar Association (ABA) Standards for Criminal Justice*. The *Standards* have been specifically adapted to the unique needs and demands of Air Force legal practice. Although in adapting the *Standards* every effort was made to resolve inconsistencies, in the event of conflict, the Uniform Code of Military Justice (UCMJ), MCM, Air Force Instructions (AFI), the *Air Force Rules of Professional Conduct* (AFRPC or the *Rules*), case law, and the *Air Force Uniform Code of Judicial Conduct* (AFUCJC) will control. In the event of conflict between the *Standards* and the ethics rules of a lawyer's licensing state, the *Standards* will control in trials by courts-martial and related proceedings.

The AFSCJ applies to all military and civilian lawyers, paralegals, and nonlawyer assistants in The Judge Advocate General's Corps, USAF. This includes host nation lawyers, paralegals, and other host nation personnel employed overseas by the Department of the Air Force, to the extent the *Standards* are not inconsistent with their domestic law and professional standards. They also apply to all lawyers, paralegals and nonlawyer assistants who practice in Air Force courts and other proceedings, including civilian defense counsel (and their assistants), with no other connection to the Air Force. Staff judge advocates (SJA) and Air Force military defense counsel working with defense counsel from outside the Air Force should ensure outside counsel are aware of the *Standards* and have ready access to them.

Some of the ABA standards are not applicable to the unique requirements of military practice, and consequently, were not included. Air Force standards that contain substantive modifications are annotated accordingly. Terminology changes made to conform a standard to Air Force practice are not so annotated. The following chapters of the *ABA Standards* apply to Air Force practice, except as indicated or qualified in the text.

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Chapter 4	Chapter 2. The Defense Function
Chapter 6	Chapter 3. Special Functions of the Trial Judge
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AIR FORCE STANDARDS FOR CRIMINAL JUSTICE

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CHAPTER 1
THE PROSECUTION FUNCTION

SECTION I. General Standards

Standard 3-1.1. The Function of the Standards
These standards are intended to be used as a guide to professional conduct and performance. They are not intended to be used as criteria for the judicial evaluation of alleged misconduct of the prosecutor to determine the validity of a conviction. They may or may not be relevant in such judicial evaluation, depending upon all the circumstances.

Standard 3-1.2. The Function of the Prosecutor

(a) [Omitted]
(b) The prosecutor is both an administrator of justice and an advocate. The prosecutor must exercise sound discretion in the performance of his or her function.
(c) [Modified] As a trial counsel, the prosecutor represents both the United States and the interests of justice. The duty of the prosecutor is to seek justice, not merely to convict.
(d) [Modified] It is the duty of the prosecutor to know and be guided by the standards of conduct applicable to military counsel by the Uniform Code of Military Justice (UCMJ); Manual for Courts-Martial (MCM); AFI 51-201, Administration of Military Justice; and the Air Force Rules of Professional Conduct (AFRPC or "Rule(s)").
(e) [Modified] As used in this chapter, the term "unprofessional conduct" denotes conduct which, in either identical or similar language, is or should be made subject to disciplinary sanctions pursuant to codes of professional responsibility in force. Where other terms are used, the standard is intended as a guide to honorable professional conduct and performance.

DISCUSSION
The term "prosecutor" as used throughout this section includes not only the trial counsel, but also the office of the SJA. Inclusion of the SJA within the definition of the term "prosecutor" should not be construed to suggest that it reflects a general, disqualifying partiality by SJAs. Where the standard refers to "trial counsel," it specifically means the lawyer detailed to the court-martial. See Rule 3.8, Special Responsibilities of a Trial Counsel; Rule for Courts-Martial (R.C.M.) 502(d)(5), Duties of Trial and Assistant Trial Counsel. Prosecutors are also obligated to know and follow the AFRPC and the other standards under subsection (d). Although Trial Counsel should be cautious to avoid the appearance of undue command influence, Trial Counsel should normally be allowed to identify his or her client as the "United States" and advocate on behalf of client. See RCM 502(d)(5) ("[t]he trial counsel shall prosecute cases on behalf of the United States …."); *Berger v. United States*, 295 U.S. 78, 88 (1935) ("[t]he United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with

earnestness and vigor—indeed he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones."); *United States v. Golston*, 53 M.J. 61, 63 (C.A.A.F. 2000) ("trial counsel at a court-martial is the representative of the United States Government, and he or she should act accordingly.")

Standard 3-1.3. Conflicts of Interest

(a) [Modified] A prosecutor should avoid the appearance or reality of a conflict of interest with respect to official duties. In some instances, as defined in the AFRPC, failure to do so will constitute unprofessional conduct.
[(b) – (h) omitted]

DISCUSSION
Particular care must be exercised when the trial counsel has had any previous professional contact with the accused, either through the legal assistance program or otherwise. In such circumstances, he or she must notify the SJA, defense counsel and the military judge (if appropriate) as soon as possible. See *United States v. Rushatz*, 31 M.J. 450 (C.M.A. 1990); *United States v. Reynolds*, 24 M.J. 261 (C.M.A. 1987); *United States v. Stubbs*, 23 M.J. 188 (C.M.A. 1987); and *United States v. Payton*, 23 M.J. 379 (C.M.A. 1987). See also Rules 1.7 to 1.13.

Standard 3-1.4. Public Statements
(a) A prosecutor should not make or authorize the making of an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if the prosecutor knows or reasonably should know that it will have a substantial likelihood of prejudicing a criminal proceeding.
(b) A prosecutor should exercise reasonable care to prevent investigators, law enforcement personnel, employees, or other persons assisting or associated with the prosecutor from making an extrajudicial statement that the prosecutor would be prohibited from making under this standard.

DISCUSSION
All trial counsel and SJAs should also be aware of the provisions of AFI 51-201, Administration of Military Justice, Chapter 12, regarding releasing information to members of the news media. See also Rule 3.6, Trial Publicity; and Standards 8-1.1 and 8-2.2.

Standard 3-1.5 Duty to Respond to Misconduct

(a) [Modified] Where a trial counsel knows that another person associated with the legal office is engaged in action, intends to act or refuses to act in a manner that is a violation of a legal obligation or violation of the law, the trial counsel should ask the person to reconsider the action or inaction which is at issue if such a request is aptly timed to prevent such misconduct and is otherwise feasible. If such a request for reconsideration is unavailing, inapt or otherwise not feasible or if the seriousness of the matter so requires, the trial counsel should refer the matter to the SJA.
(b) [Modified] If the SJA insists upon action, or a refusal to act, that is clearly a violation of the law, the trial counsel may take further remedial action, including revealing the information

necessary to remedy this violation to appropriate government officials outside the legal office, including superior lawyers in the functional chain.

SECTION II. Organization Of The Prosecution Function

Standard 3-2.1. Prosecution Authority to be Vested in a Public Official
Standard 3-2.2. Interrelationship of Prosecution Offices within a State
Standard 3-2.3. Assuring High Standards of Professional Skill
Standard 3-2.4. Special Assistants, Investigative Resources, Experts
Standard 3-2.5. Prosecutor's Handbook; Policy Guidelines and Procedures
[All omitted]

Standard 3-2.6. Training Programs
[Modified] Training programs should be established within legal offices and regional offices for new personnel and for continuing education of the staff.

DISCUSSION
The SJA of the special court-martial convening authority is responsible for training the trial counsel in his or her office. The senior trial counsel should also take an active role in training trial counsel within his or her region. See Rule 1.1, Competence.

Standard 3-2.7. Relations With the Police [Omitted]

Standard 3-2.8. Relations with the Courts and Bar
(a) It is unprofessional conduct for a trial counsel intentionally to misrepresent matters of fact or law to the court.
(b) A trial counsel's duties necessarily involve frequent and regular official contacts with the military judge or military judges of the prosecutor's jurisdiction. In such contacts, the trial counsel should carefully strive to preserve the appearance as well as the reality of the correct relationship which professional traditions and canons require between advocates and military judges.
(c) It is unprofessional conduct for a trial counsel to engage in unauthorized *ex parte* discussions with or submission of material to a military judge relating to a particular case which is or may come before the military judge.
(d) A trial counsel should not fail to disclose to the court legal authority in the controlling jurisdiction known to the trial counsel to be directly adverse to the trial counsel's position and not disclosed by defense counsel.
(e) A trial counsel should strive to develop good working relationships with defense counsel in order to facilitate the resolution of ethical problems. In particular, trial counsel should assure defense counsel that if counsel finds it necessary to deliver physical items which may be relevant to a pending case or investigation to the trial counsel, the trial counsel will not offer the fact of such delivery by defense counsel as evidence before members for purposes of establishing defense counsel's client's culpability. However, nothing in this standard shall prevent a trial counsel from offering evidence of the fact of such delivery in a subsequent proceeding for the purpose of proving a crime or fraud in the delivery of the evidence.

DISCUSSION

See the standards in Chapter 3 for more specific guidance with respect to the limits placed *on ex parte* contacts between detailed military judges and counsel. See also Rule 3.3, Candor Toward the Tribunal; Rule 3.4, Fairness to Opposing Party and Counsel; Rule 3.5, Impartiality and Decorum of the Tribunal; *United States v. Copening*, 32 M.J. 512 (A.C.M.R. 1990); and *United States v. Berman*, 28 M.J. 615 (A.F.C.M.R. 1989).

Standard 3-2.9. Prompt Disposition of Criminal Charges
(a) A trial counsel should avoid unnecessary delay in the disposition of cases. A trial counsel should not fail to act with reasonable diligence and promptness in prosecuting an accused.
(b) A trial counsel should not intentionally use a procedural device for delay for which there is no legitimate basis.
(c) The prosecution function should be so organized and supported with staff and facilities to enable it to dispose of all criminal charges promptly. The trial counsel must be punctual in attending court and in the submission of all motions, briefs and other papers. The trial counsel should emphasize to all witnesses the importance of punctuality in attending court.
(d) It is unprofessional conduct intentionally to misrepresent facts or otherwise mislead the court in order to obtain a continuance.
(e) An SJA, without attempting to get additional resources, should not carry a workload that, by reason of its excessive size, interferes with the rendering of quality representation, endangers the interests of justice in the speedy disposition of charges, or may lead to the breach of professional obligations.

DISCUSSION
In military practice, in some circumstances, noncompliance with procedural rules and unnecessarily delaying a trial is itself an offense. See Article 98, UCMJ; Rule 3.2, Expediting Litigation; Rule 3.3, Candor Toward the Tribunal, subsection (a)(1); and Rule 3.4, Fairness to Opposing Party and Counsel, subsections (a), (c), and (d).

Standard 3-2.10. Supercession and Substitution of Prosecutor [Omitted]

Standard 3-2.11. Literary or Media Agreements
[Omitted as inapplicable; see DOD 5500.7R, Chapter 2, and Rule 1.8, Conflict of Interest: Prohibited Transactions.]

SECTION III. Investigation for Prosecution Decision

Standard 3-3.1. Investigative Function of the Prosecutor
(a) A trial counsel ordinarily relies on police and other investigative agencies for investigation of alleged criminal acts, but the trial counsel has an affirmative responsibility to investigate suspected criminal activity when it is not adequately dealt with by other agencies.
(b) An SJA should not invidiously discriminate against or in favor of any person on the basis of race, religion, sex, sexual preference, or ethnicity in exercising discretion to investigate or recommend prosecution. An SJA should not use other improper considerations in exercising such discretion.
(c) It is unprofessional conduct for a trial counsel knowingly to use illegal means to obtain evidence or to employ, instruct or encourage others to use such means.
(d) [Modified] A trial counsel should not improperly discourage or obstruct communication between prospective witnesses and defense counsel. It is unprofessional conduct for the

prosecutor to advise any person or cause any person to be advised to decline to give to the defense information which such person has the right to give.
(e) It is unprofessional conduct for a trial counsel to secure the attendance of persons for interviews by use of any communication which has the appearance or color of a subpoena or similar judicial process unless the prosecutor is authorized by law to do so.
(f) It is unprofessional conduct for a trial counsel to promise not to prosecute for prospective criminal activity, except where such activity is part of an officially supervised investigative or law enforcement program.
(g) Unless a trial counsel is prepared to forgo impeachment of a witness by the trial counsel's own testimony as to what the witness stated in an interview or to seek leave to withdraw from the case in order to present the impeaching testimony, a trial counsel should avoid interviewing a prospective witness except in the presence of a third person.

DISCUSSION
Although a witness may not be obligated to submit to an interview with defense counsel under all circumstances, trial counsel must not induce a refusal to speak with the defense. See *United States v Irwin*, 30 M.J. 87 (C.M.A. 1990); *United States v. Morris*, 24 M.J. 93 (C.M.A. 1987); Rule 1.1, Competence; Rule 3.7, Lawyer as Witness; Rule 3.8, Special Responsibilities of a Trial Counsel; and Rules 4.1 to 4.4, Transactions With Persons Other Than Clients.

Standard 3-3.2. Relations with Prospective Witnesses
(a) [Modified] It is unprofessional conduct to compensate a witness, other than an expert, for giving testimony, but it is not improper to reimburse an ordinary witness for the reasonable expenses of appearing in court, attendance for depositions pursuant to statute or court rule, or attendance for pretrial interviews. Payments to a witness may be provided consistent with guidance in the Joint Travel Regulations, provided there is no attempt to conceal the fact of reimbursement.
(b) A trial counsel should advise a witness who is to be interviewed of his or her rights against self-incrimination and the right to counsel whenever the law so requires. It is also proper for a trial counsel to advise a witness whenever the trial counsel knows or has reason to believe that the witness may be the subject of a criminal prosecution. However, a trial counsel should not so advise a witness for the purpose of influencing the witness in favor of or against testifying.
(c) The trial counsel should readily provide victims and witnesses who request it information about the status of cases in which they are interested.
(d) The trial counsel should seek to insure that victims and witnesses who may need protections against intimidation are advised of and afforded such protections where feasible.
(e) The trial counsel should ensure that victims and witnesses are given notice as soon as practicable of scheduling changes which will affect the victims' or witnesses' required attendance at judicial proceedings.
(f) The trial counsel should not require victims and witnesses to attend judicial proceedings unless their testimony is essential to the prosecution or is so required by law. When their attendance is required, the trial counsel should seek to reduce to a minimum the time they must spend at the proceedings.
(g) The trial counsel should seek to insure that victims of serious crimes or their representatives are given timely notice of: (1) judicial proceedings relating to the victim's case; (2) disposition of the case, including pretrial agreements, trial and sentencing; and (3) any decision or action in the case which results in the accused's provisional or final release from custody.

(h) Where practical, the trial counsel should seek to insure that victims of serious crimes or their representatives are given an opportunity to consult with and to provide information to the trial counsel prior to the decision whether or not to prosecute, to pursue a disposition by plea, or to dismiss the charges.

DISCUSSION
Payments to witnesses in the military are governed by the Joint Travel Regulations.

In the circumstances described in subsection (b), prosecutors generally should advise the prospective witness of his or her Article 31, UCMJ, rights. In these situations, Article 31(b) warnings are warranted based on the prosecutor's relationship to the witness, *United States v. Duga*, 10 M.J. 206, 210 (C.M.A. 1981), ("because of military rank, duty, or other similar relationship, there might be subtle pressure on a subject to respond to an inquiry"); and on the purpose of the questioning, *United States v. Loukas*, 29 M.J. 385, 387 (C.M.A. 1990) (inquiry must be part of a law enforcement or disciplinary investigation). A rights advisement is not required every time a military member questions another military member whom the questioner suspects of having committed an offense. The relationships of the individuals and the particular circumstances will determine the need. See Rules 4.1 to 4.4, Transactions with Persons Other than Clients.

Standard 3-3.3. Relations with Expert Witnesses
(a) A trial counsel who engages an expert for an opinion should respect the independence of the expert and should not seek to dictate the formation of the expert's opinion on the subject. To the extent necessary, the trial counsel should explain to the expert his or her role in the trial as an impartial expert called to aid the fact finders, and the manner in which the examination of the witnesses is conducted.
(b) It is unprofessional conduct for a trial counsel to pay an excessive fee for the purpose of influencing the expert's testimony or to fix the amount of the fee contingent upon the testimony the expert will give or the result in the case.

DISCUSSION
See *United States v. Mansfield*, 24 M.J. 611 (A.F.C.M.R. 1987), concerning relationships with expert witnesses, and Rule 4.1, Truthfulness in Statements to Others.

Standard 3-3.4. Decision to Charge
Standard 3-3.5. Relations with Grand Jury
Standard 3-3.6. Quality and Scope of Evidence before Grand Jury
Standard 3-3.7. Quality and Scope of Evidence for Information
Standard 3-3.8. Discretion as to Noncriminal Disposition
[All omitted]

Standard 3-3.9. Discretion in the Charging Decision
(a) It is unprofessional conduct for a trial counsel to institute, or cause to be instituted, or to permit the continued pendency of criminal charges when it is known that the charges are not supported by probable cause. A trial counsel should not institute or permit the continued pendency of criminal charges in the absence of admissible evidence to support a conviction.
[(b) through (g) omitted]

DISCUSSION
The convening authority ultimately determines what charges will be referred and whether to convene a court-martial. Trial counsel must inform the SJA for the convening authority immediately upon discovering that there is insufficient evidence to support a conviction of any charge. Judicial economy would suggest that an accused should be charged with all known offenses and tried once; however, this is not required. See R.C.M. 307(c)(4). An accused should not be brought to trial on charges greater in number or degree than can be reasonably supported with evidence at the trial. Allegations of offenses should be disposed of in a timely manner at the lowest appropriate level of disposition. See R.C.M. 306(b). See also Rule 3.8, Special Responsibilities of a Trial Counsel.

Standard 3-3.10. Role in First Appearance and Preliminary Hearing
[Omitted]

Standard 3-3.11. Disclosure of Evidence by the Prosecutor
(a) [Modified] It is unprofessional conduct for a trial counsel to intentionally fail to disclose to the defense, as soon as practicable, the existence of evidence known to the trial counsel which reasonably tends to negate the guilt of the accused as to an offense charged, or which reasonably tends to reduce the degree of guilt of the accused of an offense charged, or which reasonably tends to reduce the punishment of the accused.
(b) The trial counsel should not fail to make a reasonably diligent effort to comply with a legally proper discovery request.
(c) It is unprofessional conduct for a trial counsel intentionally to avoid pursuit of evidence because he or she believes it will damage the prosecution's case or aid the accused.

DISCUSSION
For specific guidance on discovery in general, see R.C.M. 701(a); Rule 3.4(d), Fairness to Opposing Party and Counsel; Standards 11-2.1 to 11-2.6; and *United States v. Trimper*, 28 M.J. 460 (C.M.A. 1989).

SECTION IV. Plea Discussions

Standard 3-4.1. Availability for Plea Discussions
(a) The trial counsel should be willing to consult with defense counsel concerning disposition of charges by plea.
[(b) omitted]
(c) It is unprofessional conduct for a trial counsel knowingly to make false statements or representations as to fact or law in the course of plea discussions with defense counsel or the accused.

DISCUSSION
Pretrial agreement negotiations may be initiated by the accused, defense counsel, trial counsel, the SJA, convening authority, or their duly authorized representatives. See R.C.M. 705(d).

Standard 3-4.2. Fulfillment of Plea Discussions
(a) It is unprofessional conduct for a trial counsel to make any promise or commitment concerning the sentence which will be imposed or concerning a suspension of the sentence. A

trial counsel may properly advise the defense what position will be taken concerning disposition.
(b) It is unprofessional conduct for a trial counsel to imply a greater power to influence the disposition of a case than is actually possessed.
(c) It is unprofessional conduct for a trial counsel to fail to comply with a plea agreement, unless an accused fails to comply with a plea agreement or other extenuating circumstances are present.

Standard 3-4.3 Record of Reasons for Nolle Prosequi Disposition [Omitted]

SECTION V. The Trial

Standard 3-5.1. Calendar Control [Omitted]

Standard 3-5.2. Courtroom Professionalism
(a) The trial counsel should support the authority of the court and dignity of the trial courtroom by strict adherence to the rules of decorum, and by manifesting an attitude of professional respect toward the military judge, opposing counsel, witnesses, accused, court members, and others in the courtroom.
(b) When court is in session, the trial counsel should address the court, not opposing counsel, on all matters relating to the case.
(c) A trial counsel should comply promptly with all orders and directives of the court, but the trial counsel has a duty to have the record reflect adverse rulings or judicial conduct which the trial counsel considers prejudicial. The trial counsel has a right to make respectful requests for reconsideration of adverse rulings.
(d) Trial counsels should cooperate with courts and the organized bar in developing codes of decorum and professional etiquette for each jurisdiction.

DISCUSSION
The Chief Trial Judge, USAF Trial Judiciary (HQ USAF/JAT), and/or the Chief Regional Military Judge for the trial judiciary region in which the trial is located may promulgate rules for courts-martial within that region. See also Standard 6-3.1; Rule 3.2, Expediting Litigation; Rule 3.3, Candor Toward The Tribunal; and Rule 3.4, Fairness to Opposing Party and Counsel.

Standard 3-5.3. Selection of Court Members
(a) The trial counsel should prepare himself or herself prior to trial to discharge effectively the prosecution function in the selection of the court and the exercise of challenges for cause and peremptory challenges.
(b) In those cases where it appears necessary to conduct a pretrial investigation of the background of court members, investigatory methods of the trial counsel should neither harass nor unduly embarrass potential court members or invade their privacy and, wherever possible, should be restricted to an investigation of records and sources of information already in existence.
(c) The opportunity to question court members should be used solely to obtain information for the intelligent exercise of challenges. A trial counsel should not intentionally use the *voir dire* to present factual matters which the trial counsel knows will not be admissible at trial or to argue the trial counsel's case to the court members.

DISCUSSION

This standard refers specifically to *voir dire* and trial counsel's preparation for *voir dire*. See R.C.M. 912, regarding questionnaires submitted to detailed court members. If the trial counsel is aware of any matters which might be grounds for a valid challenge for cause against a member, he or she should so advise the SJA for the convening authority prior to trial. See also *United States v. Credit*, 2 M.J. 631 (A.F.C.M.R. 1976).

Standard 3-5.4. Relations with Court Members
(a) [Modified] It is unprofessional conduct for a trial counsel to communicate privately with court members concerning a case before or during trial. The trial counsel should avoid the reality or the appearance of any such improper communications.
(b) The trial counsel should treat court members with deference and respect, but should avoid the reality or appearance of currying favor by a show of undue solicitude for their comfort or convenience.
(c) [Modified] After discharge of the members from further consideration of a case, it is unprofessional conduct for the trial counsel to intentionally make comments to or ask questions of a court member for the purpose of harassing or embarrassing the member in any way which will tend to influence judgment in future cases.

DISCUSSION
It is permissible for the trial counsel to ask a court member for a critique of his or her performance in the trial, so long as such request does not involve soliciting from the court member his or her vote on the findings and/or sentence. It is also permissible for the trial counsel to communicate the time and place court members should report or other similar administrative matters. See Rule 3.5, Impartiality and Decorum of the Tribunal.

Standard 3-5.5. Opening Statement
The trial counsel's opening statement should be confined to a statement of the issues in the case and remarks on evidence the trial counsel intends to offer which the trial counsel believes in good faith will be available and admissible. It is unprofessional conduct to allude to any evidence unless there is a good faith and reasonable basis for believing that such evidence will be tendered and admitted in evidence.

Standard 3-5.6. Presentation of Evidence
(a) It is unprofessional conduct for a trial counsel knowingly to offer false evidence, whether by documents, tangible evidence, or the testimony of witnesses, or fail to seek withdrawal thereof upon discovery of its falsity.
(b) It is unprofessional conduct for a trial counsel knowingly and for the purpose of bringing inadmissible matters to the attention of the military judge or court members to offer inadmissible evidence, ask legally objectionable questions, or make other impermissible comments or arguments in the presence of the military judge or court members.
(c) It is unprofessional conduct for a trial counsel to permit any tangible evidence to be displayed in the view of the military judge or court members, which would tend to prejudice fair consideration by the military judge or members until such time as a good faith tender of such evidence is made.
(d) It is unprofessional conduct to tender tangible evidence in the view of the court members if it would tend to prejudice fair consideration by the members, unless there is a reasonable basis for its admission in evidence. When there is any substantial doubt about the admissibility of such

evidence, it should be tendered by an offer of proof and a ruling obtained.

DISCUSSION
In a trial before members, if the trial counsel has reason to believe that there will be an objection to an item of evidence, the evidence should be offered in an Article 39(a), UCMJ, session, and a ruling on admissibility obtained from the military judge. See Military Rules of Evidence (M.R.E.) 103(c).

Standard 3-5.7. Examination of Witnesses
(a) The interrogation of all witnesses should be conducted fairly, objectively, and with due regard for the dignity and legitimate privacy of the witness, and without seeking to intimidate or humiliate the witness unnecessarily.
(b) [Modified] The trial counsel's belief that the witness is telling the truth does not preclude cross- examination, but may affect the method and scope of cross-examination. A trial counsel should not abuse the power of cross-examination to discredit or undermine a witness if the trial counsel knows the witness is testifying truthfully.
(c) A trial counsel should not call a witness in the presence of court members who the trial counsel knows will claim a valid privilege not to testify.
(d) It is unprofessional conduct for a trial counsel to ask a question which implies the existence of a factual predicate for which a good faith belief is lacking.

DISCUSSION
If the trial counsel is informed in advance that a witness will claim a privilege, and the trial counsel wishes to contest the claim or demonstrate the witness's unavailability, the matter should be treated without the members present in an Article 39(a), UCMJ, session. See M.R.E. 104 and Rule 3.4, Fairness to Opposing Party and Counsel. This rule by no means precludes trial counsel from legitimately impeaching witnesses as to the accuracy and completeness of their recollections, their biases, their ability to perceive the facts and events, etc.

Subsection (b) has been modified to recognize a trial counsel's dilemma when faced with a witness who incorrectly believes he or she is testifying truthfully, or who offers an ill-considered, but true, opinion. In the second sentence of the subsection, the word "use" in the ABA Standard has been replaced by the word "abuse."

Standard 3-5.8. Argument to the Court Members
(a) The trial counsel may argue all reasonable inferences from evidence in the record. It is unprofessional conduct for the trial counsel intentionally to misstate the evidence or mislead the court members as to inferences that they may draw.
(b) It is unprofessional conduct for the trial counsel to express his or her personal belief or opinion as to the truth or falsity of any testimony or evidence, or the guilt of the accused.
(c) The trial counsel should not use arguments calculated to inflame the passions or prejudices of the court members.
(d) The trial counsel should refrain from any argument which would divert the court from its duty to decide the case on the evidence.
(e) [Added] It is the responsibility of the military judge to ensure that argument to the court members is kept within proper, accepted bounds.

DISCUSSION

Arguments on findings are governed by R.C.M. 919. Sentencing arguments are regulated by R.C.M. 1001(g). It is permissible, in sentencing argument, to refer to deterrence of others from committing a similar offense as that of the accused, as long as such argument is reasonably balanced with the other sentencing goals. The military judge always has a *sua sponte* obligation to ensure that arguments are proper, and, if improper argument occurs, to immediately give appropriate curative instructions, even in the absence of objection by the defense. See also Rule 3.3, Candor Toward the Tribunal; and Rule 3.4, Fairness to Opposing Party and Counsel.

Standard 3-5.9. Facts Outside the Record
It is unprofessional conduct for the trial counsel to intentionally refer to or argue on the basis of facts outside the record whether at trial or on appeal, unless such facts are matters of common public knowledge based on ordinary human experience or matters of which the court may take judicial notice.

DISCUSSION
This standard in military practice would apply not only to the trial counsel, but also to counsel from the Appellate Government Division who are assigned to the case on appeal. See Rule 3.3, Candor Toward the Tribunal; Rule 3.4, Fairness to Opposing Party and Counsel; and Standard 4-7.9. C.f., M.R.E. 201 and 201A.

Standard 3-5.10. Comments by Prosecutor after Trial
The prosecutor should not make public comments critical of the findings or sentence, whether rendered by military judge or court members.

DISCUSSION
See AFI 51-201, Chapter 12; ABA Standard 8-1.1, Extrajudicial Statements by Lawyers; and Rule 3.6, Trial Publicity.

SECTION VI. Sentencing

Standard 3-6.1. Role in Sentencing
(a) The trial counsel should not make the severity of sentences the index of his or her effectiveness. To the extent that the trial counsel becomes involved in the sentencing process, he or she should seek to insure that a fair and informed judgment is made on the sentence and to avoid unfair sentence disparities.
[(b) and (c) omitted]

DISCUSSION
See R.C.M. 1001.

Standard 3-6.2. Information Relevant to Sentencing [Omitted]

DISCUSSION
See R.C.M. 1001 for sentencing procedures. The trial counsel will disclose to the defense, upon request, the information described in R.C.M. 701(a)(5).

CHAPTER 2

THE DEFENSE FUNCTION

SECTION I. Role of Defense Counsel

Standard 4-1.1. The Function of the Standards
These standards are intended to be used as a guide to professional conduct and performance. They are not intended to be used as criteria for the judicial evaluation of alleged misconduct of defense counsel to determine the validity of a conviction. They may or may not be relevant in such judicial evaluation, depending upon all the circumstances.

Standard 4-1.2. Role of Defense Counsel
(a) Counsel for the accused is an essential component of the administration of criminal justice. A court properly constituted to hear a criminal case must be viewed as an entity consisting of the military judge, court members (where appropriate), trial counsel and defense counsel.
(b) The basic duty the defense counsel owes to the administration of justice and as an officer of the court is to serve as the accused's counselor and advocate with courage and devotion and to render effective, quality representation.
(c) [Omitted]
(d) The defense counsel should seek to reform and improve the administration of criminal justice. When inadequacies or injustices in the substantive or procedural law come to defense counsel's attention, he or she should stimulate efforts for remedial action.
(e) The defense counsel, in common with all members of the bar, is subject to standards of conduct stated in statutes, rules, decisions of courts and codes, canons, or other standards of professional conduct. The defense counsel has no duty to execute any directive of the accused which does not comport with law or such standards. The defense counsel is the professional representative of the accused, not the accused's alter ego.
(f) It is unprofessional conduct for a defense counsel intentionally to misrepresent matters of fact or law to the court.
(g) Defense counsel should disclose to the tribunal legal authority in the controlling jurisdiction known to defense counsel to be directly adverse to the position of the accused and not disclosed by the prosecutor.
(h) It is the duty of defense counsel to know and be guided by the standards of professional conduct as defined in codes and canons of the legal profession, applicable in defense counsel's jurisdiction. The functions and duties of defense counsel are the same whether defense counsel is assigned or (in the case of civilian lawyers) privately retained.
(f) As used in this chapter, the term "unprofessional conduct" denotes conduct which, in either identical or similar language, is or should be made subject to disciplinary sanctions pursuant to codes of professional responsibility. Where other terms are used, the standard is intended as a guide to honorable conduct and performance.
Standard 4-1.3. Delays: Punctuality (a) Defense counsel should act with reasonable diligence and promptness in representing a client.
(b) Defense counsel should avoid unnecessary delay in the disposition of cases. Defense counsel should be punctual in attending court and in the submission of all motions, briefs and other papers. Defense counsel should emphasize to the client and all witnesses the importance of punctuality and attending court.
(c) It is unprofessional conduct for defense counsel intentionally to misrepresent facts or

otherwise mislead the court in order to obtain a continuance.
(d) Defense counsel should not intentionally use procedural devices for delay for which there is no legitimate basis.
[(e) omitted]

DISCUSSION
Implicit in this standard is the understanding that defense counsel must provide effective representation to each and every client. The term "unnecessary delay" should be interpreted as delays beyond the time reasonably necessary to adequately prepare and represent each client. What is "reasonably necessary" will vary based upon several factors, including the number and complexity of cases counsel is responsible for, the availability of resources and witnesses and a variety of other factors.

By way of illustration, the omitted subsection (e) addresses lawyers who accept more employment than they can effectively handle. While military defense counsel do not enjoy the luxury of voluntarily limiting the number of clients they represent, they must be equally mindful of the limits of their effectiveness. Such limitations may affect appointment of counsel. See Rule 1.2, Establishment and Scope of Representation; Rule 1.3, Diligence; Rule 3.2, Expediting Litigation; and Rule 3.3, Candor Toward the Tribunal.

Standard 4-1.4. Public Statements
Defense counsel should not make or authorize the making of an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if defense counsel knows or reasonably should know that it will have a substantial likelihood of prejudicing a criminal proceeding.

DISCUSSION
See Rule 3.6, Trial Publicity, and Standard 8-1.1.

Standard 4-1.5 Advisory Committee on Professional Responsibility and Standards
[Modified] Counsel should be aware of The Judge Advocate General's Advisory Committee on Professional Responsibility and Standards. The committee consists of the Directors of Civilian Professional Development, Plans and Programs, the USAF Judiciary, and Civil Law and Litigation. Defense counsel inquiries to the Advisory Committee that are submitted through the Trial Defense Division enjoy the same confidentiality as the client is entitled to through the lawyer-client relationship. The Advisory Committee may issue binding advisory opinions with the concurrence of The Judge Advocate General.

Standard 4-1.6. Trial Lawyer's Duty to Administration of Justice [Omitted]

DISCUSSION
Generally, this standard encourages all experienced trial lawyers to qualify themselves and stand ready to undertake the defense of an accused. It was omitted as not entirely consistent with the establishment and administration of an independent defense bar within the Air Force. Conceivably, it could apply in the case of individually requested counsel, who must be qualified and certified under Article 27(b), UCMJ, in order to act in that capacity. The same standards govern a defense counsel's conduct regardless, of whether or not he or she is assigned to the Air

Force Trial Defense Division. See R.C.M. 502(d)(6).

SECTION II. Access to Counsel

Standard 4-2.1. Communication
Standard 4-2.2. Referral Service for Criminal Cases
Standard 4-2.3. Prohibited Referrals
[All omitted]

DISCUSSION
See AFI 51-201

SECTION III. Lawyer-Client Relationship

Standard 4-3.1. Establishment of Relationship
(a) Defense counsel should seek to establish a relationship of trust and confidence with the accused and should discuss the objectives of the representation and whether defense counsel will continue to represent the accused if there is an appeal. Counsel should explain the necessity of full disclosure of all facts known to the client for an effective defense, and the extent to which counsel's obligation of confidentiality makes privileged the accused's disclosures.
(b) To ensure the privacy essential for confidential communication between a lawyer and client, adequate facilities should be available for private discussions between counsel and accused in jails, prisons, courthouses, and other places where accused persons must confer with counsel.
(c) Personnel of jails, prisons, and custodial institutions should be prohibited by law or administrative regulations from examining or otherwise interfering with any communication between client and lawyer relating to any legal action arising out of charges or incarceration.

DISCUSSION
See generally, M.R.E. 502; AFI 31-205, *The Air Force Corrections System*; Rule 1.4, Communication; and Rule 1.6, Confidentiality of Information.

Standard 4-3.2. Interviewing the Client
(a) As soon as practicable the defense counsel should seek to determine all relevant facts known to the accused. In so doing, counsel should probe for all legally relevant information without seeking to influence the direction of the client's responses.
(b) It is unprofessional conduct for the Defense counsel to instruct the client or to intimate to the client in any way that the client should not be candid in revealing facts so as to afford the defense counsel free rein to take action which would be precluded by counsel's knowing of such facts.

Standard 4-3.3. Fees
[Omitted]

DISCUSSION
Military lawyers do not charge or collect fees; however, civilian lawyers practicing before Air Force courts- martial are bound by state and federal bar standards. See ABA Rule 1.5, Fees.

Standard 4-3.4. Obtaining Publication Rights from the Accused

[Omitted as inapplicable; see DOD 5500.7R, Chapter 2, and Rule 1.8, Conflict of Interest: Prohibited Transactions.]

Standard 4-3.5. Conflicts of Interest
(a) Defense counsel should not permit his or her professional judgment or obligations to be affected by his or her own political, financial, business, property, or personal interests.
(b) Defense counsel should disclose to the accused at the earliest feasible opportunity any interest in or connection with the case or any other matter that might be relevant to the accused's selection of a lawyer to represent him or her or the lawyer's continued representation. Such disclosure should include communication of information reasonably sufficient to permit the client to appreciate the significance of any conflict or potential conflict of interest.
(c) Except for preliminary matters such as initial hearings, counsel should not undertake to defend more than one accused in the same criminal case if the duty to one accused may conflict with the duty to another. The potential for conflict of interest is so grave that ordinarily a lawyer should decline to act for more than one of several co-defendants, except in unusual situations when, after careful investigation, it is clear either that no conflict is likely to develop at trial, sentencing, or at any other time in the proceeding or that common representation will be advantageous to each of the accused represented, and in either case, that:
(i) each accused gives an informed consent to such multiple representation; and
(ii) the consent of each accused is made a matter of judicial record.
In determining the presence of consent by each accused, the military judge should make appropriate inquiries respecting actual or potential conflicts of interest of counsel and whether each accused fully comprehends the difficulties that a defense counsel sometimes encounters in defending multiple clients.
[(d) through (k) omitted]

DISCUSSION
See generally, *Wheat v. United States*, 108 S.Ct. 1692 (1988); *United States v. Newak*, 24 M.J. 238 (C.M.A. 1987); *United States v. Devitt*, 24 M.J. 307 (C.M.A. 1987); *United States v. Hurtt*, 22 M.J. 134 (C.M.A. 1986); also, *United States v. Breese*, 11 M.J. 17 (C.M.A. 1981); R.C.M. 502(d)(2); and Rules 1.7 to 1.9, Conflict of Interest.

Standard 4-3.6. Prompt Action To Protect the Accused
Many important rights of the accused can be protected and preserved only by prompt legal action. Defense counsel should inform the accused of his or her rights at the earliest opportunity and take all necessary action to vindicate such rights. Counsel should consider all procedural steps which in good faith may be taken, including, for example, moving to seek pretrial release of the accused, obtaining psychiatric examination of the accused when a need appears, moving for change of venue or continuance, moving to suppress illegally obtained evidence, moving for severance from jointly charged defendants, and seeking dismissal of the charges.

DISCUSSION
See R.C.M. 502(d)(6); Rule 1.3, Diligence; Rule 3.1, Meritorious Claims and Contentions; Rule 3.2, Expediting Litigation; and Rule 3.3, Candor Toward the Tribunal.

Standard 4-3.7. Advice and Service on Anticipated Unlawful Conduct
(a) It is a defense counsel's duty to advise a client to comply with the law, but the lawyer may

advise concerning the meaning, scope, and validity of the law.
(b) It is unprofessional conduct for a Defense counsel to counsel a client in or knowingly assist a client to engage in conduct which counsel knows to be illegal or fraudulent but defense counsel may discuss the legal consequences of any proposed course of conduct with a client.
(c) [Modified]It is unprofessional conduct for a Defense counsel to agree in advance of the commission of a crime that counsel will serve as counsel for the accused, except as part of a *bona fide* effort to determine the validity, scope, meaning, or application of the law.
(d) A defense counsel shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are implicitly authorized in order to carry out the representation, and except as stated in paragraph (e).
(e) [Added] A defense counsel may reveal such information to the extent the lawyer reasonably believes necessary:

(i) to prevent the client from committing a criminal act that the defense counsel believes is likely to result in imminent death or substantial bodily harm, or substantial impairment of national security or the readiness or capability of a military unit, vessel, aircraft, or weapons system; or

(ii) to establish a claim or defense on behalf of the defense counsel in a controversy between counsel and client, to establish a defense to a criminal charge or civil claim against counsel based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning a defense counsel's representation of the client.

(iii) to prevent the client from attempting suicide or causing serious bodily harm to herself or himself; or

(iv) to assist Air Force authorities in locating the client when those authorities believe the client may attempt suicide or cause serious bodily harm to herself or himself.

DISCUSSION
Subparagraph (d) was substituted and subparagraph (e) was added in order to eliminate inconsistency with Rule 1.6, Confidentiality. A defense counsel's duty to a client is a strong one. There may be situations where a defense counsel can act to avoid and prevent ongoing or potential misconduct without violating client confidences, and these alternatives should be considered first. Only in the very extreme and limited circumstances described above may a lawyer be excused from his fundamental obligation to preserve client confidences. Submissions by an appellant under *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), are included in the category of complaints against counsel discussed in subsection (e)(2); however, counsel may not reveal confidences that are either beyond the scope or irrelevant to such complaints. See Rule 1.2, Establishment and Scope of Representation; Rule 1.6, Confidentiality of Information; and Standard 4-7.7.

Subparagraphs (e)(iii) and (e)(iv) were added to preclude even the appearance of an ethical violation if a counsel discloses either confidences or information pertaining to the representation of a client to prevent a client from attempting suicide or physically harming himself or herself. These additions derive primarily from the fact that self-injuries are criminal acts under the UCMJ. Counsel in such circumstances should disclose only so much information as is necessary to prevent the client from harming himself or herself and should not forego opportunities to prevent clients from harming themselves via means other than disclosure of protected information.

Standard 4-3.8. Duty To Keep Client Informed
(a) Defense counsel has a duty to keep the accused informed of the developments in the case and the progress of preparing the defense and should promptly comply with reasonable requests for information.
(b) Defense counsel should explain developments in the case to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

DISCUSSION
See R.C.M. 502(d)(6) and Rule 1.4, Communication.

4.3.9. Obligations of Hybrid or Standby Counsel [Omitted]

SECTION IV. Investigation and Preparation

Standard 4-4.1. Duty To Investigate
(a) Defense counsel should conduct a prompt investigation of the circumstances of the case and to explore all avenues leading to facts relevant to the merits of the case and the penalty in the event of a conviction. The investigation should always include efforts to secure information in the possession of the prosecution and law enforcement authorities. The duty to investigate exists regardless of the accused's admissions or statements to the defense counsel of facts constituting guilt or the accused's stated desire to plead guilty.
(b) Defense counsel should not seek to acquire possession of physical evidence personally or through use of an investigator where defense counsel's sole purpose is to obstruct access to such evidence.
DISCUSSION
See R.C.M. 502(d)(6); R.C.M. 701; Rule 1.1, Competence; and *United States v Polk*, 32 M.J. 150 (C.M.A. 1991).

Standard 4-4.2. Illegal Investigation
It is unprofessional conduct for defense counsel knowingly to use illegal means to obtain evidence or information or to employ, instruct, or encourage others to do so.

DISCUSSION
See Rule 3.4, Fairness to Opposing Party and Counsel; Rule 5.1, Responsibilities of a Supervisory Lawyer; and Rule 5.3, Responsibilities Regarding Nonlawyer Assistants.

Standard 4-4.3. Relations with Prospective Witnesses
(a) Defense counsel, in representing an accused, should not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person.
(b) It is unprofessional conduct to compensate a witness, other than an expert, for giving testimony, but it is not improper to reimburse a witness for the reasonable expenses consistent with guidance in the Joint Travel Regulations, provided there is no attempt to conceal reimbursement.
(c) It is not necessary for defense counsel or an investigator for the defense, in interviewing a prospective witness, to caution the witness concerning possible self-incrimination and the need for counsel.
(d) A defense counsel should not discourage or obstruct communication between prospective

witnesses and the trial counsel. It is unprofessional conduct to advise any person, other than a client, or cause such person to be advised to decline to give to the trial counsel or counsel for co-defendants information which such person has a right to give.
(e) Unless defense counsel is prepared to forgo impeachment of a witness by counsel's own testimony as to what the witness stated in an interview or to seek leave to withdraw from the case in order to present such impeaching testimony, counsel should avoid interviewing a prospective witness, except in the presence of a third person.

DISCUSSION
See Rule 3.4, Fairness to Opposing Party and Counsel; Rule 3.7, Lawyer as Witness; Rule 4.1, Truthfulness in Statements to Others; Rule 4.2, Communication With Person Represented by Counsel; Rule 4.3, Dealing with Unrepresented Person; and Rule 4.4, Respect for Rights of Third Persons. But see *United States v. Baca*, 27 M.J. 110 (C.M.A. 1988), and *United States v. Cook*, 27 M.J. 212 (C.M.A. 1988).

Subsection (c) recognizes that a defense counsel need not advise a prospective military witness of his or her rights. Contra *United States v. Duga*, 10 M.J. 206, 210 (C.M.A. 1981) ("because of military rank, duty, or other similar relationship, there might be subtle pressure on a subject to respond to an inquiry"). But see *United States v. Loukas*, 29 M.J. 385, 387 (C.M.A. 1990) (inquiry must be part of a law enforcement or disciplinary investigation).

Standard 4-4.4. Relations with Expert Witnesses
(a) A defense counsel who engages an expert for an opinion should respect the independence of the expert and should not seek to dictate the information of the expert's opinion on the subject. To the extent necessary, counsel should explain to the expert his or her role in the trial as an impartial witness called in to aid the fact finders, and the manner in which the examination of witnesses is conducted.
(b) It is unprofessional conduct for a defense counsel to pay an excessive fee for the purpose of influencing the expert's testimony or to fix the amount of the fee contingent upon the testimony the expert will give or the result in the case.

DISCUSSION
See *United States v. Mansfield*, 24 M.J. 611 (A.F.C.M.R. 1987); Rule 3.4, Fairness to Opposing Party and Counsel; Rule 4.1, Truthfulness in Statements to Others; and Rule 4.3, Dealing With Unrepresented Person.

Standard 4-4.5. Compliance with Discovery Procedure
Defense counsel should make a reasonably diligent effort to comply with a legally proper discovery request.

DISCUSSION
See generally, R.C.M. 701(b); Rule 3.3, Candor Toward the Tribunal; Rule 3.4, Fairness to Opposing Party and Counsel; and AFSCJ, Chapter 5.

4-4.6. Physical Evidence
(a) Defense counsel who receives a physical item under circumstances implicating a client in criminal conduct should disclose the location of or should deliver that item to law enforcement authorities only: (1) if required by law or court order, or (2) as provided in paragraph (d)

(b) Unless required to disclose, defense counsel should return the item to the source from whom the defense counsel received it, except as provided in paragraphs (c) and (d). In returning the item to the source, defense counsel should advise the source of the legal consequences pertaining to the possession or destruction of the item. Defense counsel should also prepare a written record of these events for his or her file, but should not give the source a copy of such record.
(c) Defense counsel may receive the item for a reasonable period of time during which the defense counsel: (1) intends to return it to the owner; (2) reasonably fears that the return of the item to the source will result in destruction of the item; (3) reasonably fears that return of the item to the source will result in physical harm to anyone; (4) intends to examine, inspect, or use the item in any way as part of the defense counsel's representation of the client; or (5) cannot return it to the source. If defense counsel tests or examines the item, he or she should thereafter return it to the source unless there is reason to believe that the evidence might be altered or destroyed or used to harm another or return is otherwise impossible. If defense counsel retains the item, he or she should retain it in his or her law office in a manner that does not impede the lawful ability of law enforcement authorities to obtain the item.
(d) If the item received is contraband, i.e., an item possession of which is in and of itself a crime such as narcotics, defense counsel may suggest that the client destroy it where there is no pending case or investigation relating to this evidence and where such destruction is clearly not in violation of any criminal statute. If such destruction is not permitted by law or if in defense counsel's judgment he or she cannot retain the item, whether or not it is contraband, in a way that does not pose an unreasonable risk of physical harm to anyone, defense counsel should disclose the location of or should deliver the item to law enforcement authorities.
(e) If defense counsel discloses the location of or delivers the item to law enforcement authorities under paragraphs (a) or (d), or to a third party under paragraph (c)(1), he or she should do so in the way best designed to protect the client's interests.

SECTION V. Control and Direction of Litigation

Standard 4-5.1. Advising the Accused

(a) After informing himself or herself fully on the facts and the law, the defense counsel should advise the accused with complete candor concerning all aspects of the case, including a candid estimate of the probable outcome.
(b) It is unprofessional conduct for the defense counsel intentionally to understate or overstate the risks, hazards, or prospects of the case to exert undue influence on the accused's decision as to his or her plea.
(c) The defense counsel should caution the client to avoid communication about the case with the witnesses, except with the approval of counsel, to avoid any contact with court members or prospective court members, and to avoid either the reality or the appearance of any other improper activity.

DISCUSSION
See Rule 1.2, Establishment and Scope of Representation; Rule 1.4, Communication; Rule 2.1, Advisor; Rule 3.1, Meritorious Claims and Contentions; Rule 3.3, Candor Toward the Tribunal; and Rule 3.4, Fairness to Opposing Party and Counsel.

Standard 4-5.2. Control and Direction of the Case

(a) [Modified] Certain decisions relating to the conduct of the case are ultimately for the accused

and others are ultimately for defense counsel. The decisions which are to be made by the accused after full consultation with counsel are:

(i) which pleas to enter;

(ii) whether to accept a pre-trial agreement

(iii) whether to waive trial by court members, or if the accused elects trial by court members, whether to request enlisted members; and

(iii) whether to testify in his or her own behalf.

(b) Strategic and tactical decisions should be made by defense counsel after consultation with the client where feasible and appropriate. Such decisions include what witnesses to call, whether and how to conduct cross-examination, what court members to challenge, what trial motions should be made, and what evidence should be introduced.

(c) If a disagreement on significant matters of tactics or strategy arises between the defense counsel and the accused, the defense counsel should make a record of the circumstances, counsel's advice and reasons, and the conclusion reached. The record should be made in a manner which protects the confidentiality of the lawyer-client relationship.

DISCUSSION

See Rule 1.2, Establishment and Scope of Representation; Rule 1.6, Confidentiality of Information; R.C.M. 502(d)(6); R.C.M. 910; and Standard 4-8.2.

SECTION VI. Disposition without Trial

Standard 4-6.1. Duty to Explore Disposition without Trial

(a) Whenever the law, nature, and circumstances of the case permit, the defense counsel should explore the possibility of an early diversion of the case from the criminal process.

(b) A defense counsel may engage in plea discussions with the convening authority through the SJA. Under no circumstances should a defense counsel recommend that an accused accept a plea agreement unless appropriate investigation and study of the case has been completed, including an analysis of controlling law and the evidence likely to be introduced at trial.

DISCUSSION

See R.C.M. 705 and 910(f)(1). Examples of "diversions" from the criminal process in military practice are resignations for the good of the service, requests for administrative discharge in lieu of court-martial, retirement requests, etc. See also Rule 1.2, Establishment and Scope of Representation; Rule 1.4, Communication; and Rule 2.1, Advisor.

Standard 4-6.2. Plea Discussions

(a) Defense counsel should keep the accused advised of developments arising out of plea discussions conducted with the trial counsel.

(b) Defense counsel should promptly communicate and explain to the accused all significant plea proposals made by the trial counsel.

(c) It is unprofessional conduct for a defense counsel knowingly to make false statements concerning the evidence in the course of plea discussions with the trial counsel.

(d) It is unprofessional conduct for a defense counsel to seek concessions favorable to one client by any agreement which is detrimental to the legitimate interests of a client in another case.

(e) [Modified] Defense counsel representing two or more clients in the same or related cases should not participate in making an aggregated agreement as to guilty pleas, unless each client

consents after consultation, including disclosure of the existence and nature of all the claims or pleas involved.

DISCUSSION
See Rule 1.4, Communication; Rules 1.7 to 1.9, Conflict of Interest; Rule 3.3, Candor Toward the Tribunal; Rule 3.4, Fairness to Opposing Party and Counsel; R.C.M. 502, 705, and 910; and AFI 51-201, Chapter 6. See also *United States v. Newak*, 24 M.J. 238 (C.M.A. 1987).

SECTION VII. Trial

Standard 4-7.1. Courtroom Professionalism

(a) As an officer of the court, the defense counsel should support the authority of the court and the dignity of the trial courtroom by strict adherence to the codes of professionalism, and by manifesting a professional attitude toward the military judge, opposing counsel, witnesses, court members, and others in the courtroom.
(b) Defense counsel should not engage in unauthorized *ex parte* discussions with or submission of material to a military judge relating to a particular case which is or may come before the judge.
(c) When court is in session, defense counsel should address the court and should not address the trial counsel directly on all matter relating to the case.
(d) The defense counsel should comply promptly with all orders and directives of the court, but the defense counsel has a duty to have the record reflect adverse rulings or judicial conduct which counsel considers prejudicial to his or her client's legitimate interests. Defense counsel has a right to make respectful requests for reconsiderations of adverse rulings.
(e) Counsel should cooperate with courts and the organized bar in developing codes of professionalism for each jurisdiction.

DISCUSSION
The Chief Trial Judge, USAF Trial Judiciary may promulgate rules for courts-martial. See *United States v. Klein*, 20 M.J. 26, 28 (C.M.A. 1985) ("Counsel should not hesitate, in the zealous representation of their clients, to pin the military judge down to preserve an issue"). See also Rule 3.5, Impartiality and Decorum of the Tribunal.

Standard 4-7.2. Selection of Court Members

(a) The defense counsel should prepare himself or herself before trial to discharge effectively his or her function in the selection of court members, including the raising of any appropriate issues concerning the method by which the court panel was selected and the exercise of both challenges for cause and peremptory challenges.
(b) In those cases where it appears necessary to conduct a pretrial investigation of the background of court members, investigatory methods of a defense counsel should neither harass nor unduly embarrass potential court members or invade their privacy and, wherever possible, should be restricted to an investigation of records and sources of information already in existence.
(c) The opportunity to question court members personally should be used solely to obtain information for the intelligent exercise of challenges. Defense counsel should not intentionally use the *voir dire* to present factual matters which counsel knows will not be admissible at trial or to argue the defense counsel's case to the court members.

DISCUSSION
See R.C.M. 912; Rule 3.3, Candor Toward The Tribunal; Rule 3.4, Fairness to Opposing Party and Counsel; Rule 4.4, Respect for Rights of Third Persons; and *United States v. Credit*, 2 M.J. 631 (A.F.C.M.R. 1976).

Standard 4-7.3. Relations with Court Members
(a) [Modified]It is unprofessional conduct for defense counsel to communicate privately with court members concerning the case before or during the trial. The defense counsel should avoid the reality or appearance of any such improper communications.
(b) Defense counsel should treat court members with deference and respect, avoiding the reality or appearance of currying favor by a show of undue solicitude for their comfort or convenience.
(c) After discharge of the court members from further consideration of the case, it is unprofessional conduct for a defense counsel to intentionally make comments to or ask questions of a court member in any way which will tend to influence judgment in future service as a court member. If the defense counsel believes that the findings or sentence may be subject to legal challenge, counsel may properly communicate with court members to determine whether such challenge may be available.

DISCUSSION
Nothing precludes a lawyer from seeking a critique or clemency recommendation from a court member. What is prohibited are "improper" communications which may be further defined by the Uniform Rules of Practice Before Air Force Courts-Martial. See M.R.E. 606(b) and R.C.M. 923. It is permissible for defense counsel to ask a court member to critique his or her performance in the trial, so long as the request does not involve soliciting the court member's vote on findings or sentence. See also Standard 3-5.4, and Rule 3.5, Impartiality and Decorum of the Tribunal.

Standard 4-7.4. Opening Statement
Defense counsel's opening statement should be confined to a brief statement of the issues in the case and evidence counsel intends to offer which the counsel believes in good faith will be available and admissible. It is unprofessional conduct to allude to any evidence unless there is a good faith and reasonable basis for believing such evidence will be tendered and admitted into evidence.

DISCUSSION
See R.C.M. 502(d)(6); Rule 3.3, Candor Toward the Tribunal; and Rule 3.4, Fairness to Opposing Party and Counsel.

Standard 4-7.5. Presentation of Evidence
(a) It is unprofessional conduct for a defense counsel knowingly to offer false evidence, whether by documents, tangible evidence, or the testimony of witnesses, or fail to take reasonable remedial measures upon discovery of its falsity.
(b) It is unprofessional conduct for a defense counsel knowingly and for the purpose of bringing inadmissible matter to the attention of the military judge or court members to offer inadmissible evidence, ask legally objectionable questions, or make other impermissible comments or arguments in the presence of the military judge or court members.

(c) It is unprofessional conduct to permit any tangible evidence to be displayed in the view of the military judge or court members which would tend to prejudice fair consideration of the case by the military judge or members until such time as a good faith tender of such evidence is made.
(d) It is unprofessional conduct to tender tangible evidence in the presence of the military judge or court members if it would tend to prejudice fair consideration of the case, unless there is a reasonable basis for its admission in evidence. When there is any substantial doubt about the admissibility of such evidence, it should be tendered by an offer of proof and a ruling obtained.

DISCUSSION
In a trial before members, when defense counsel has reason to anticipate an objection to certain evidence, the evidence should be offered in an Article 39(a), UCMJ, session outside the members' presence. See M.R.E. 103(c); Rule 3.3, Candor Toward the Tribunal; Rule 3.4, Fairness to Opposing Party and Counsel; and Rule 3.5, Impartiality and Decorum of the Tribunal.

Standard 4-7.6. Examination of Witnesses
(a) The interrogation of all witnesses should be conducted fairly, objectively, and with due regard for the dignity and legitimate privacy of the witness, and without seeking to intimidate or humiliate the witness unnecessarily.
(b) A defense counsel's belief or knowledge that the witness is telling the truth does not preclude cross- examination.
(c) A defense counsel should not call a witness in the presence of the members who the lawyer knows will claim a valid privilege not to testify.
(d) It is unprofessional conduct for a defense counsel to ask a question which implies the existence of a factual predicate for which a good faith belief is lacking.

DISCUSSION
See M.R.E. 104; Rule 3.3, Candor Toward the Tribunal; Rule 3.4, Fairness to Opposing Party and Counsel; and Rule 3.5, Impartiality and Decorum of the Tribunal.

Standard 4-7.7. Argument to the Court Members
(a) In closing argument to the court members, the defense counsel may argue all reasonable inferences from the evidence in the record. It is unprofessional conduct for a defense counsel intentionally to misstate the evidence or mislead the court members as to the inferences it may draw.
(b) It is unprofessional conduct for a defense counsel to express a personal belief or opinion in the accused's innocence or personal belief or opinion in the truth or falsity of any testimony or evidence.
(c) A defense counsel should not make arguments calculated to appeal to the prejudices of the court members.
(d) A defense counsel should refrain from argument which would divert the court members from their duty to decide the case on the evidence.
(e) [Added] It is the responsibility of the military judge to ensure that final argument to the court members is kept within proper, accepted bounds.

DISCUSSION
Closing arguments on findings are regulated by R.C.M. 919. Sentencing arguments are

controlled by R.C.M. 1001(g). Subsection (d) should be read as to apply to arguments on findings. Defense counsel may argue broader issues and the consequences of the conviction during sentencing arguments within the context of the appropriate purposes of sentencing. See Rules 3.3, Candor Toward the Tribunal; 3.4, Fairness to Opposing Party and Counsel; and 3.5, Impartiality and Decorum of the Tribunal. Compare Standard 3-5.8.

Standard 4-7.8. Facts Outside the Record
It is unprofessional conduct for a defense counsel intentionally to refer to or argue on the basis of facts outside the record whether at trial or on appeal, unless such facts are matters of common public knowledge based on ordinary human experience or matters of which a court can take judicial notice.

DISCUSSION
See Rule 3.3, Candor Toward the Tribunal; Rule 3.4, Fairness to Opposing Party and Counsel; and M.R.E. 201 and 201A.

Standard 4-7.9. Post-Trial Motions
The trial defense counsel's responsibility includes presenting appropriate motions, after findings and before sentence, to protect the accused's rights.

DISCUSSION
Examples include, but are not limited to, motions to hold charges multiplicious for sentencing and motions for pretrial confinement credit, etc.

Standard 4-7.10. False Testimony by the Accused [Added]
(a) If the accused has admitted to defense counsel facts which establish guilt and counsel's independent investigation has established that the admissions are true, but the accused insists on the right to trial, counsel must discourage the accused from taking the witness stand to testify falsely.
(b) If, in advance of trial, the accused insists that he or she will take the stand to testify falsely, the defense counsel may withdraw from the case, if that is feasible, seeking leave of the court if necessary, but the court should not be advised of counsel's reason for seeking to do so.
(c) If withdrawal from the case is not feasible or is not permitted by the court, or if the situation arises immediately preceding trial or during the trial and the accused insists upon testifying falsely in his or her own behalf, it is unprofessional conduct for the defense counsel to lend aid to the perjury or use the perjured testimony. Before the accused takes the stand in these circumstances, the defense counsel should make a record of the fact that the accused is taking the stand against the advice of counsel in some appropriate manner. The defense counsel may identify the witness as the accused and may ask appropriate questions of the accused when it is believed that the accused's answers will not be perjurious. As to matters for which it is believed that the accused will offer perjurious testimony, counsel should not conduct direct examination. A defense counsel may not later argue the accused's known false version of the facts to the court members as worthy of belief, and may not recite or rely upon the false testimony in his or her closing argument.
(d) [Added] In the event that the accused clearly testifies falsely on a material matter, despite counsel's advice and other actions to dissuade the accused from doing so, defense counsel shall

disclose the perjury to the court. In a trial by members, defense counsel should disclose the perjury to the military judge *ex parte*.

DISCUSSION
Lawyers should be cautioned that the "lying client" situation is rare. These rules apply when the lawyer knows the accused has committed perjury. Lawyers should recognize that "the most honest witness may recall (or sincerely believe he recalls) details that he previously overlooked." *Nix v. Whiteside*, 475 U.S. 157, 191; 106 S.Ct. 988, 1006 (1986). Suspicions are not enough. See *United States v. Polk*, 32 M.J. 150 (C.M.A. 1991). As implicitly recognized in subsections (a) and (b), the client has ultimate authority to decide whether he or she will testify. The lawyer may not attempt to preempt the "lying client" problem by refusing to allow the client to take the stand.

Counsel must carefully balance the obligation to preserve client confidences (Rule 1.6) and the duty of candor to the court (Rule 3.3). Although subsection (d) requires disclosure of false testimony to the court, counsel must be careful to limit such disclosure in order to preserve all other client confidences.

Just as subsection (c) admonished counsel to make appropriate records before trial when the accused will take the stand against the advice of counsel, post-trial records should be equally clear. In a situation where counsel has been surprised by a client's unexpected perjury on the stand, counsel should consult the chief senior defense counsel immediately after trial and prepare a written record for his or her files.

This section was withdrawn by the ABA Standing Committee on Association Standards for Criminal Justice before submission to the ABA House of Delegates in 1979. It is included here, with significant modifications, to provide needed guidelines consistent with the requirements of Rules 1.6 and 3.3, and the guidance provided in dicta in the Supreme Court plurality decision of *Nix v. Whiteside*, 475 U.S. 157, 106 S.Ct. 988 (1986).

SECTION VIII. After Conviction

Standard 4-8.1. Sentencing

(a) The defense counsel should, at the earliest possible time, be or become familiar with the sentencing alternatives available to the court and with community and other facilities which may be of assistance in a plan for meeting the accused's needs. Defense counsel's preparation should also include familiarization with the court's practices in exercising sentencing discretion, the practical consequences of different sentences, and the normal pattern of sentences for the offense involved, including any guidelines applicable at either sentencing or parole stages. The consequences of the various dispositions available should be explained fully by the defense counsel to the accused.
(b) [Modified] Defense counsel should present to the court any ground which will assist in reaching a proper disposition favorable to the accused.
(c) [Omitted]
(d) Defense counsel should alert the accused to the right of allocution and to the possible dangers of making a judicial confession in the course of allocution which might prejudice an appeal.

(e) [Added] Trial defense counsel should take all appropriate post-trial actions to seek relief from the convening authority in the form of clemency or approving findings or a sentence less severe than that adjudged. *United States v. Palenius*, 2 M.J. 86 (C.M.A. 1977); *United States v. Titsworth*, 13 M.J. 147 (C.M.A. 1982); *United States v. Goode*, 1 M.J. 3 (C.M.A. 1975).

DISCUSSION
See R.C.M. 1001(c).

Standard 4-8.2. Appeal
(a) After conviction, the defense counsel should explain to the accused the meaning and consequences of the court's judgment and the accused's appellate rights. The defense counsel should give the accused his or her professional judgment as to whether or not there is a meritorious ground for appeal and as to the probable results of an appeal. The defense counsel should also explain to the accused the advantages and disadvantages of an appeal. The decision to withdraw a case from appellate review must be the accused's own choice.
[(b) Omitted]

DISCUSSION
See R.C.M. 1102, 1105, and 1106(f); Rule 1.4, Communication; Rule 3.1, Meritorious Claims and Contentions; and Standard 4-5.2.

Standard 4-8.3. Counsel on Appeal
(a) Appellate defense counsel should not seek to withdraw from a case solely on the basis of his or her own determination that the appeal lacks merit.
(b) Appellate counsel should give a client his or her best professional evaluation of the questions that might be presented on appeal. Counsel, when inquiring into the case, should consider all issues that might affect the validity of the judgment of conviction and sentence including any that might require initial presentation in a post conviction proceeding. Counsel should advise on the probable outcome of a challenge to the conviction or sentence. Counsel should endeavor to persuade the client to abandon a wholly frivolous appeal or to eliminate contentions lacking in substance.
(c) If the client chooses to proceed with an appeal against the advice of counsel, counsel should present the case, so long as such advocacy does not involve deception of the court. When counsel cannot continue without misleading the court, counsel may request permission to withdraw.
(d) [Omitted]
(e) [Omitted]

DISCUSSION
See Rule 1.16, Declining or Terminating Representation; and *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

Standard 4-8.4. Conduct of Appeal
(a) Appellate counsel should be diligent in perfecting an appeal and expediting its prompt submission to the appellate court.
(b) Appellate counsel should be accurate in referring to the record and the authorities upon which counsel relies in the presentation to the court of briefs and oral argument.

(c) [Modified] It is unprofessional conduct for Appellate Counsel to intentionally refer to or argue on the basis of facts outside the record on appeal, unless such facts are matters of common public knowledge based on ordinary human experience, matters of which the court may take judicial notice, or other matters that are properly before the court.

DISCUSSION
Subsection (c) was slightly modified to add other matters properly before the court. This recognizes unique aspects of military practice such as the fact finding powers of the Air Force Court of Criminal Appeals (Article 66(c), UCMJ), and consideration of post-trial matters such as the *Goode* response and other clemency materials. See generally, Rule 1.3, Diligence; Rule 3.3, Candor Toward the Tribunal; Rule 3.4, Fairness to Opposing Party and Counsel; Rule 3.5, Impartiality and Decorum of the Tribunal; Articles 61-67 and 70, UCMJ; R.C.M. 1202 and 1205; *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982); and *Anders v. California*, 386 U.S. 738, 87 S.Ct. 1396 (1967).

Standard 4-8.5. Post-Conviction Remedies
After a conviction is affirmed on appeal, appellate counsel should determine whether there is any ground for relief under other post-conviction remedies. If there is a reasonable prospect of a favorable result, counsel should explain to the appellant the advantages and disadvantages of taking such action. Appellate counsel is not obligated to represent the accused in a post-conviction proceeding unless counsel has agreed to do so. In other respects, the responsibility of a lawyer in a post-conviction proceeding should be guided generally by the standards governing the conduct of lawyers in criminal cases.

DISCUSSION
"Post-conviction remedies" refers to remedies beyond legal appeals, such as applications to the Board for Correction of Military Records or submissions to the Clemency and Parole Board. See Rule 1.4, Communication; Rule 2.1, Advisor; and Rule 3.1, Meritorious Claims and Contentions.

Standard 4-8.6. Challenges to the Effectiveness of Counsel
(a) If an appellate defense counsel, after investigation, is satisfied that another defense counsel who served in an earlier phase of the case did not provide effective assistance, he or she should not hesitate to seek relief for the accused on that ground.
(b) If an appellate defense counsel, after investigation, is satisfied that another defense counsel who served in an earlier phase of the case provided effective assistance, he or she should so advise the client and may decline to proceed further.
(c) If defense counsel concludes that he or she did not provide effective assistance in an earlier phase of the case, defense counsel should explain this conclusion to the accused and seek to withdraw from representation with an explanation to the court of the reason therefor.
(d) Counsel whose conduct of a criminal case is drawn into question is entitled to testify concerning the matters charged and is not precluded from disclosing the truth concerning the accusation to the extent defense counsel reasonably believes necessary, even though this involves revealing matters which were given in confidence.

DISCUSSION
Counsel must continue to balance the obligation to preserve client confidences against his or her right and need to respond to allegations of ineffective assistance or misconduct. Disclosures

must be limited in order to preserve confidences beyond the scope and unrelated to the allegations. Subsection (b) is limited by the application of *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982). See Rule 1.6, Confidentiality of Information; Rule 3.1, Meritorious Claims and Contentions; Rule 3.7, Lawyer as Witness; Rule 4.4, Respect for Rights of Third Persons; and Rule 8.3, Reporting Professional Misconduct.

CHAPTER 3
SPECIAL FUNCTIONS OF THE MILITARY JUDGE

SECTION I. Basic Duties

Standard 6-1.1 General Responsibility of the Military Judge

(a) The military judge has the responsibility for safeguarding both the rights of the accused and the interests of the public in the administration of criminal justice. The adversary nature of the proceedings does not relieve the military judge of the obligation of raising on his or her initiative, at all appropriate times and in an appropriate manner, matters which may significantly promote a just determination of the trial. The only purpose of a criminal trial is to determine whether the prosecution has established the guilt of the accused as required by law, and, if necessary, to adjudge an appropriate sentence, and the military judge should not allow the proceedings to be used for any other purpose.

(b) The military judge should require that every proceeding before him or her be conducted with unhurried and quiet dignity, and should aim to establish such physical surroundings as are appropriate to the administration of justice. The military judge should give each case individual treatment, and the judge's decisions should be based on the particular facts of that case. The military judge should conduct the proceedings in clear and easily understandable language, using interpreters when necessary.

(c) The military judge should be sensitive to the important roles of the trial counsel, defense counsel, witnesses, court members and the interests of the accused, victim and public; and the judge's conduct toward them should manifest professional respect, courtesy, and fairness.

DISCUSSION

See R.C.M. 801(a); AFI 51-201, paragraph 1.3; ABA Code of Judicial Conduct; and Rule 3.5, Impartiality and Decorum of the Tribunal.

Standard 6-1.2. Community Relations

(a)The military judge may promote efforts to educate the community on the operation of the criminal justice system. However, in endeavoring to educate the community, the judge should avoid activity which would give the appearance of impropriety or bias.

(b) The trial judge should not discuss pending or impending cases, and should avoid responding to personal criticism or complaints about particular decisions, other than to correct factual misrepresentation in the reporting of the ruling.

Standard 6-1.3. Adherence to Standards

The military judge should be familiar with and adhere to the canons and codes applicable to the judiciary, the codes of professional responsibility applicable to the legal profession, and standards concerning the proper administration of criminal justice.

DISCUSSION
Since the Air Force military judge is involved in the direct enforcement of discipline, his or her own integrity and adherence to Air Force standards of conduct and appearance must be above reproach. *United States v. Berman*, 28 M.J. 615 (A.F.C.M.R. 1989). See also AFI 51-201, paragraph 1.3.

Standard 6-1.4. Appearance, Demeanor, and Statements of the Judge The military judge's appearance, demeanor, and statements should reflect the dignity of the judicial office and enhance public confidence in the administration of justice. The wearing of the judicial robe in the courtroom will contribute to these goals.

DISCUSSION
A judge must be particularly careful that his or her demeanor, facial expressions, and tone of voice do not convey unintended messages to the court members or other trial participants. Air Force practice dictates that military judges will wear the black judicial robe when presiding over open sessions of courts-martial, except under combat or field conditions.

Standard 6-1.5. Obligation To Use Court Time Effectively and Fairly
(a) The military judge has the obligation to avoid delays, continuances, and extended recesses, except for good cause. In the matter of punctuality, the observance of scheduled court hours, and the use of working time, the military judge should be an exemplar for all other persons engaged in the criminal case. The judge should require punctuality and optimum use of working time from all such persons.
(b) The military judge should respect the personal and professional demands on the lives of counsel, the accused, court members, witnesses, and victims, and should schedule and utilize court time remaining sensitive to these needs.

DISCUSSION
This standard again emphasizes the need for the military judge to have total control over the proceedings. The judge must remain sensitive to the perceptions of the accused, court members, and any spectators. If the court is recessed until a specified time, and in the interim the military judge grants an extension to the recess, the judge should ensure that all participants in the trial are aware of the extension and of the new time for reconvening. When the court is reconvened, it is good practice for the judge to announce on the record the fact that an additional delay was granted.

Standard 6-1.6. Duty To Maintain Impartiality
(a) The military judge should avoid impropriety and the appearance of impropriety in all activities, and should conduct himself or herself at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary. The judge should not allow military, family, social, or other relationships to influence judicial conduct or judgment.
(b) During the course of official proceedings, the military judge should avoid contact or familiarity with the accused, victims, witnesses, counsel, or members of the families of such persons which might give the appearance of bias or partiality
(c) A military judge should not hold membership in any organization that practices invidious discrimination on the basis of race, sex, religion, national origin, disability, age or sexual orientation.

(d) [Modified] It is the responsibility of the military judge to attempt to eliminate, both in chambers and in the courtroom, bias or prejudice due to race, sex, religion, national origin, disability, age, or sexual orientation.
(e) A military judge should not be influenced by actual or anticipated public criticism in his or her actions, rulings, or decisions.

DISCUSSION
See *United States v. Berman*, supra.

Standard 6-1.7. Judge's Duty Concerning Record of Judicial Proceedings
[Modified] The military judge has a duty to see that the reporter makes a true, complete, and accurate record of all proceedings, and to ensure that events in the trial are accurately described for the record and that all parties present in the courtroom are accounted for whenever the court is convened or reconvened.

Standard 6-1.8. Proceedings In and Outside of the Courtroom
(a) The military judge should maintain a preference for live public proceedings with all parties physically present.
(b) All significant proceedings, whether or not public, should be on the record. Relevant decisions in proceedings not on the record should be reflected in the record.
(c) The military judge should place or permit counsel to place any germane matter on the record which has not been previously recorded.
(d) When electronic procedures for transmission or recording are used, the proceedings transmitted or recorded should reflect the decorum of the courtroom. When the right to counsel applies, such procedures should not result in a situation where only the prosecution or defense counsel is physically present before the judge.

Standard 6-1.9. Obligation to Perform and Circumstances Requiring Recusal
(a) The military judge should recuse himself or herself whenever the judge has any doubt as to his or her ability to preside impartially in a criminal case or whenever the judge believes his or her impartiality can reasonably be questioned.
(b) Military judges have an obligation to perform their judicial function and avoid recusal when not warranted.

DISCUSSION
See R.C.M. 902. A military judge must disqualify himself or herself if any of the conditions listed in R.C.M. 902(b) exist. The military judge shall, upon motion of either party or *sua sponte*, decide whether he or she is disqualified.

Standard 6-1.10. Issuance or Review of Warrants
Standard 6-1.11. Communications Concerning Prisoner Status
[All omitted]

SECTION II. General Relations with Counsel and Witnesses

Standard 6-2.1. *Ex Parte* Discussions of a Pending Case
The military judge should insist that neither the trial counsel nor the defense counsel, nor any other person, discuss a pending case with the judge *ex parte*, except after adequate notice to all other parties and when authorized by law or in accordance with approved practice. The military

judge should ensure that all such *ex parte* communications are subsequently noted on the record.

DISCUSSION
It is acceptable, in Air Force practice, for the military judge to discuss matters with trial or defense counsel individually which are administrative in nature, which deal with the logistics of the trial, or which involve the control of the judge's docket. Judges must also consider the effect of R.C.M. 802 on *ex parte* discussions. See *United States v. Garcia*, 24 M.J. 518 (A.F.C.M.R. 1987).

Standard 6-2.2. Duty To Witnesses
The military judge should permit full and proper examination and cross-examination of witnesses, but should require the interrogation to be conducted fairly and objectively and with due regard for the dignity and legitimate privacy of the witnesses

Standard 6-2.3. Duty To Control Length and Scope of Examination
The military judge should permit reasonable latitude to counsel in the examination and cross-examination of witnesses, but should not permit unreasonable repetition or permit counsel to pursue clearly irrelevant lines of inquiry.

DISCUSSION
The members may request and the military judge may require that a witness be recalled, or that a new witness be summoned, or other evidence produced. The members or military judge may direct trial counsel to produce additional evidence. See M.R.E. 614. In taking such action, the court must not depart from an impartial role. See also *United States v. Stroup*, 29 M.J. 224 (C.M.A. 1989); *United States v Lents*, 32 M.J. 636 (A.C.M.R. 1991).

Standard 6-2.4. Duty of Judge on Counsel's Objections and Requests for Rulings
The military judge should respect the obligation of counsel to present objections to procedures and to the admissibility of evidence, to request rulings on motions, to make offers of proof, and to have the record show adverse rulings and reflect conduct of the judge which counsel considers prejudicial. Counsel should be permitted to state succinctly the grounds of his or her objections or requests; but the judge should nevertheless control the length, manner and timing of argument.

Standard 6-2.5. Duty of Judge to Respect Privileges
The military judge should respect the obligation of counsel to refrain from speaking on privileged matters and should avoid putting counsel in a position where counsel's adherence to the obligation, such as by a refusal to answer, may tend to prejudice the client. Unless the privilege is waived or is otherwise inapplicable, the military judge should not request counsel to comment on evidence or other matters where counsel's knowledge is likely to be gained from privileged communications.

DISCUSSION
See Discussion, Standard 4-7.7.

Standard 6-2.6. Duty to Court Members
(a) The military judge has the responsibility to treat the court members with dignity. This includes the responsibility both to inform the court members of anticipated scheduling and to assure that the court members have an opportunity to deliberate on a reasonable schedule. The

military judge should also endeavor to assure that the court members have comfortable surroundings.
(b) The military judge should conduct the trial in such a way as to enhance the court members' ability to understand the proceedings and to perform its fact-finding function.

SECTION III. Maintaining Order in the Courtroom

Standard 6-3.1. Special Rules for Order in the Courtroom
The military judge, preferably before a criminal trial or at its beginning, should prescribe and make known the ground rules relating to conduct which the parties, the trial counsel, the defense counsel, the witnesses, and others will be expected to follow in the courtroom, and which are not set forth in the MCM or in the published rules of court.

DISCUSSION
The presiding military judge has the ultimate authority as to procedures to be followed in an individual court-martial.

Standard 6-3.2 Security in Court Facilities
The military judge should endeavor to maintain secure court facilities. In order to protect the dignity and decorum in the courtroom, this should be accomplished in the least obtrusive and disruptive manner, with an effort made to minimize any adverse impact.

Standard 6-3.3. Colloquy between Counsel
The military judge should make known before trial that no colloquy, argument, or discussion directly between counsel in the presence of the judge or court members will be permitted on matters relating to the case, except that, if a brief conference between counsel might tend to expedite the trial, the judge will grant them leave to confer.

Standard 6-3.4. Courtroom Demeanor
(a) The military judge should be a model of dignity and impartiality. The judge should exercise restraint over his or her conduct and utterances. The judge should remain neutral regarding the proceedings at all times, suppress personal predilections, control his or her temper and emotions, and be patient, respectful, and courteous to defendants, court members, witnesses, victims, lawyers, and others with whom the military judge deals in an official capacity. The military judge should not permit any person in the courtroom to embroil him or her in conflict, and should otherwise avoid personal conduct which tends to demean the proceedings or to undermine judicial authority in the courtroom.
(b) The military judge should require similar conduct of staff, court officials and others subject to the military judge's direction and control.

Standard 6-3.5. Judge's Use of Powers to Maintain Order
(a) The military judge should maintain order and decorum in judicial proceedings. The military judge has the obligation to use his or her judicial power to prevent distractions from and disruptions of the trial.
(b) When it becomes necessary during the trial for the military judge to comment upon the conduct of witnesses, spectators, counsel, or others, or upon the testimony, the military judge should do so outside the presence of the court members, if possible. Any such comment should

be in a firm, dignified, and restrained manner, avoiding repartee, limiting comments and rulings to what is reasonably required for the orderly progress of the trial, and refraining from unnecessary disparagement of persons or issues.

Standard 6-3.6. The Accused's Election to Represent Himself or Herself at Trial
(a) An accused should be permitted, at the accused's election, to proceed in his or her trial without the assistance of counsel only after the military judge makes thorough inquiry and is satisfied that the accused:

(i) has been clearly advised of the right to the assistance of counsel, including the right to the assignment of counsel when the accused is so entitled;

(ii) is capable of understanding the proceedings; and

(iii) has made an intelligent and voluntary waiver of the right to counsel.

(b) When a litigant undertakes to represent himself or herself, the court should take whatever measures may be reasonable and necessary to ensure a fair trial.

DISCUSSION
See R.C.M. 506(d), regarding waiver of the right to counsel by the accused. The military judge may grant the request after pointing out to the accused that he or she has no legal training, that there are dangers and disadvantages in failing to raise motions and objections in a timely fashion and in conducting improper examination and cross-examination of witnesses, and that no special consideration can be granted merely because the accused proceeds *pro se*. See also *United States v. Beatty*, 25 M.J. 311 (C.M.A. 1987); *United States v. Bowie*, 21 M.J. 453 (C.M.A. 1986), cert. denied 107 S.Ct. 8 (1987).

Standard 6-3.7. Standby Counsel for *Pro Se* Accused
(a) When an accused has been permitted to proceed without the assistance of counsel, the military judge should consider the appointment of standby counsel to assist the accused when called upon. Standby counsel should always be appointed in capital cases and in cases when the maximum penalty is life without the possibility of parole. Standby counsel should ordinarily be appointed in cases expected to be long or complicated, or in which there are multiple accused, and in any case in which a severe sentence might be imposed.
(b) The military judge should clearly notify both the defendant and standby counsel of their respective roles and duties.
(c) When standby counsel is appointed to provide assistance to the *pro se* accused only when requested, the military judge should ensure that counsel not actively participate in the conduct of the defense unless requested by the accused or directed to do so by the court. When standby counsel is appointed to actively assist the *pro se* accused, the military judge should ensure that the accused is permitted to make final decisions on all matters, including strategic and tactical matters relating to the conduct of the case.

DISCUSSION
The standby counsel must be certified under Article 27(b), UCMJ, and may remain at the counsel table available to assist the accused throughout the trial. See *United States v. Beatty* and *United States v. Bowie*, both supra.

Standard 6-3.8. The Disruptive Accused

An accused may be removed from the courtroom during trial when the accused's conduct is so disruptive that the trial cannot proceed in an orderly manner. Removal is preferable to gagging or shackling the disruptive accused. If removed, the accused should be required to be present in the court building while the trial is in progress. The removed accused should be afforded an opportunity to hear the proceedings and, at appropriate intervals, be offered on the record an opportunity to return to the courtroom upon assurance of good behavior. The offer to return need not be repeated in open court each time. A removed accused who does not hear the proceedings should be given the opportunity to learn of the proceedings from defense counsel at reasonable intervals.

DISCUSSION
Trial may proceed without the presence of an accused who has disrupted a court-martial, but only after at least one warning by the military judge that such behavior may result in removal from the courtroom. The record of trial must clearly reflect the reasons for removing the accused. See R.C.M. 804(b), Discussion. Disruptive behavior of the accused may also constitute contempt. See R.C.M. 809.

Standard 6-3.9. Misconduct of *Pro Se* Accused
If an accused who is permitted to proceed without the assistance of counsel engages in conduct which is so disruptive, including disobeying or failing to respond to judicial orders or rulings, that the trial cannot proceed in an orderly manner, the court should, after appropriate warnings, revoke the permission and require representation by counsel. If standby counsel has previously been appointed, the counsel should be asked to represent the accused. When appropriate, the trial should be recessed only long enough for counsel to make the necessary preparations to go forward with the trial.

DISCUSSION
The right of the military accused to proceed *pro se* may be revoked if the accused is disruptive or fails to follow basic rules of decorum and practice. See R.C.M. 506(d) and R.C.M. 804.

Standard 6-3.10. Misconduct of Spectators and Others
(a) Any person who engages in conduct which disturbs the orderly process of the trial may be admonished or excluded, and, if such conduct is intentional, may be punished for contempt. Any person whose conduct in a criminal proceeding tends to menace the accused, an attorney, a victim, a witness, a juror, a court officer, the military judge, or a member of the accused's or victim's family may be removed from the courtroom.
(b) When a victim or a member of a victim's or an accused's family is removed from the courtroom during trial, he or she should ordinarily be allowed to return upon assurance of good behavior.

DISCUSSION See R.C.M. 806.

Standard 6-3.11. Lawyers from Other Jurisdictions [Omitted]

SECTION IV. Use of the Contempt Power

Standard 6-4.1. Power to Impose Sanctions
The court has the inherent power to protect the integrity and fair administration of the criminal

justice process by imposing sanctions. The military judge has the power to cite and, if necessary, punish summarily anyone who, in the judge's presence in open court, willfully obstructs the course of criminal proceedings.

DISCUSSION
See Article 48, UCMJ, and R.C.M. 809(a) and its discussion for procedures and limitations on the contempt power in military practice. See also *United States v. Burnett*, 27 M.J. 99 (C.M.A. 1988).

Standard 6-4.2. Imposition of Sanctions
If the military judge determines to impose sanctions for misconduct affecting the trial, the military judge should ordinarily impose the lease severe sanctions appropriate to correct the abuse and deter repetition and should do so outside the presence of the court members, if possible. In weighing the severity of the possible sanction for disruptive courtroom conduct to be applied during the trial, the military judge should consider the risk of further disruption, delay, or prejudice that might result from the character of the sanction or the time of its imposition.

Standard 6-4.3. The Sanction of Contempt
The sanction of contempt should not be imposed by the military judge unless:
(a) it is clear from the identity of the offender and the character of his or her acts that the disruptive conduct was willfully contemptuous; or
(b) the conduct warranting such sanction was preceded by a clear warning that such conduct was impermissible and that specified sanctions might be imposed for its repetition.

Standard 6-4.4. Notice of Intent to Use Contempt Power; Postponement of Adjudication
(a) The military judge should, as soon as practicable after he or she is satisfied that courtroom misconduct requires contempt proceedings, inform the alleged offender of the judge's intention to institute such proceedings.
(b) The military judge should consider deferring adjudication of contempt for courtroom misconduct of an accused, an attorney, or a witness until after the trial, and should defer such a proceeding unless prompt punishment is imperative.

DISCUSSION
See Burnett, supra.

Standard 6-4.5. Notice of Nature of the Conduct and Opportunity to Be Heard
Before imposing any punishment for criminal contempt, the military judge should give the offender notice of the nature of the conduct and at least a summary opportunity to adduce evidence or argument relevant to guilt or punishment.

Standard 6-4.6. Imposition of Sanctions and Referral to Another Judge
The judge before whom courtroom misconduct occurs may impose appropriate sanctions, including punishment for contempt, but should refer the matter to another judge whenever the presiding judge has any doubt about his or her ability to preside over the matter impartially, or if the presiding judge's objectivity can reasonably be questioned.

CHAPTER 4
FAIR TRIAL AND FREE PRESS

SECTION I. Conduct of Lawyers in Criminal Cases.

Standard 8-1.1. Extrajudicial Statements by Lawyers

(a) A lawyer should not make or authorize the making of an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if the lawyer knows or reasonably should know that it will have a substantial likelihood of prejudicing a criminal proceeding.

(b) Statements relating to the following matters are ordinarily likely to have a substantial likelihood of prejudicing a criminal proceeding:

(1) the prior criminal record (including arrests, indictments, or other charges or crime) of a suspect or accused;

(2) the character or reputation of a suspect or accused;

(3) the opinion of the lawyer on the guilt of the accused, the merits of the case or the merits of the evidence in the case;

(4) the existence or contents of any confession, admission, or statement given by the accused, or the refusal or failure of the accused to make a statement;

(5) the performance of any examinations or tests, or the accused's refusal or failure to submit to an examination or test, or the identity or nature of physical evidence expected to be presented;

(6) the identity, expected testimony, criminal records, or credibility of prospective witnesses;

(7) the possibility of a plea of guilty to the offense charged, or other disposition; and

(8) information which the lawyer knows or has reason to know would be inadmissible as evidence in a trial.

(c) Notwithstanding paragraphs (a) and (b), statements relating to the following matters may be made:

(1) the general nature of the charges against the accused, provided that there is included therein a statement explaining that the charge is merely an accusation and that the accused is presumed innocent until and unless proven guilty;

(2) the general nature of the defense to the charges or to other public accusations against the accused, including that the accused has no prior criminal record;

(3) the name, age, residence, occupation, and family status of the accused;

(4) information necessary to aid in the apprehension of the accused or to warn the public of any dangers that may exist;

(5) a request for assistance in obtaining evidence;

(6) the existence of an investigation in progress, including the general length and scope of the investigation, the charge or defense involved, and the identity of the investigating officer or agency;

(7) the facts and circumstances of an arrest, including the time and place, and the identity of the arresting officer or agency;

(8) the identity of the victim, where the release of that information is not otherwise prohibited by law or would not be harmful to the victim;

(9) information contained within a public record, without further comment; and

(10) the scheduling or result of any stage in the judicial process.

(d) Nothing in this standard is intended to preclude the formulation or application of more restrictive rules relating to the release of information about juvenile offenders, to preclude the

holding of hearings or the lawful issuance of reports by legislative, administrative, or investigative bodies, to preclude any lawyer from replying to charges of misconduct that are publicly made against him or her, or to preclude or inhibit any lawyer from making an otherwise permissible statement which serves to educate or inform the public concerning the operations of the criminal justice system.

DISCUSSION
Ordinarily, the general nature of a defense to the charges in Standard 8-1.1(c)2 should only be given by defense personnel.

Standard 8-1.2. Rule of Court [Omitted]

SECTION II. The Conduct of Law Enforcement Officers, Judges, and Court Personnel in Criminal Cases

Standard 8-2.1. Release of Information by Law Enforcement Agencies
(a) The provisions of Standard 8-1.1 are applicable to the release of information to the public by law enforcement officers and agencies.
(b) Law enforcement officers and agencies should not exercise their custodial authority over an accused individual in a manner that is likely to result in either:

(1) the deliberate exposure of a person in custody for the purpose of photographing or televising by representatives of the news media; or

(2) the interviewing by representatives of the news media of a person in custody, except upon request or consent by that person to an interview after being informed adequately of the right to consult with counsel and of the right to refuse to grant an interview.

(c) Nothing in this standard is intended to preclude any law enforcement officer or agency from replying to charges of misconduct that are publicly made against him or her or from participating in any legislative, administrative, or investigative hearing, nor is this standard intended to supersede more restrictive rules governing the release of information concerning juvenile offenders.

Standard 8-2.2. Disclosures by Court Personnel
Court personnel shall not disclose to any unauthorized person information relating to a pending criminal case that is not part of the public records of the court and that may be prejudicial to the right of the United States or the accused to a fair trial.

DISCUSSION
AFI 51-201, Chapter 13, Section D sets out the information which may be provided to the media.

Standard 8-2.3. Conduct of Military Judges
Military judges should refrain from any conduct or the making of any statements that may be prejudicial to the right of the United States or of the accused to a fair trial.

DISCUSSION
Military judges will refer all press requests received by them to the servicing SJA and the installation public affairs officer.

SECTION III. The Conduct of Judicial Proceedings in Criminal Cases

Standard 8-3.1. Prohibition of Direct Restraints on Media
Absent a clear and present danger to the fairness of a trial or other compelling interest, no rule of court or judicial order should be promulgated that prohibits representatives of the news media from broadcasting or publishing any information in their possession relating to a criminal case.

Standard 8-3.2. Public Access to Judicial Proceedings and Related Documents and Exhibits
[Omitted]

Standard 8-3.3. Change of Venue or Continuance [Omitted]

Standard 8-3.4. Severance
In cases in which there is a substantial likelihood that one or more of the accused will not receive a fair trial because of potentially prejudicial publicity against another accused, the court shall grant severance on motion of either the prosecution or the defense.

Standard 8-3.5. Selecting the Court Members
The following standards govern the selection of a court panel in those criminal cases in which questions of possible prejudice are raised.
(a) [Modified] If there is a substantial possibility that individual court members will be ineligible to serve because of exposure to potentially prejudicial material, the examination of each member with respect to exposure shall take place outside the presence of other chosen and prospective court members. An accurate record of this examination shall be kept by the court reporter. The questioning shall be conducted for the purpose of determining what the prospective court member has read and heard about the case and how any exposure has affected that person's attitude toward the trial, not to convince the prospective member that an inability to cast aside any preconceptions would be a dereliction of duty.
[(b) through (d) omitted]

DISCUSSION
Grounds for challenge for cause of a court member are included in R.C.M. 912(f). An accurate record of *voir dire* proceedings will automatically be obtained in Air Force practice, since a sworn court reporter must record all open sessions of the trial.

Standard 8-3.6. Conduct of the Trial
The following standards govern the conduct of a criminal trial when problems relating to the dissemination of potentially prejudicial materials are raised.
(a) Whenever appropriate, in view of the notoriety of a case or the number or conduct of news media representatives present at any judicial proceeding, the court shall ensure the preservation of decorum by instructing those representatives and others as to the permissible use of the courtroom and other facilities of the court, the assignment of seats to news media representatives on an equitable basis, and other matters that may affect the conduct of the proceeding.
[(b) through (c) omitted]
(d) In any case that appears likely to be of significant public interest, an admonition in substantially the following instruction shall be given before the end of the first day if the court members are not sequestered:

During the time you serve on this court-martial panel, there may appear in the newspapers or on radio or television reports concerning this case, and you may be tempted to read, listen to, or watch them. Please do not do so. Due process of law requires that the evidence to be considered by you in reaching your findings meet certain standards; for example, a witness may testify about events personally seen or heard but not about matters told to the witness by others. Also, witnesses must be sworn to tell the truth and must be subject to these standards, and if you read, listen to, or watch these reports, you may be exposed to information which unduly favors one side and to which the other side is unable to respond. In fairness to both sides, therefore, it is essential that you comply with this instruction. If the process of selecting a court-martial panel is a lengthy one, an admonition shall also be given to each member as he or she is selected. At the end of each day of the trial, and at other recess periods if the court deems necessary, an admonition in substantially the following form shall be given: For the reasons stated earlier in the court-martial, I must remind you not to read, listen to, or watch any news reports concerning this case while you are serving on this court.
(e) [Omitted]

DISCUSSION
Since Air Force court panels are not sequestered, it is necessary for the military judge to be sensitive to the possibility of exposure of the court members to information about the case from various news media, and instructions such as the ones in this standard would be necessary in appropriate cases. The members are usually instructed that, if they become aware of information about the case from sources other than evidence properly admitted at trial, they must immediately inform the military judge, so that an inquiry may be conducted to determine their suitability for further service on the panel.

Standard 8.3.7. Setting Aside the Verdict [Omitted]

Standard 8.3.8. Broadcasting, Televising, Recording and Photographing Courtroom Proceedings [Omitted]

CHAPTER 5
DISCOVERY AND PROCEDURE BEFORE TRIAL

SECTION I. General Principles

Standard 11-1.1. Objectives of Pretrial Procedures
(a) Procedure prior to trial should, consistent with the constitutional rights of the accused:
(i) promote a fair and expeditious disposition of the charge, whether by diversion, plea, or trial;
(ii) provide the accused with sufficient information to make an informed plea;
(iii) permit thorough preparation for trial and minimize surprise at trial;
(iv) reduce interruptions and complications during trial and avoid unnecessary and repetitious trials by identifying and resolving prior to trial any procedural, collateral, or constitutional issues;
(v) minimize the procedural and substantive inequities among similarly situated accused; and
(vi) effect economies in time, money, judicial resources, and professional skills by minimizing paperwork, avoiding repetitious assertions of issues, and reducing the number of

separate hearings; and

(vii) minimize the burden upon victims and witnesses

(b) These needs can be served by:

(i) full and free exchange of appropriate discovery;

(ii) simpler and more efficient procedures; and

(iii) Procedural pressures for expediting the processing of cases.

Standard 11-1.2. Applicability

[Modified] These standards should be applied in all criminal cases.

DISCUSSION

In military practice, discovery standards apply in all courts-martial.

Standard 11-1.3. Definition of "Statement"

(a) When used in these standards, a "written statement" of a person shall include:

(i) any statement in writing that is made, signed, or adopted by that person; and

(ii) the substance of a statement of any kind made by that person that is embodied or summarized in any writing or recording, whether or not specifically signed or adopted by that person. The term is intended to include statements contained in police or investigative reports, but does not include attorney work product.

(b) When used in these standards, an "oral statement" of a person shall mean the substance of any statement of any kind by that person, whether or not reflected in any existing writing or recording.

SECTION II. Discovery Obligations of the Prosecution and Defense

Standard 11-2.1. Prosecutorial Disclosure

(a) The trial counsel should, within a specified and reasonable time prior to trial, disclose to the defense the following information and material and permit inspection, copying, testing, and photographing of disclosed documents or tangible objects:

(i) All written and all oral statements of the accused or co-accused that are within the possession or control of the prosecution and that relate to the subject matter of the offense charged, and any documents relating to the acquisition of such statements.

(ii) The names and addresses of all persons known to the prosecution to have information concerning the offense charged, together with all written statements of any such person that are within the possession or control of the prosecution and that relate to the subject matter of the offense charged. The prosecution should also identify the persons it intends to call as witnesses at trial.

(iii) The relationship, if any, between the prosecution and any witness it intends to call at trial, including the nature and circumstances of any agreement, understanding or representation between the prosecution and the witness that constitutes an inducement for the cooperation or testimony of the witness.

(iv) [Modified] Any reports or written statements of experts made in connection with the case, including results of physical or mental examinations and of scientific tests, experiments, or comparisons. With respect to each expert whom the prosecution intends to call as a witness at trial, the prosecutor should also furnish to the defense a curriculum vitae.

(v) Any tangible objects, including books, papers, documents, photographs, buildings,

places, or any other objects, which pertain to the case or which were obtained for or belong to the accused. The prosecution should also identify which of these tangible objects it intends to offer as evidence at trial.

(vi) [Modified] Any record of prior criminal convictions, pending charges, or probationary status of the accused or any co-accused.

(vii) Any material, documents, or information relating to lineups, soups, and picture or voice identifications in relation to the case.

(viii) Any material or information within the prosecutor's possession or control which tends to negate the guilt of the accused as to the offense charged or which would tend to reduce the punishment of the accused.

(b) If the trial counsel intends to use character, reputation, or other act evidence, the prosecution should notify the defense of that intention and of the substance of the evidence to be used.

(c) If the accused's conversations or premises have been subjected to electronic surveillance (including wiretapping) in connection with the investigation or prosecution of the case, the trial counsel should inform the defense of that fact.

(d) If any tangible object which the trial counsel intends to offer at trial was obtained through a search and seizure, the trial counsel should disclose to the defense any information, documents, or other material relating to the acquisition of such objects.

DISCUSSION

See R.C.M. 701 and its Discussion. See also Rule 3.3, Candor Toward the Tribunal; Rule 3.4, Fairness to Opposing Party and Counsel; and Rule 3.8, Special Responsibilities of a Trial Counsel.

Discovery under military law is generally broader and more direct than in most civilian courts. See *United States v. Mougenel*, 6 M.J. 589 (A.F.C.M.R. 1978).

Article 46, UCMJ, provides that the prosecution and defense shall have equal opportunity to obtain witnesses and other evidence, and the United States Court of Appeals for the Armed Forces has interpreted Article 46 to mean that "the defense is entitled to equal access to all evidence, whether or not it is apparently exculpatory." *United States v. Garries*, 22 M.J. 288, 293 (C.M.A. 1986); *United States v. Reece*, 25 M.J. 93 (C.M.A. 1987). See also R.C.M. 703(f).

Standard 11-2.2. Defense Disclosure

(a) The defense should, within a specified and reasonable time prior to trial, disclose to the prosecution the following information and material and permit inspection, copying, testing, and photographing of disclosed documents and tangible objects:

(i) The names and addresses of all witnesses (other than the accused) whom the defense intends to call at trial, together with all written statements of any such witness that are within the possession or control of the defense and that relate to the subject matter of the testimony of the witness. Disclosure of the identity and statements of a person who will be called for the sole purpose of impeaching a prosecution witness should not be required until after the prosecution witness has testified at trial.

(ii) [Modified] Any reports or written statements made in connection with the case by experts whom the defense intends to call at trial, including the results of physical or mental examinations and of scientific tests, experiments, or comparisons that the accused intends to offer as evidence at trial. For each such expert witness, the defense should also furnish to the

trial counsel a curriculum vitae.

(iii) Any tangible objects, including books, papers, documents, photographs, buildings, places or any other objects, which the defense intends to introduce as evidence at trial.

(b) If the defense intends to use character, reputation, or other act evidence not relating to the accused, the defense should notify the prosecution of that intention and of the substance of the evidence to be used.

(c) [Modified] If the defense intends to rely upon a defense of alibi, innocent ingestion or lack of mental responsibility, the defense should notify the prosecution of that intent and of the names of the witnesses who may be called in support of that defense.

DISCUSSION

See R.C.M. 701 and its Discussion.

Standard 11-2.3. The Person of the Accused [Omitted]

SECTION III. Special Discovery Procedures

Standard 11-3.1. Obtaining Nontestimonial Information from Third Parties [Omitted]

Standard 11-3.2. Preservation of Evidence and Testing or Evaluation by Experts

(a) If either party intends to destroy or transfer out of its possession any objects or information otherwise discoverable under these standards, the party should give notice to the other party sufficiently in advance to afford that party an opportunity to object or take other appropriate action.

(b) Upon motion, either party should be permitted to conduct evaluations or tests of physical evidence in the possession or control of the other party which is subject to disclosure. The motion should specify the nature of the test or evaluation to be conducted, the names and qualifications of the experts designated to conduct evaluations or tests, and the material upon which such tests will be conducted. The court may make such orders as are necessary to make the material to be tested or examined available to the designated expert.

(i) The court should condition its order so as to preserve the integrity of the material to be tested or evaluated.

(ii) If the material is contraband material or a controlled substance, the entity having custody of the material may elect to have a representative present during the testing of the material.

SECTION IV. Timing and Manner of Disclosure

Standard 11-4.1. Timely Performance of Disclosure

(a) [Omitted]

(b) [Omitted]

(c) Each party should be under a continuing obligation to produce discoverable material to the other side. If, subsequent to compliance with these standards or orders pursuant thereto, a party discovers additional material or information which is subject to disclosure, the other party should promptly be notified of the existence of such additional material. If the additional material or

information is discovered during or after trial, the court should also be notified.

Standard 11-4.2. Manner of Performing Disclosure
Disclosure may be accomplished in any manner mutually agreeable to the parties. Absent agreement, the party having the burden of production should:
(a) notify opposing counsel that material and information, described in general terms, may be inspected, obtained, tested, copied, or photographed during specified reasonable times; and
(b) make available to opposing counsel at the time specified such material and information and suitable facilities or other arrangements for inspection, testing, copying, and photographing of such material and information.

Standard 11-4.3. Obligation to Obtain Discoverable Material
(a) The obligations of the trial counsel and of the defense attorney under these standards extend to material and information in the possession or control of members of the attorney's staff and of any others who either regularly report to or, with reference to the particular case, have reported to the attorney's office.
(b) The trial counsel should make reasonable efforts to ensure that material and information relevant to the defendant and the offense charged is provided by investigative personnel to the trial counsel's office.
(c) If the trial counsel is aware that information which would be discoverable if in the possession of the prosecution is in the possession or control of a government agency not reporting directly to the trial counsel, the trial counsel should disclose the fact of the existence of such information to the defense.
(d) Upon a party's request for, and designation of, material or information which would be discoverable if in the possession or control of the other party and which is in the possession or control of the others, the party from whom the material is requested should use diligent good faith efforts to cause such material to be made available to the opposing party. If the party's efforts are unsuccessful and such material or others are subject to the jurisdiction of the court, the court should issue suitable subpoenas or orders to cause such material to be made available to the party making the request.
(e) Upon a showing that items not covered in the foregoing standards are material to the preparation of the case, the court may order disclosure of the specified material or information.

SECTION V. Depositions

Standard 11-5.1. Depositions to Perpetuate Testimony [Omitted].]

Standard 11-5.2. Discovery Depositions [Omitted]

Section VI. General Provisions Governing Discovery

Standard 11-6.1. Restrictions on Disclosure
(a) Disclosure should not be required of legal research or of records, correspondence, reports, or

memoranda to the extent that they contain the opinions, theories, or conclusions of the trial counsel or defense counsel, or members of the attorney's legal staff.

(b) Disclosure of an informant's identity should not be required where such identity is a government secret and where a failure to disclose will not infringe on the constitutional right of the accused. Disclosure should not be denied regarding witnesses or material to be produced at a hearing or trial.

(c) [Modified] The court may deny, delay, or otherwise condition discovery under this Section of the standards if it finds that there is a substantial risk of grave prejudice to national security resulting from such disclosure, and where a failure to disclose will not infringe on the constitutional rights of the accused.

(d) Disclosure should not be required from the defense of any communications of the defendant, or any other materials which are protected from disclosure by the Constitution, statutes or other law.

(e) The court should have the authority to deny, delay, or otherwise condition disclosure authorized by these standards if it finds that there is a substantial risk to any person of physical harm, intimidation, or bribery resulting from such disclosure which outweighs any usefulness of the disclosure.

Standard 11-6.2. Failure of a Party to Use Disclosed Material at Trial

The fact that a party has indicated during the discovery process an intention to offer specified evidence or to call a specified witness is not admissible in evidence at a hearing or trial.

Standard 11-6.3. Investigations Not to Be Impeded

Neither the counsel for the parties nor other prosecution or defense personnel should advise persons (other than the accused) who have relevant material or information to refrain from discussing the case with opposing counsel or showing opposing counsel any relevant material, nor should they otherwise impede opposing counsel's investigation of the case.

Standard 11-6.4. Custody of Materials

Any materials furnished to an attorney pursuant to these standards should be used only for the purposes of preparation and trial of the case, and should be subject to such other terms and conditions as the court may provide.

Standard 11-6.5. Protective Orders

Upon a showing of cause, the court may at any time order that specified disclosures be restricted, conditioned upon compliance with protective measures, or deferred, or make such other order as is appropriate, provided that all material and information to which a party is entitled is disclosed in sufficient time to permit counsel to make beneficial use of the disclosure.

Standard 11-6.6. Excision

When some parts of material or information are discoverable under these standards and other parts are not discoverable, the discoverable parts should be disclosed. The disclosing party should give notice that nondiscoverable parts have been withheld and the nondiscoverable parts should be sealed, preserved in the records of the court, and made available to the appellate court in the event of an appeal.

DISCUSSION
Any issues relating to perceived abuses of discovery should be raised by a motion for appropriate relief, prior to the entry of pleas by the accused. Otherwise, the issue may be deemed to be waived on appeal.

Standard 11-6.7. *In Camera* Proceedings
Upon request of any person, the court may permit any showing of cause for denial or regulation of disclosures, or any portion of such showing, to be made *in camera*. A record should be made of both in court and *in camera* proceedings. Upon the entry of an order granting relief following a showing *in camera*, all confidential portions of the *in camera* portion of the showing should be sealed, preserved in the records of the court, and made available to the appellate court in the event of an appeal.

Section VII. Sanctions

Standard 11-7.1. Sanctions
(a) If an applicable discovery rule or an order pursuant thereto is not promptly implemented, the court should do one or more of the following:

(i) order the noncomplying party to permit the discovery of the material and information not previously disclosed;

(ii) grant a continuance;

(iii) prohibit the party from calling a witness or introducing into evidence the material not disclosed, subject to the accused's right to present a defense and provided that the exclusion does not work an injustice either to the prosecution or the defense; and/or

(iv) enter such other order as it deems just under the circumstances.

(b) The court may subject counsel to appropriate sanctions, including a finding of contempt, upon a finding that counsel willfully violated a discovery rule or order.

OPR: AFLOA/JAJ

Attachment 4

UNIFORM RULES OF PRACTICE BEFORE AIR FORCE COURTS-MARTIAL

PREAMBLE

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PROMULGATION

APPENDIX A: Format for notification memorandum to the CDO

APPENDIX B: Format for caption and pleadings

APPENDIX C: Format for Scheduling Order

PREAMBLE

These rules govern the trial of courts-martial within the United States Air Force. They are intended to inform staff judge advocates, military judges, and counsel of the basic rules of practice and to promote uniformity in courts-martial practice. The rules are not all-inclusive nor are they intended to be.

Rule 1.1. OBJECTIVE OF THESE RULES

Pursuant to R.C.M. 108, these rules, hereinafter referred to as the "Rules of Court," provide rules for the conduct of Air Force general and special courts-martial and the orderly administration of justice by setting forth the practices and procedures now followed in Air Force courts-martial.

Rule 1.2. APPLICATION OF RULES OF COURT

The Rules of Court apply to the trial of all general and special courts-martial involving Air Force accused, including those in which military judges assigned to other Services preside. Counsel, as Officers of the Court, are obliged to be familiar with and to comply with these rules, as well as those contained in The Judge Advocate General's Corps Professional Responsibility Program (including *the Air Force Rules of Professional Conduct*; *the Air Force Standards for Civility in Professional Conduct*; *The Air Force Standards for Criminal Justice*; and *the TJAGD Professional Responsibility Program*), the Manual for Courts-Martial, military case law, and applicable Department of the Air Force Instructions.

Rule 1.3. CONSTRUCTION AND ENFORCEMENT OF THE RULES OF COURT

(A) Construction: The Rules of Court will be construed so as to ensure simplicity in procedure, fairness in administration, reduction in cost and speedy disposition of charges against the accused. The military judge is the ultimate arbiter of fairness in the trial arena. Accordingly, the military judge has inherent power to permit or require variations from the Rules of Court (see, e.g., RCM 801(a)(3)).

(B) Reporting Violations: Should any counsel, or any other person involved in the trial process choose to report a violation of the Rules of Court, the report should be made to the detailed trial judge through counsel. At the conclusion of the trial, the detailed trial judge will report alleged violations to the Chief Regional Military Judge (CRMJ) and the Chief Trial Judge (CTJ), regardless of whether action was taken by the detailed judge regarding the alleged violation.

(C) Enforcement by Detailed Judge: Non-compliance with the Rules of Court, in and of itself, gives rise to no rights or remedies to the Government or the accused, and the rules will be interpreted in this context. However, the trial judge is not restricted in granting rights or remedies for actions which independently violate other standards applicable to trial practitioners, i.e., rules against contempt of court, sanctions for discovery violations, or ethical violations, solely because the conduct in question also violates the Rules of Court. In the case of violations of the *Uniform Rules of Practice Before Air Force Courts-Martial*, the military judge may, upon application of a party or *sua sponte*, take such action as may be warranted by the attendant circumstances and the interests of justice. This action may include, but is not limited to,

addressing the alleged conduct on the record during the course of trial.

(D) Enforcement by the CTJ or the CRMJ: Upon report of alleged violations of the Rules of Court forwarded by the detailed military judge, the CTJ or the CRMJ may, in the case of military counsel, forward the complaint of violation to the supervising attorney for action. The decision to forward such complaints is within the sound discretion of the CTJ or the CRMJ, taking into account the nature and circumstances of the alleged violation. The CTJ or the CRMJ, or any other person, may also take other appropriate action as provided for by the Rules of Court or other standards applicable to trial practitioners, i.e., ethical and professional standards.

PRELIMINARY MATTERS

Rule 2.1. DOCKETING

(A) Docketing of courts-martial is a judicial function. The CTJ has world-wide responsibility for the docketing of courts-martial and detailing of military judges. The CTJ delegates the authority to the CRMJs of Europe and the Pacific to docket courts-martial and detail judges within their respective regions. The CTJ also delegates the authority to the Deputy Chief Trial Judge (DCTJ) to docket cases world-wide. To assist the CTJ, the Central Docketing Office (CDO) serves as the focal point for all court-martial docketing and detailing decisions, to include the detailing of CONUS judges for OCONUS courts-martial.

(B) The CDO maintains a current docket of all pending CONUS and OCONUS courts-martial and all other forums in which a military judge has been detailed or assigned, such as Article 32, UCMJ, investigations and administrative discharge proceedings.

Rule 2.2. NOTIFICATIONS TO CDO

To facilitate efficient docketing management, each Staff Judge Advocate (SJA) office will immediately notify the CDO (and OCONUS CRMJ and/or detailed military judge, as appropriate) of the following events in the manner provided:

(A) Preferral of court-martial charges when a general court-martial (GCM) or special court-martial (SPCM) is contemplated -- e-mail a copy of the complete charge sheet to the CDO.

(B) Imposition of any form of pretrial restraint and any status change -- e-mail a copy of the confinement order to the CDO.

(C) Referral of charges to trial by GCM or SPCM -- e-mail a copy of the complete charge sheet and all convening orders to the CDO after service of the charges on the accused. Note: do not send the pretrial advice, court member nomination list or court member data sheets.

(D) Chapter 4 or resignation request -- indicate whether permission to proceed to trial will be sought, or whether trial will be directed to proceed, and notify the CDO and the detailed judge of the action taken on the request.

(E) Withdrawal, dismissal, or other disposition short of trial -- e-mail a copy of the convening authority action to the CDO.

(F) Major modification of charges and specifications after referral -- e-mail a copy of the modified charge sheet to the CDO and the detailed judge.

(G) Other events or circumstances that might interfere with trial of a case as scheduled -- e-mail motions to delay or continue to the CDO and the detailed judge. Note: e-mail all other motions to the detailed judge only.

OCONUS SJAs must also provide this information to their respective CRMJ.

Rule 2.3. DETAILING OR RETAINING OF COUNSEL

(A) As soon as possible after preferral, military trial and defense counsel will provide the CDO a written notice of detailing; civilian defense counsel will provide a written notice of representation. The notice will contain counsel's full name; rank and duty title (as applicable); position (*e.g.*, trial counsel, assistant trial counsel, detailed defense counsel, etc.); office phone number; e-mail address and mailing address in the case of civilian counsel. In addition, civilian counsel's notice will identify the jurisdiction(s) in which the counsel is admitted to practice. Upon referral, such notices constitute the formal notice of appearance of such counsel.

(B) The detailed defense counsel has the duty to provide civilian counsel a copy of these rules; and the *Air Force Rules of Professional Conduct*; the *Air Force Standards for Civility in Professional Conduct*; the *Air Force Standards for Criminal Justice*; and *TJAGC Professional Responsibility Program*.

Rule 2.4. WITHDRAWAL BY COUNSEL

Prior to referral, if counsel withdraws from the case, counsel shall notify the CDO. Any substitute detailing or retention of counsel will be filed in accordance with Rule 2.3. After referral, counsel may withdraw only in the following manner:

(A) TRIAL COUNSEL. Trial counsel may not withdraw unless substitute qualified counsel is detailed prior to or simultaneously with the relief of the withdrawing counsel. Notice of the withdrawal and new detailing will be filed immediately with the military judge.

(B) MILITARY DEFENSE COUNSEL. Detailed and individual military defense counsel may not withdraw from representation of the accused without the military judge's approval, whether or not the accused desires to release the military counsel. If counsel seeks permission to withdraw before the case is docketed for trial, send the request to the CDO for action by the CTJ or DCTJ.

(C) CIVILIAN DEFENSE COUNSEL. Civilian defense counsel may not withdraw from representation of the accused without the military judge's approval, whether or not the accused desires to release the civilian counsel. 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 failure to pay the fee does not, however, terminate the attorney's obligations as an officer of the court. If counsel seeks permission to withdraw before the case is docketed for trial, send the request to the CDO for action by the CTJ or DCTJ.

Rule 2.5. ESTABLISHING TRIAL DATES

(A) GENERALLY. There are several factors which must be considered in setting a trial date, to include: conflicts with docketed cases, estimated length of the trial, availability of a military judge, witnesses, consultants, experts, local and regional or civilian counsel and court reporter, discovery, forensic tests, medical or psychiatric evaluation, and the existence of any pending requests for individual military counsel, discharge, resignation, or retirement in lieu of trial. These factors should be discussed by both sides prior to calling in the case. Trials will be scheduled to start and end on duty days, unless circumstances dictate otherwise.

(B) POST-REFERRAL. While the Convening Authority may decide not to refer forwarded charges to trial in any given case, the parties must be prepared to engage immediately in the event charges are referred.

(1) Procedure. Immediately after referral and service of the charges on the accused, the legal office prosecuting the case will notify the CDO as outlined in Rule 2.2(C) along with the memo at Appendix A (template located at the AF/JAT website).

(2) The CDO will contact the detailed counsel to request they provide their respective schedules, the earliest date they can try the case and their estimate of how long it will take to try the case. Military defense counsel do not need to provide the CDO a copy of their schedule if their schedule is current in the Judiciary Docket System.

(3) Docketing Conference.

a. The Clerk of Trial Courts or docketing judge will hold a docketing conference with counsel in all cases. The docketing conference should be held within two duty days (CDO local time) following the day of notice of referral. After determining how long counsel estimate it will take to try the case, the Clerk of Trial Courts will set a "presumptive trial date." This is the earliest day that a military judge is available to try the case after the statutory waiting period (see R.C.M. 602) has elapsed, based on the estimated length of the trial. If the parties are unable to proceed to trial on the "presumptive trial date," they will be required to account for their inability to do so during the docketing conference.

b. It is incumbent upon the responsible base SJA to identify the likely detailed trial counsel and to notify the responsible Defense Counsel at the point the charges are forwarded to the Convening Authority for a referral decision so the parties can coordinate their schedules, determine availability of prospective witnesses and co-counsel, and discuss potential trial dates well before the docketing conference.

c. It also is incumbent upon military defense counsel to coordinate with civilian defense counsel well ahead of the docketing conference to discuss the same matters and

alert the civilian counsel to the pendency of the docketing conference. After holding the docketing conference, the Clerk of Trial Courts or docketing judge will coordinate an initial trial date and any request to exclude time from accountability under R.C.M. 707 with the CTJ or DCTJ. The CTJ or DCTJ will decide whether to exclude time from R.C.M. 707 accountability.

(4) Docketing Memorandum. Within 24 hours after a trial date is established, the CDO will prepare a docketing memorandum setting out the initial trial date, identification of the detailed trial judge, exclusions of time under R.C.M. 707 (if any), and any other relevant data, including the "presumptive trial date" and government and defense "case ready" dates. The memorandum will be e-mailed to the detailed trial and defense counsel, and civilian defense counsel.

Rule 2.6. PRETRIAL RCM 802 SCHEDULING CONFERENCE

(A) Experience shows that early dialogue between the military judge and counsel is critical to timely and orderly progress of the case. This dialogue should identify issues that are outstanding or foreseeable and capable of early resolution -- e.g., approval of experts, discovery, evidentiary motions, requests for sanity boards.

(B) Accordingly, in each general and special court-martial, the military judge will, pursuant to R.C.M. 802, conduct a Pretrial Scheduling Conference ("Scheduling Conference") as soon as possible and not later than seven calendar days after the case is docketed for trial. Scheduling conferences should be held either face-to-face or via video teleconference. The scheduling conference may be held telephonically when the military judge determines that this method will be most expeditious and effective. Upon request from the military judge, trial counsel will coordinate all conference communications. During the conference, the military judge will undertake a detailed examination of all potential issues with counsel to ensure trial is held on (or before) the initial trial date. Counsel will apprise the detailed judge of all issues that may affect the scheduled trial date, such as providing discovery, availability of witnesses and experts, submission of motions, sanity concerns or any other relevant issue.

Rule 2.7. SCHEDULING ORDER

(A) After the 802 Scheduling Conference, the military judge will, except where found to be unnecessary, issue a Scheduling Order to establish timelines, resolve issues, and move the case forward most effectively. A sample of a Scheduling Order is provided at Appendix C.

(B) The military judge will proactively manage case progress. To this end, the military judge will conduct additional conferences as appropriate. If the military judge determines that a separate Article 39(a)/arraignment session is necessary, the military judge will schedule separate sessions. These matters are covered in more detail in Rules 3.4 and 3.5.

(C) The military judge will remain alert to the opportunity to move the trial date forward in time. The trial date may be advanced at the discretion of the military judge.

PRETRIAL MATTERS

Rule 3.1. COMMUNICATIONS WITH THE MILITARY JUDGE

(A) *EX PARTE* COMMUNICATIONS. Except as provided by the Manual for Courts-Martial, *ex parte* communications between counsel and the military judge concerning a case pending before that military judge are prohibited. Routine administrative matters are excluded from this prohibition.

(B) WRITTEN COMMUNICATIONS. Except in the case of an authorized *ex parte* communication, counsel will—on all written communications with the military judge—send a copy of the communication to opposing counsel.

(C) ORAL COMMUNICATIONS. On oral communications with the military judge, the military judge will determine whether the communication needs to be reduced to writing and if so, by which party.

Rule 3.2. PRETRIAL NOTICE REQUIREMENTS

Unless an extension or waiver is granted by the military judge for good cause, the following notice requirements apply.

(A) PLEAS AND FORUM. Defense counsel will file a notice of probable pleas and choice of forum with the Court (with a copy to trial counsel and the court reporter) in writing not later than 24 hours after the accused is served with the referred charges or seven calendar days prior to the scheduled trial date, whichever is later. The pleas will be expressed in the precise form counsel anticipate announcing them in open court. Defense counsel will promptly notify the judge and trial counsel of any change in anticipated plea or choice of forum. If defense counsel learns that a case previously scheduled as a litigated trial has turned into a guilty plea, defense counsel shall notify the CDO of the change in plea. If feasible, the CDO and/or the military judge will conduct an additional docketing conference to see if the trial can be moved to an earlier date.

(B) PRETRIAL AGREEMENTS. Defense counsel will notify the military judge that a pretrial agreement offer has been submitted to the Government. If the Government accepts an accused's offered pretrial agreement, the trial counsel will immediately provide a copy of the offer portion of the pretrial agreement to the military judge. In addition, trial counsel will provide the military judge any stipulation of fact.

(C) ALTERNATE DISPOSITION. Trial and defense counsel will notify the military judge immediately whenever a request for discharge or resignation or retirement in lieu of court-martial has been submitted.

(D) MOTIONS. Counsel for both sides will file a notice of the substance of any anticipated motions, including motions *in limine*, in accordance with any Scheduling Order or other order of the military judge, and, in any event, not later than fourteen calendar days prior to

trial, in order to permit the Court and opposing counsel to research the issues in advance of the trial or scheduled hearing.

(E) WITNESS LISTS. Counsel for both sides will file a list containing each anticipated witness' full name, unit/duty station (as applicable), address and telephone number not later than five days after receipt of discovery or the date specified in the military judge's Scheduling Order, whichever is earlier. Counsel will amend and update their lists as appropriate with the Court (with a copy to opposing counsel and the court reporter).

(F) VOIR DIRE. Counsel for both sides will provide a written copy of their proposed voir dire to the military judge and opposing counsel not later than three duty days prior to trial or the date specified in the military judge's Scheduling Order, whichever is earlier. Unless the military judge directs otherwise, counsel will conduct voir dire, based on the questions approved by the military judge from the written submissions.

(G) PROPOSED INSTRUCTIONS. Requests for special instructions will be in writing and presented to the military judge and opposing counsel as required by any Scheduling Order or as early as possible during the trial proceedings.

(H) OTHER REQUIRED NOTIFICATIONS. Counsel for both sides will file other notifications required by the Manual for Courts-Martial or other authority—such as notice of certain defenses and notices under M.R.E. 412, 413 and 414 in accordance with any Scheduling Order or other order of the military judge.

Rule 3.3. DISCOVERY

(A) Counsel are to review, be familiar with, and adhere to R.C.M. 701 – 703. Early, responsive discovery is strongly encouraged and leads to orderly, on-time trials.

(B) Requests for discovery will be made to the opposing side as soon as possible and otherwise in accordance with any Scheduling Order or other order of the military judge. In the absence of a Scheduling Order, parties will file the initial discovery request within five calendar days of the docketing conference. Formal replies will be made within two duty days. Counsel for both sides will promptly respond to and comply with all requests for discovery. If some items require additional time, counsel will file a partial response and notify the opposing party and the court of the anticipated completion date. The military judge will be notified at the initial RCM 802 Scheduling Conference, or subsequently as matters arise whenever discovery issues require judicial engagement/resolution.

(C) INITIAL DISCLOSURE. Before or upon service of charges, the SJA or trial counsel will provide defense counsel with copies of the charge sheet, the commander's forwarding memo, convening order(s), pertinent investigative reports, and statements relating to an offense charged in the case, and any R.C.M. 701(a)(6) evidence.

Rule 3.4. PRETRIAL CONFERENCES

As noted in Rule 2.6(B), pretrial conferences, in addition to the Scheduling Conference with the

military judge and counsel for both sides, will be held as necessary to keep the case on track. The accused is neither required nor prohibited from attending any such conference. Conferences may be held to inform the military judge of unusual problems or issues arising after the Scheduling Conference and to seek judicial engagement/resolution. However, pretrial conferences will not be used to litigate or decide contested issues. *See* R.C.M. 802 and Discussion.

Rule 3.5. ARTICLE 39(a) SESSIONS

The military judge may set an Article 39(a) session, to include arraignment, as part of the pretrial Scheduling Order or by subsequent order. Military judges should consider Article 39(a) sessions prior to the date of trial to conduct arraignment and resolve outstanding legal issues. Such sessions may be conducted via video teleconference in accordance with the provisions of AFI 51-201, paragraph 8.21 and Rule 3.8, below.

Rule 3.6. MOTIONS

(A) NOTICE AND FILING. IAW Rules 2.6 and 3.2(D), counsel for both sides will notify the military judge and opposing counsel of any motions, evidentiary objections or other issues which may be litigated before or at trial. Motions will be in writing and filed in accordance with the Scheduling Order or other order of the military judge. Every motion, pleading or other document submitted to the Court by a party will be signed by at least one counsel of record.

(B) SPECIFIC MOTIONS. Counsel are to review and be familiar with the various types of motions as outlined in R.C.M. 906 – 907.

(C) OTHER REMEDIES. Prior to filing a motion, counsel will make reasonable efforts to secure the requested relief from opposing counsel. These rules do not operate to relieve the moving counsel from complying with applicable provisions of the Manual for Courts-Martial, to include any requirement to seek relief from the convening authority before seeking such relief from the court.

(D) CONTENTS. Motions will include a caption indicating the parties to the case, the personal data of the accused, and the title of the motion. “Personal data” includes rank, name, and duty assignment; the member’s social security number should not be included. Motions will include: (1) the specific relief requested, (2) a statement of relevant facts; (3) the applicable law; (4) argument and (5) a conclusion. Motions will include a statement of whether the moving party requests or waives an Article 39(a) session to present argument or evidence. Replies will indicate agreement or disagreement with the stated facts. Affidavits may be attached when controverted factual issues are involved. A sample motion is at Appendix B.

(E) RULINGS. Rulings upon pretrial motions will be announced by appropriate court order. The order (where written), the motion and the response will be designated as appellate exhibits in the record of trial.

Rule 3.7. SPEEDY TRIAL CHRONOLOGY
In those cases where the defense moves to dismiss the charges and specifications on the grounds of denial of speedy trial, the trial counsel will prepare a written chronology of events prior to trial. The chronology will be in the format approved in *United States v. Ramsey*, 28 M.J. 370, 374 (C.M.A. 1989). If counsel are unable to stipulate to the events and dates, areas of disagreement should be identified and litigated when the appropriate motion is presented.

Rule 3.8. USE OF VIDEOTELECONFERENCING (VTC)
Video teleconferencing is authorized for all preliminary matters prior to the entry of pleas by the accused, to include conferences held under R.C.M. 802 and Article 39(a) sessions. If either party proposes to use alternatives to testimony after the court is assembled, such as VTC (or other audiovisual) technology, in accordance with R.C.M. 703(b)(1), 804(b), 805(a), 805(c), and/or R.C.M. 914B (and AFI 51-201 para 8.21), the proponent shall serve notice of its intent on the Court and opposing counsel not later than ten duty days prior to trial. Any objection shall be filed within two duty days of receipt.

DURING TRIAL

Rule 4.1. CONVENING THE COURT
The military judge will establish the time and date of the initial convening of the Court and all sessions thereafter. All personnel of the court will be present and ready to proceed at the scheduled time.

Rule 4.2. MILITARY JUDGE
All persons in the courtroom, other than the court reporter, will rise when the military judge enters or leaves the courtroom. If a nameplate is provided for the judge, it will designate the judge as "Judge _____". Military rank will not be placed on the nameplate.

Rule 4.3. ROBES
The judicial robe will be worn by the military judge in all Air Force general and special courts-martial.

Rule 4.4. COURT MEMBERS
All persons, other than the military judge and court reporter, will rise when the members as a group enter and leave the courtroom.

(A) INFORMATION PROVIDED TO COURT MEMBERS BEFORE ASSEMBLY. Court members will not be advised of: (1) the reasons or responsibility for any delay in trial; (2) requests for sanity boards or administrative separation; or (3) projected pleas or forum. Either party may apply to the detailed military judge for an order to the court members warning them to avoid anticipated pretrial publicity.

(B) QUESTIONNAIRES PROHIBITED. Other than to obtain the normal *United States v. Credit*, 2 M.J. 631 (C.M.A. 1976), information for potential members, no pretrial questionnaires will be sent to any court member, except upon approval of the military judge. No post-trial questionnaires or surveys will be sent to any member, except upon approval of the

military judge. Defense requests for clemency recommendations will be limited solely to that purpose and do not require the approval of the military judge. R.C.M. 1105(b)(2)(D).

(C) TELEPHONE STANDBY. Unless otherwise directed by the military judge, court members will be on 15-minute telephone standby until completion of the preliminary Article 39(a) session. Members will not be released until a judge alone request has been approved on the record.

(D) APPROACHING MEMBERS. Unless directed otherwise by the military judge, counsel may not – without prior permission – approach the court members.

(E) MEMBERS' OATH. Trial counsel will swear the members in accordance with the oath for members in R.C.M. 807(b)(2). The parenthetical "(upon a challenge or)" will be omitted. No other modifications will be made.

Rule 4.5. PUNCTUALITY
All parties will be punctual for all sessions of the court-martial.

Rule 4.6. UNIFORM AND CIVILIAN ATTIRE
The default military uniform for all courts-martial is military service dress. The military judge may designate an alternate uniform if a military exigency exists. Civilian attorneys will wear appropriate business attire suitable for appearance before a federal court.

Rule 4.7. SIDEBAR CONFERENCES
Sidebar conferences will not be used. If matters must be discussed outside the presence of the court members, an Article 39(a) session will be used.

Rule 4.8. SPECTATORS

(A) Spectators are welcome to attend any session of a court-martial except those sessions at which spectators must be excluded, as determined by the military judge. Counsel will ensure that the military judge is notified if any spectator may be called as a witness, unless the spectator becomes a witness by observing trial events. (A spectator may observe a providency hearing and become a witness without prior notification.)

(B) Consult the military judge in advance if potential spectators exceed normal seating capacity, before adding chairs inside the bar, or reserving seats for media or family members. Ordinarily standing-room access will not be approved.

(C) In a bench trial, the court member seats may be used as spectator seating with approval of the military judge, and with the understanding that ingress and egress to such seats will be limited to court recesses. Spectators should be dressed appropriately, befitting the seriousness of the proceedings.

Rule 4.9. CONDUCT OF SPECTATORS AND PARTICIPANTS DURING TRIAL

(A) Spectators ordinarily may enter or leave the courtroom while court is in session. Spectators will not disturb the proceedings in any way, including verbal expressions, whispering, shaking or nodding of the head, or similar displays. Spectators will refrain from any activities indicative of inattention to the proceedings, such as sleeping, clipping nails, reading any material, and watching, listening to, or playing with any electronic device or game.

(B) All beepers, audible pagers, and cell phones must be turned off prior to entering the courtroom. Trial counsel will post signs indicating this requirement outside the courtroom where spectators and the court members enter. Counsel for both sides are responsible for informing their witnesses of this requirement.

(C) Military and civilian law enforcement spectators will not enter the courtroom bearing arms while the court is in session without the prior approval of the military judge. [See also Rule 6.5.]

(D) Spectators who violate any rules may be warned that their behavior will not be tolerated and, at the discretion of the military judge, may be excluded from the courtroom. Contempt proceedings may be initiated in appropriate cases.

Rule 4.10. SMOKING, FOOD AND BEVERAGES
Smoking, eating food, and drinking beverages will not be permitted in the court-room during open sessions (except water or other non-alcoholic beverage in an unmarked container for the trial participants). Trial participants will not chew gum or use any form of tobacco product in the courtroom.

Rule 4.11. PHOTOGRAPHY AND RECORDINGS
Photographs, sound and video recordings (except those made for the limited purpose of preparing an official record of the proceedings or for evaluating the performance of any trial participant) and radio and television broadcasts will not be made in or from the courtroom during trial proceedings. A closed circuit television system may be used under the circumstances set forth in M.R.E. 611(d), R.C.M. 804(c), and R.C.M. 914A, when an accused has been removed from the courtroom, or to accommodate members of the public who have been unable to obtain space in the courtroom. [*See also* R.C.M. 806(c)]

Rule 4.12. READING BACK PORTIONS OF THE RECORD
Portions of the record of trial including prior questions or answers will be reread or replayed back to the Court only at the direction of the military judge.

Rule 4.13. DELIBERATIONS
A deliberation room for use by the court members will be provided in every trial with court members. The court members will not deliberate in the courtroom unless exigent circumstances are found by the military judge. The bailiff must ensure that counsel, the accused, spectators, and witnesses do not stand at or near the doors or windows of the deliberation rooms.

Rule 4.14. BAILIFF
A bailiff should be present at every court-martial, if practicable. No person will be detailed as a bailiff who is undergoing correctional custody or who is assigned bailiff duties as a result of nonjudicial punishment. The bailiff should not have an interest in the case, or a close association with the accused or with a victim. Ordinarily, the bailiff should be senior in grade to the accused. The trial counsel will ensure the bailiff is oriented to the courtroom and instructed on bailiff duties by a base legal office member. If no bailiff is available, trial counsel or assistant trial counsel will perform the bailiff duties.

Rule 4.15. COURTROOM SECURITY

(A) SECURITY CONCERNS. If counsel for either side becomes aware of any potential security concerns counsel will immediately advise the military judge of such concerns.

(B) PREVENTIVE SECURITY MEASURES. At the initial R.C.M. 802 conference, the trial counsel will advise the military judge of any special security features of the courtroom, (e.g., a "panic button," bullet resistant plating, or phone connection to law enforcement) and any planned security actions (e.g., searching spectator's parcels or metal detector "wanding").

(C) GUARDS. After notifying the military judge in advance, the trial counsel will provide for guards whenever necessary to secure high value evidentiary items or to provide security for the accused or other trial participants. Guards will not be permitted into the bar of the Court unless it is necessary for them to carry out their mission. Guards will not be armed, unless such arming is specifically approved in advance by the military judge.

(D) CUSTODY OF ACCUSED. The duties of prisoner escort are inconsistent with the duties of counsel at a court-martial. Neither trial counsel nor defense counsel nor the bailiff will sign for a prisoner, before or during trial. Ordinarily, a prisoner escort should be detailed from the accused's squadron. However, if confinement is adjudged, the trial counsel is responsible for custody of the accused until the confinement is deferred or the accused is received for confinement by security forces.

(E) SECURITY OF ACCUSED. The accused will not be shackled or unshackled, or physically restrained in the presence of court members except upon prior approval of the military judge for good cause shown.

CONDUCT OF COUNSEL

Rule 5.1. RESPONSIBILITY OF COUNSEL
Counsel owe a duty both to the client and to the Court. Counsel will assist the military judge in maintaining a dignified atmosphere within a military setting.

Rule 5.2. INTEGRITY
Conduct of counsel before the court and with opposing counsel will be characterized by candor, fairness, and civility. Counsel will not violate any established rule of procedure or standing

order or ruling of the Court. Counsel's actions will be tested by a "good faith" standard. Counsel will not encourage the Court or court members to ignore the law.

Rule 5.3. COURTESY
Counsel will stand when addressing the military judge, court members, or witnesses and when conducting all trial actions such as examination of witnesses and argument. Counsel will address the military judge as "Your Honor" and will address the members and the accused by their grade and name. Unless directed otherwise by the military judge, counsel may, without prior permission, approach the bench or the court reporter to provide or retrieve evidence. Inappropriate or rude behavior or language, or any actions calculated to intimidate a witness, provoke opposing counsel, or improperly impede the proceedings is prohibited. Stated affirmatively, counsel will treat others civilly and with respect. If the bailiff does not, trial counsel will say "all rise" whenever the military judge or the entire court member panel enters or leaves the courtroom.

Rule 5.4. FINDINGS AND SENTENCING WORKSHEET
During trial with court members, trial counsel shall prepare tailored findings and sentencing worksheets, using the formats in Appendix B, DA Pamphlet 27-9, and submit them to the judge and opposing counsel at least two duty days prior to trial. Any lesser included offenses likely to be in issue will be reflected on the findings worksheet.

Rule 5.5. AVOID UNDUE FAMILIARITY
Counsel will refrain from undue familiarity between themselves, with the members, witnesses, spectators, or the military judge while court is in session, or in front of the accused, spectators, witnesses or the members.

Rule 5.6. ONE COUNSEL PER CAUSE
Except with the permission of the military judge, only one counsel for each side or for each accused will examine any one witness or address the court on any issue, motion, objection or argument.

Rule 5.7. ENGLISH REQUIRED
Counsel will be fluent in written and spoken English.

Rule 5.8. PERSONAL OPINIONS
Counsel will not, during trial, assert personal knowledge of the facts in issue, except when testifying as a witness. Counsel will not assert a personal opinion as to the justness of a cause, the credibility of a witness, or the guilt or innocence of the accused except that counsel may argue for any position or conclusion based on an analysis of the evidence with respect to the matter stated. Counsel will not express a personal belief or opinion as to an appropriate sentence or portion thereof.

Rule 5.9. STATE OBJECTION
When making objections, counsel will first state only the objection and the specific basis for it without further elaboration. Counsel may present argument only on invitation by the military judge.

Rule 5.10. OBLIGATION TO PRESENT CONTRARY AUTHORITIES
In presenting matters to the Court for ruling, counsel will disclose contrary legal authority known to counsel and not already disclosed by opposing counsel.

Rule 5.11. RELATIONS WITH THE NEWS MEDIA
Counsel will comply with the *Air Force Standards for Criminal Justice*, especially Chapter 4, Fair Trial and Free Press. Military judges will refer all media requests to the servicing staff judge advocate and installation public affairs office.

Rule 5.12. LEAVING THE COURTROOM
Counsel will not leave the courtroom during trial without first obtaining permission from the military judge.

WITNESSES

Rule 6.1. COURTESY TO WITNESSES
Witnesses will be treated with fairness and consideration and will not be treated in an abusive manner. Counsel will examine a witness at a reasonable distance and will not approach a witness without permission from the military judge.

Rule 6.2. PRETRIAL INSTRUCTIONS TO WITNESSES
Counsel will instruct their witnesses on the physical layout of the courtroom and on proper decorum while in the courtroom. Specifically, counsel will instruct witnesses to avoid chewing gum or tobacco, wearing sunglasses, or using profanity, slang or colloquialisms except as required as part of their testimony. Witnesses will be instructed to avoid casual conversation with the military judge or court members.

Rule 6.3. SALUTING IN COURT
Military witnesses will not salute the military judge or the President of the Court.

Rule 6.4. AVAILABILITY
Counsel will make arrangements to ensure that witnesses will be immediately available when called. Counsel will inform the bailiff of the witness' whereabouts and coordinate with each other to minimize delays.

(A) ON-CALL STATUS. Apply common sense. Convenience to the witnesses and a smooth orderly trial are not inconsistent goals when counsel plan ahead. It is preferable to have three witnesses waiting rather than have to recess the trial to wait for each of them. On the other hand, an occasional recess to notify a senior officer or medical officer who is on immediate telephone standby is acceptable.

(B) WAITING AREA. Sound discretion often requires segregation of witnesses from each other or others waiting for service in the legal office. Victim witnesses will be treated as required by common sense, federal statute, and Air Force Instructions.

(C) PRESENCE IN COURTROOM. A witness being called at the conclusion of a recess should be present at the witness stand upon resumption of trial. Prospective witnesses will not be present in the courtroom during proceedings except upon agreement by both sides and approval of the military judge, or as otherwise required by law.

(D) RELEASE OF WITNESSES. No witness will be released beyond recall until the court is adjourned, without the approval of the military judge.

Rule 6.5. ATTIRE
Military members should normally testify in service dress uniform. If approved by the military judge in advance, military members may testify in an alternative clean, neat, duty uniform. Whether or not on duty, military witnesses who wear uniforms in the course of their duty should testify in uniform. However, military witnesses called or recalled unexpectedly during off-duty hours may testify in civilian attire to avoid inordinate delay. Civilian witnesses should testify in appropriate, clean, neat attire. Military investigators who routinely work in civilian attire may wear appropriate clean, neat attire. With advance notice to the military judge, on-duty military and civilian law enforcement personnel normally armed in the course of their duties with a holstered sidearm – whether or not concealed – may remain so armed during their testimony. [*See also* Rule 4.9.]

EVIDENCE

Rule 7.1. MARKING EXHIBITS
Items intended to be used or introduced as prosecution or defense exhibits at trial will be given to and marked by the court reporter prior to trial. A combination of numeric and alphabetical exhibit markings should *not* be used (*e.g.*, Pros Ex 1A, or Def Ex A1). Mark original documents (*e.g.*, performance reports, citations, etc.) lightly in pencil or on an attached label so that the document is not permanently defaced.

(A) PROSECUTION EXHIBITS. Prosecution exhibits will be marked consecutively with Arabic numerals and will be labeled "for identification." If more than one page in length, use the legend "Page __ of __ pages."

(B) DEFENSE EXHIBITS. Defense exhibits will be marked consecutively with capital letters, using no more than double letters (*i.e.*, A-Z, AA, AB, AC-AZ, BA-BZ, CA-CZ, etc.), and will be labeled "for identification." If more than one page in length, use the legend "Page __ of __ pages."

(C) COURT EXHIBITS. Court Exhibits will be numbered consecutively with Arabic numerals at the direction of the military judge and will be labeled "for identification."

(D) APPELLATE EXHIBITS. Appellate Exhibits will be numbered consecutively with Roman numerals at the direction of the military judge; however, the judge may permit Appellate Exhibits to be marked consecutively with Arabic numerals if there are a large number of them.

(E) INDEXING EXHIBITS. Multiple exhibits, such as defense sentencing documents should be preceded by a descriptive index, marked as a defense exhibit. In complex cases with numerous exhibits the prosecution may do likewise. This will expedite the proceedings by eliminating the necessity to describe the exhibits orally on the record.

(F) REJECTED EXHIBITS. With consent of the side proffering a rejected exhibit, it may be withdrawn at the direction of the military judge to reduce bulk in the record. Likewise, if an exhibit is modified prior to consideration by the fact-finder, the original version may be withdrawn with the consent of the parties.

(G) COPIES. Counsel offering an exhibit shall ordinarily have copies made for the judge and opposing counsel. When counsel requests to publish a document to the members, that counsel will have previously made copies for each court member. When counsel are offering an exhibit for which they wish a copy or reproduction to be substituted in the record, the counsel should be prepared with an exact copy or reproduction or accurate representation when offering the exhibit. The copy or reproduction should mirror the actual exhibit as closely as possible, to include the use of color copies for photographs, or 8 ½ x 11 paper copies for charts or PowerPoint slides, as appropriate.

Rule 7.2. GUARDING EVIDENCE

The counsel sponsoring the exhibit will exercise care to prevent loss or inappropriate use (*e.g.*, drugs, weapons). In addition, counsel will ensure that exhibits not yet received into evidence, or exhibits which have been offered and rejected, are not displayed before the court members. Counsel will notify the military judge prior to trial whenever any weapon, ammunition, or explosive is to be brought into the courtroom during trial.

(A) CUSTODY OF EVIDENCE. The counsel offering an exhibit remains responsible for safeguarding the exhibit until turned over to the reporter or evidence custodian at the conclusion of trial. If chain-of-custody may be in issue, counsel will not sign for the evidence until admissibility is decided. In that event, the evidence custodian may remain in the courtroom or at counsel table with the approval of the military judge.

(B) WEAPONS AS EVIDENCE. Weapons – or objects capable of use as a weapon – will be treated with appropriate respect and precaution, and will be kept at all times under the personal supervision of the counsel offering them.

(1) Firearms. Any firearm brought into the courtroom as evidence will be "broken" or disabled in a manner to make it VISIBLY INOPERABLE to all persons in the courtroom. Additionally, a yellow wooden pencil will be inserted prominently into the chamber end of the barrel (or a nylon "zip-cuff" or a bicycle lock may be securely fastened through the barrel and chamber) to demonstrate that no round is present in the firing position. If counsel has the SLIGHTEST DOUBT as to the meaning of this rule, or any terminology in this rule, or how to properly handle the firearm, counsel will seek and obtain appropriate expert guidance PRIOR to trial. Do NOT point the barrel of ANY firearm at ANY person.

(2) Ammunition. Live rounds of ammunition for any firearm will not be present in the courtroom at the same time as the firearm.

(3) Other Weapons. Other weapons (or items capable of use as a weapon) will be kept out of the reach of the accused, witnesses, and spectators, except upon explicit approval of the military judge for purposes of identification or carefully supervised demonstration. Explosives, flammable or caustic liquids, or other hazardous materials will be not be brought into the courtroom except on prior approval of the judge.

TRIAL PROCEDURE

Rule 8.1. PROCEDURE GUIDE

The Procedure Guide for use in Air Force courts-martial will be DA Pamphlet 27-9, as modified by the Chief Trial Judge, US Army Trial Judiciary, and the Chief Trial Judge, US Air Force Trial Judiciary. Nothing in this rule prohibits military judges from exercising their discretion to depart from the procedure guide, where appropriate, and from fashioning appropriate instructions, notwithstanding those set forth in DA Pamphlet 27-9.

Rule 8.2. OFFERS OF PROOF

Offers of proof are not evidence. Essential findings will not be based on offers of proof. Offers of proof will be utilized only in those circumstances set out in M.R.E. 103(a)(2).

Rule 8.3. UNSWORN STATEMENT BY THE ACCUSED

An accused may make an unsworn oral statement from a location approved by the military judge. The unsworn statement may contain any matters allowed by law or precedent.

Rule 8.4. STIPULATIONS

Counsel will attempt to narrow the issues to be litigated as much as possible by the use of stipulations of fact and testimony. Stipulations will normally be in writing. Oral stipulations will be offered only when circumstances have prevented preparation of a written stipulation.

RECORDS OF TRIAL

Rule 9.1. SUBSTITUTING EXHIBITS IN THE RECORD OF TRIAL

If an exhibit is not to be included in the record of trial because of its size (*e.g.*, an automobile, a piano), it may be photographed and the photograph substituted in the record, or it may be described by its relevant physical or identification characteristics (*e.g.*, one 1985 Pontiac, Model Grand Prix, blue, two door, serial number 1234-45-6789, with a large dent in the right front fender). If an exhibit is not to be included in the record because of its nature (*e.g.*, drugs, money), it may be photographed or described. A description is generally preferable to a photograph because a description conserves time and resources. Counsel will obtain the permission of the military judge to substitute for an item of evidence in the record.

Rule 9.2. PREPARATION AND AUTHENTICATION OF RECORDS OF TRIAL

(A) In all courts-martial, the trial counsel is responsible for completion of the record of trial. In discharging this duty, trial counsel will review the procedures outlined in R.C.M. 1103, 1103A and 1104.

(B) The military judge—or the court reporter as authorized by the military judge in appropriate cases—is responsible for authenticating the record of trial. However, such authentication is limited to examining the trial transcript "record of proceedings" and exhibits, and no other documents which comprise the entire record of trial—e.g., the pretrial investigation and allied papers.

(C) The defense counsel has the opportunity to examine and comment upon the record of trial prior to authentication.

(D) Experience has shown that the adoption of four practices will produce an accurate and speedily accomplished record of trial. (These four practices are highly encouraged but not mandatory.) These four practices are:

(1) The military judge and the court reporter, immediately following adjournment of the court-martial, ensure that all offered exhibits are accounted for and left in the custody of the court reporter.

(2) The military judge leaves a signed, but undated, authentication page with the court reporter. Upon the later direction of the military judge, the court reporter dates and inserts the previously signed authentication page in the record of trial.

(3) In a trial of more than one day in duration, the court reporter prepares the transcript in 50-page electronic increments for in turn review by the trial counsel, defense counsel and military judge. Such increments enable the counsel and military judge to accomplish review in "digestible" portions—this enables better and more focused review. Such increments also enable the court reporter to adopt changes and compile the final record in segments. Finally, such increments also give the military judge and all concerned quick insight as to any developing problems or bottlenecks in the review process—thus enabling swift engagement and remediation of the same.

(4) Corrections to the record of trial by all involved are made and sent by the electronic "Track Changes" method. To this end, the sender ensures the intended recipient actually received the e-mail. While this process eliminates the historical "errata sheet" practice of identifying the changes made, it has the benefit of eliminating unnecessary time spent on mailing. It also enables counsel and the military judge to easily make minor changes that might be otherwise overlooked when using the errata sheet process.

PROMULGATION

Consistent with R.C.M. 108, the foregoing Rules of Court have been reviewed and approved by The Judge Advocate General. These Rules of Court supersede the Rules of Court, which were promulgated on 1 February 2009. They will go into effect throughout the United States

Air Force on 1 October 2010. With prior approval of the CTJ, CRMJs may supplement these Rules of Court within their respective regions, in a manner not inconsistent with these rules.

APPENDIX A

1 Feb 11

MEMORANDUM FOR CENTRAL DOCKETING OFFICE

FROM: 99 AFR/JA (Maj Bright)
111 Smith St
Justice AFB, PA 11438

SUBJECT: Notice of Referral and Identification of Counsel, *United States v.* _____

Charges in the case of *United States v.* _____ have been referred for trial by (special) (general) court-martial. We request that the case be docketed for trial. The following information is provided:

Date of referral:_____

Detailed Trial Counsel:_____

Detailed Defense Counsel:_____

Estimated Length of Trial:_____

A copy of the referred charges and convening order are attached. (This copy also reflects service.) (This copy does not reflect service, but service is expected on _____ and a copy of the served charges will be forwarded immediately after service is accomplished.)

////signed////
WILMA W. BRIGHT, Major, USAF
Chief of Military Justice

2 Attachments:
1. DD Form 458

2. Convening Order

APPENDIX B

UNITED STATES OF AMERICA	)	
	)	Defense Motion to Dismiss
v.	)	(Statute of Limitations)
	)	
SSgt John Q. Accused	)	
123 SFS (AETC)	)	
Current Base of Assignment AFB, AK	)	XX November 200X

MOTION

The Defense raises a Motion to Dismiss, with prejudice, Specification 1 of the Charge because it alleges conduct which occurred before the five year Statute of Limitations. The authority for this Motion is Article 43, U.C.M.J. and R.C.M. 907(b)(2)(B).

FACTS

1. [Procedural background of the case.]

2. [Contention of the alleged victim about the dates the offenses occurred (last offense occurred on 1 Dec 01.)]

3. The sworn charges were received by the Summary Court-Martial Convening Authority on 9 Jan 07.

LAW

4. Article 43, U.C.M.J., sets forth the applicable Statute of Limitations for alleged violations of the punitive articles of the U.C.M.J. In recent history, the Statute of Limitations was five years from the receipt of sworn charges and specifications by an officer exercising summary court-martial jurisdiction for the vast majority of alleged offenses, unless otherwise specified.

5. [More law.]

6. [More law.]

ARGUMENT

7. The acts alleged by ABC are claimed to have occurred more than five years prior to preferral of the resulting charge and specification and receipt thereof for the officer exercising Summary Court-Martial Convening Authority (9 Jan 07) in this case.

8. In two recent cases, Army and Navy-Marine Corps trial judges have held that the Statute extension cannot be applied retroactively. Those respective service appellate courts, however, which are traditionally quite conservative, have recently overturned what the Defense contends was the correct application of the law by trial judges. *See*, *United States v. Ratliff*, 65 M.J. 806 (N.M.Ct.Crim.App. 2007); *Lopez de Victoria*, 65 M.J. 521.[1] The Defense, like the respective trial judges, asserts the applicable Statute of Limitations that applies in this case is the five-year statute of limitations set forth in U.C.M.J. Article 43 for all non-rape child sexual abuse allegations which allegedly occurred before the FY 2004 National Defense Authorization Act, Public Law 108-136.

9. In making a decision on this issue, the Defense believes the Court should also take into account the Air Force's failure to pursue this case in 2001 when the allegations were brought to the attention of both SSgt Accused's Commander at the time, as well as officials at Anybase AFB, TX. Consequently, the Air Force had access to all available information about the 2001 allegations, at that time, at two separate levels, and chose to take no action. Accordingly, the Government should not now be permitted to complain that the 04 NDAA must be applied retroactively to revive a prosecution they declined when it was originally reported – at a time when all available evidence was fresh, as well as witness memory.

10. Based on the arguments articulated above, our position is that the allegations embraced by Specification 1 of the Charge are time-barred by the law that existed at the time of the alleged acts and by the state of current military law with precedential impact. The exceptions to the previous five-year statute of limitations provided for by the 2004 NDAA do not apply to the allegations in this case. The allegations in this case do not fall under any other exception to the Article 43 five-year statute. Consequently, Specification 1 of the Charge should be dismissed with prejudice.

RELIEF REQUESTED

11. THEREFORE, the Defense respectfully requests this Honorable Court grant the Motion to Dismiss (with prejudice) Specification 1 of the Charge for violation of the applicable Statute of Limitations.

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1 Interestingly, the Army Court in Lopez de Victoria, in distinguishing its result from Richardson and Toussie, exhibited its willingness to step into the legislature's shoes when the offense concerns child victims, while concluding that perpetrators who evaded the Vietnam War draft might properly yield a different outcome. 65 M.J. at 529-30.1 But the legal principles at issue are the same in both cases. They should apply equally to all defendants, regardless of whether the crimes of one set of defendants are deemed more repugnant than those of another.

Respectfully Submitted,

(Signature Block)

I certify that I have served a true copy (via e-mail) of the above on Judge (Name) and (Trial Counsel's Name) on XX Nov 0X.

(Signature Block)

APPENDIX C

3 September 20XX

MEMORANDUM FOR TC (CAPT ALPHA / MAJ BRAVO)
DC (CAPT CHARLIE / MAJ DELTA)

FROM: Lt Col John D. Foxtrot (Detailed Military Judge)

SUBJECT: Scheduling Conference Summary and Scheduling Order—*United States v. A1C Homer T. Simpson* (Echo AFB, XX)

1. **Background.** By memo dated 1 Sep XX, the CDO set this case for trial on 27 Sep XX. On 3 Sep XX, an RCM 802 Scheduling Conference was held with the counsel in order to ensure trial occurs on/before the trial date. As a result of the conference, the subjects were covered and deadlines established as set forth below.

2. **Arraignment.** The Military Judge finds that a separate arraignment session (is) (is not) necessary to ensure trial proceeds on/before the 27 Sep XX trial date. (Accordingly, arraignment will be held [in person] [via VTC] on _____ at _____ hours at _____.)

3. **Issues Covered.** The following issues were addressed during the Scheduling Conference:

- **Filing of Required Notifications—e.g., RCM 701(b)(2), MREs 304(d), 404(b), 412, 413, 414 and 513.**

- **Notice of Certain Defenses IAW RCM 701(b)(2).**
- **Mental Capacity/Responsibility.**

- **Status of Discovery.**
- **Witness Availability/Production.**
- **Depositions.**
- **Immunity.**
- **Expert Consultants.**
- **Expert Witnesses.**
- **Expected Motions.**
- **Expected Pleas and Forum.**
- **PTA Discussions/Alternative Dispositions.**
- **Media and/or Security.**
- **Other Matters.**

4. **Deadlines.** In light of the foregoing, counsel will meet the following deadlines:

Deadlines	**Due Date**
Filing of Required Notifications	**10 Sep XX (Fri)**
Notice of Special/Affirmative Defenses	**10 Sep XX (Fri)**
Action on Outstanding Witness Request(s)	**To Be Set by MJ**
Decision on/Provision of Outstanding Discovery	**To Be Set by MJ**
Motions	**14 Sep XX (Tues)**
Response to Motions	**17 Sep XX (Fri)**
Exchange of Gov't and Defense Witness Lists	**20 Sep XX (Mon)**
Notice of Pleas and Forum	**20 Sep XX (Mon)**

Voir Dire	**22 Sep XX (Wed)**
Member Credit Data	**22 Sep XX (Wed)**
Trial	**27 Sep XX (Mon)**

// Signed //

JOHN D. FOXTROT, Lt Col, USAF
Military Judge

OPR: AF/JAA, AFLOA/JAJT

Attachment 5

THE AIR FORCE UNIFORM CODE OF JUDICIAL CONDUCT

I. INTRODUCTION

II. PREAMBLE

III. TERMINOLOGY

IV. CANONS:

CANON 1. A judge shall uphold the integrity and independence of the judiciary

CANON 2. A judge shall avoid impropriety and the appearance of impropriety in all of the judge's activities

CANON 3. A judge shall perform the duties of the judicial office impartially and diligently

CANON 4. A judge shall conduct the judge's extrajudicial activities so as to minimize the risk of conflict with judicial obligations

CANON 5. A judge or judicial candidate shall refrain from inappropriate political activity

V. APPLICATION OF THE CODE OF JUDICIAL CONDUCT

PART I. INTRODUCTION

In 1924, the American Bar Association (ABA) formulated the original *Canons of Judicial Ethics*. In 1972, the ABA adopted the *Code of Judicial Conduct*, which was slightly amended in 1984. That code, with some modification, has been adopted by the Judicial Conference of the United States and most states. In late 1988, after a conference of appellate military judges, the service Courts of Military Review appointed a working group composed of a judge from each of the Courts of Military Review to study the ABA *Code of Judicial Conduct* and make recommendations to their respective Judge Advocate Generals (TJAG) about the advisability of adopting a uniform code of judicial conduct for trial and appellate military judges. During the time of the working group's study, the ABA issued a draft revision of its *Code of Judicial Conduct*. While that draft revision was not a final product sanctioned by the ABA, the working group considered the draft. Later in the project, the Chief Trial Judges of each service joined the group to consider developing regulations and procedures relating to judicial discipline.

The working group presented the results of their study first to their fellow judges for review and then worked with representatives of the respective TJAGs for their input and further considerations. This version of the draft *Code of Judicial Conduct* was accepted in principle by the Air Force TJAG but was not accepted by the TJAGs for the other services.

The American Bar Association revised and then adopted the *Model Code of Judicial Conduct* in August 1990. The Working Group's draft was then revised to conform with this

ABA *Model Code of Judicial Conduct* (August 1990) and to accommodate the unique aspects of service as an Air Force trial or appellate military judge.

PART II. PREAMBLE

Our legal system is based on the principle that an independent, fair, and competent judiciary will interpret and apply the laws that govern us. The role of the judiciary is central to American concepts of justice and the rule of law. Intrinsic to all sections of this code is the notion that judges, individually and collectively, must respect and honor the judicial office as a public trust and strive to enhance and maintain confidence in our legal system. The judge is at once an arbiter of facts and law for the resolution of disputes and a highly visible symbol of government under the rule of law.

The *Air Force Uniform Code of Judicial Conduct* (the *Code*) is intended to establish standards for ethical conduct of judges. It consists of broad statements called Canons, specific rules set forth in Sections under each Canon, a Terminology Part (Part III), an Application Part, (Part V), and Commentary and References throughout. The text of the Canons and its Sections, along with the Terminology and Application Parts, is authoritative. The Commentary, by explanation and example, provides guidance with respect to the purpose and meaning of the Canons and Sections. The Commentary is not intended as a statement of additional rules. The References provide authority but are not all-inclusive. When the text uses "shall" or "shall not," it is intended to impose binding obligations, the violation of which can result in disciplinary action. When "should" or "should not" is used, the text is intended to be advisory and a statement of what is or is not appropriate conduct but it is not intended to be a binding rule under which a judge may be disciplined. When "may" is used, it denotes permissible discretion or, depending on the context, it refers to actions that are not covered by specific proscriptions.

The Canons and Sections are rules of reason. They should be applied consistent with constitutional requirements, statutes, departmental directives, Air Force instructions, other court rules, and decisional law, and in the context of all relevant circumstances. The *Code* is to be construed so it does not impinge on the essential independence of judges in making judicial decisions.

The text of the Canons and Sections is intended to govern conduct of judges and to be binding upon them. It is not intended, however, that every transgression will result in disciplinary action. Whether disciplinary action is appropriate, and the degree of discipline to be imposed, should be determined through a reasonable and reasoned application of the text and should depend on such factors as the seriousness of the transgression, whether there is a pattern of improper activity, and the effect of the improper activity on others or on the judicial system. In addition, this *Code* and the Canons and Sections are not to be construed as a general order or regulation within the meaning of Article 92, Uniform Code of Military Justice (UCMJ); nor are they designed or intended as a basis for civil liability or criminal actions under the UCMJ. Furthermore, the purpose of the *Code* would be subverted if the *Code* were invoked by lawyers for mere tactical advantage in a proceeding or by judges for their own personal benefit.

Accordingly, nothing in the *Code* should be deemed to augment any substantive legal

duty of judges or add to the extra-disciplinary consequences of violating such a duty.

The *Code* is not intended as an exhaustive guide for the conduct of judges. Judges should also be governed in their judicial and personal conduct by general ethical standards. The *Code* is intended, however, to state basic standards which should govern the conduct of all judges and to provide guidance to assist judges in establishing and maintaining high standards of judicial and personal conduct.

The *Code* promulgated herein is designed to apply to both active duty and reserve trial and appellate military judges; but its application to reserve trial and appellate military judges is limited to those aspects of their service which relate only to their military duties.

PART III. TERMINOLOGY

"Appropriate authority" denotes the authority with responsibility for initiation of the disciplinary process with respect to the violation to be reported. See Sections 3D(1) and 3D(2).

"Continuing part-time judge" denotes a judge who serves repeatedly on a part-time basis such as a reserve trial or appellate military judge. The definition also includes a retired judge subject to recall who is permitted to practice law. See Part V, Subpart C.

"Court personnel" does not include the lawyers in a proceeding before a judge. See Sections 3B(7)(c) and 3B(9).

"*De Minimis*" denotes an insignificant interest that could not raise reasonable question as to the judge's impartiality. See Section 3E(1)(c) and 3E(1)(d).

"Economic interest" denotes ownership of a more than *de minimis* legal or equitable interest, or a relationship as officer, director, advisor, or other active participant in the affairs of a party, except that:

(i) ownership of an interest in a mutual or common investment fund that holds securities is not an economic interest in such securities unless the judge participates in the management of the fund, or a proceeding pending or impending before the judge could substantially affect the value of the interest;

(ii) service by a judge as an officer, director, advisor, or other active participant in an educational, religious, charitable, fraternal, or civic organization, or service by a judge's spouse, parent, or child as an officer, director, advisor, or other active participant in any organization does not create an economic interest in securities held by that organization;

(iii) a deposit in a financial institution, the proprietary interest of a policy holder in a mutual insurance company, of a depositor in a mutual savings association, or of a member in a credit union, or a similar proprietary interest, is not an economic interest in the organization unless a proceeding pending or impending before the judge could substantially affect the value of

the interest; and

(iv) ownership of government securities is not an economic interest in the issuer unless a proceeding pending or impending before the judge could substantially affect the value of the securities.

See Sections 3E(1)(c) and 3E(2).

"Fiduciary" includes such relationships as executor, administrator, trustee, and guardian. See Sections 3E(2) and 4E.

"Judge" includes military judge, and is intended to refer to Air Force military judges, both active duty and reserve, who are serving in a trial or appellate level position.

"Knowingly," "knowledge," or **"knows"** denotes actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances. See Sections 3D and 3E(1).

"Law" denotes court rules, as well as statutes, constitutional provisions, Air Force instructions, and decisional law. See Sections 2A, 3A, 3B(2), 3B(7), 4B, 4C, 4D(5), 4F, and 4I.

"Member of the judge's family" denotes a spouse, child, grandchild, parent, grandparent, or other relative or person with whom the judge maintains a close familial relationship. See Sections 4D(3), 4E, and 4G.

"Member of the judge's family residing in the judge's household" denotes any relative of a judge by blood or marriage, or a person treated by a judge as a member of the judge's family, who resides in the judge's household. See Section 3E(1) and 4D(5).

"Nonpublic information" denotes information that, by law, is not available to the public. Nonpublic information may include but is not limited to: information that is sealed by statute or court order, impounded, or communicated *in camera*; and information offered in grand jury proceedings, presentencing reports, dependency cases, or psychiatric reports. See Section 3B(11).

"Periodic part-time judge" denotes a judge who serves or expects to serve repeatedly on a part-time basis, but under a separate appointment for each limited period of service or for each matter. A reserve trial or appellate military judge may come within this definition. See Part V, Subpart D.

"*Pro tempore* part-time judge" denotes a judge who serves or expects to serve once or only sporadically on a part-time basis under a separate appointment for each period of service or for each case heard. A reserve trial or appellate military judge may come within this definition. See Part V, Subpart E.

"Require." The rules prescribing that a judge "require" certain conduct of others are, like all of the rules in this *Code*, rules of reason. The use of the term "require" in that context means a

judge is to exercise reasonable direction and control over the conduct of those persons subject to the judge's direction and control. See Sections 3B(3), 3B(4), 3B(5), 3B(6), 3B(9), and 3C(2).

"Third degree of relationship." The following persons are relatives within the third degree of relationship: great-grandparent, grandparent, parent, uncle, aunt, brother, sister, child, grandchild, great-grandchild, nephew, or niece. See Section 3E(1)(d).

PART IV. CANONS

CANON 1

A JUDGE SHALL UPHOLD THE INTEGRITY AND INDEPENDENCE OF THE JUDICIARY.

1A. An independent and honorable judiciary is indispensable to justice in our society. A judge should participate in establishing, maintaining, and enforcing high standards of conduct, and shall personally observe those standards so that the integrity and independence of the judiciary will be preserved. The provisions of this *Code* are to be construed and applied to further that objective.

Commentary:

Deference to the judgments and rulings of courts depends on public confidence in the integrity and independence of judges. The integrity and independence of judges depends in turn upon their acting without fear or favor. Although judges should be independent, they must comply with the law, including the provisions of this *Code*. Public confidence in the impartiality of the judiciary is maintained by the adherence of each judge to this responsibility. Conversely, violation of this *Code* diminishes public confidence in the judiciary and thereby does injury to the system of government under law.

Military judges must apply the principles of this *Code* in all their written and orally announced decisions and opinions. The judiciary enhances the perception of its independence and integrity by fully adhering to recognized court standards, Rules for Courts-Martial (R.C.M.), and the general principle that a court should explain the bases for its decisions regarding issues in a case submitted for its review.

Traditionally, some people have thought that military justice is concerned solely with providing the discipline for the preservation of morale and good order. Military justice is also properly focused on preserving rights of service members while meeting the needs of military discipline. Congress and the public expect the military to have a judicial system that is responsive to the unique needs of discipline in the armed services but safeguards rights of service members. To this end, Congress has created a military judiciary which is intended to be independent. Accordingly, judges must recognize and safeguard against any affront to the independence of a court, such as attempted unlawful influence by a commander or other superior, or invasion of the deliberative process.

Moreover, any perception of the foregoing similarly must be addressed. Military judges must ensure that their conduct comports, and is perceived to comport, with the principle of judicial independence and integrity. That principle includes maintaining the confidentiality of the deliberative process and the invocation, when necessary, of qualified judicial privilege. The judiciary's independence and integrity ultimately depend upon the personal and professional conduct of the individual judge.

References:

N.M.C.M.R. v. Carlucci, 26 M.J. 328 (C.M.A. 1988).
Chandler v. Judicial Council of the Tenth Circuit, 382 U.S. 1003 (1966), 398 U.S. 74 (1970).
Hastings v. Judicial Conference of the United States, 593 F.Supp. 1371 (D.C. D.C. 1984).
In the Matter of Certain Complaints under Investigation by an Investigating Committee of the Judicial Council of the Eleventh Circuit, 783 F.2d 1488 (11th Cir. 1986). Article 37, UCMJ.
R.C.M. 908.
ABA Standards for Appellate Courts.
ABA Standards for Criminal Justice, The Function of the Trial Judge.

CANON 2

A JUDGE SHALL AVOID IMPROPRIETY AND THE APPEARANCE OF IMPROPRIETY IN ALL OF THE JUDGE'S ACTIVITIES.

2A. A judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.

Commentary:

Public confidence in the judiciary is eroded by irresponsible or improper conduct by judges. A judge must avoid all impropriety and appearance of impropriety. A judge must expect to be the subject of constant public scrutiny. A judge must therefore accept restrictions on his or her conduct that might be viewed as burdensome by the ordinary citizen and do so freely and willingly.

The prohibition against behaving with impropriety or the appearance of impropriety applies to both the professional and personal conduct of a judge. Because it is not practicable to list all prohibited acts, the proscription is necessarily cast in general terms that extend to conduct by judges that is harmful, although not specifically mentioned in the *Code*. Actual improprieties under this standard may include violations of law, court rules, or other specific provisions of this *Code*. The test for appearance of impropriety is whether the conduct would create in reasonable minds a perception that the judge's ability to carry out judicial responsibilities with integrity, impartiality, and competence is impaired.

2B. A judge shall not allow family, social, political, or other relationships to influence the judge's judicial conduct or judgment. A judge shall not lend the prestige of judicial office to advance the private interests of the judge or others; nor shall a judge convey or permit others to convey the impression that they are in a special position to influence the judge. A judge shall not testify voluntarily as a character witness.

Commentary:

Maintaining the prestige of judicial office is essential to a system of government in which the judiciary functions independently of the executive and legislative branches. This is even more important, and difficult, in a judicial system such as the court-martial system because it is within the executive branch. Respect for the judicial office facilitates the orderly conduct of legitimate judicial functions. Judges should distinguish between proper and improper use of the prestige of office in all of their activities. For example, it would be improper for a judge to allude to his or her judgeship to gain a personal advantage such as deferential treatment when stopped by a police officer for a traffic offense. Similarly, judicial letterhead must not be used for conducting a judge's personal business affairs. Judges should comply with applicable regulations on the use of judicial staff and appurtenances of judicial office for personal business.

A judge must avoid lending the prestige of judicial office for the advancement of the private interests of others. For example, a judge must not use the judge's judicial position to gain advantage in a civil suit involving a member of the judge's family. As to acceptance of awards, see Section 4D(5)(a) and accompanying Commentary. This area is further restricted by Department of Defense (DoD) regulation.

Although a judge should be sensitive to possible abuse of the prestige of office, a judge may, based on the judge's personal knowledge, serve as a reference or provide a letter of recommendation. However, a judge must not initiate the communication of information to a sentencing judge or a corrections officer, but may provide to such persons information for the record in response to a formal request.

Judges may participate in the process of judicial selection by cooperating with appointing authorities and screening committees seeking names for consideration, and by responding to official inquiries concerning a person being considered for a judgeship.

A judge must not testify voluntarily as a character witness because to do so may lend the prestige of the judicial office in support of the party for whom the judge testifies. Moreover, when a judge testifies as a witness, a lawyer who regularly appears before the judge may be placed in the awkward position of cross-examining the judge. A judge may, however, testify when properly summoned. Except in unusual circumstances where the demands of justice require, a judge should discourage a party from requiring the judge to testify.

Reference:

DoD 5500.7-R, *Joint Ethics Regulation*

2C. A judge shall not hold membership in any organization that practices invidious discrimination on the basis of race, sex, religion, or national origin.

Commentary:

Membership of a judge in an organization that practices invidious discrimination may create the undesirable perception that the judge's impartiality is impaired. Section 2C refers to the current practices of the organization. Whether an organization practices invidious discrimination is often a complex question to which judges must be sensitive. The answer

cannot be determined from a mere examination of an organization's current membership rolls, but rather depends on how the organization selects members and other relevant factors, such as that the organization is dedicated to the preservation of religious, ethnic, or cultural values of legitimate common interest to its members, or that it is in fact and effect an intimate, purely private organization whose membership limitations could not be constitutionally prohibited. Absent such factors, an organization is generally said to discriminate invidiously if it arbitrarily excludes from membership on the basis of race, religion, sex, or national origin persons who would otherwise be admitted to membership.

Although Section 2C relates only to membership in organizations that invidiously discriminate on the basis of race, sex, religion, or national origin, a judge's membership in an organization that engages in any discriminatory membership practices prohibited by the law of the jurisdiction also violates Canon 2 and Section 2A and gives the appearance of impropriety. In addition, it would be a violation of Canon 2 and Section 2A for a judge to arrange a meeting at a club that the judge knows practices invidious discrimination on the basis of race, sex, religion, or national origin in its membership or other policies, or for the judge to regularly use such a club. Moreover, public manifestation by a judge of the judge's knowing approval of invidious discrimination on any basis gives the appearance of impropriety under Canon 2 and diminishes public confidence in the integrity and impartiality of the judiciary, in violation of Section 2A.

References:

Article 37, UCMJ.
United States v. Tomchek, 2 M.J. 813 (A.C.M.R. 1976). *United States v. Berman*, 28 M.J. 615 (A.F.C.M.R. 1989).
New York State Club Ass'n Inc. v. City of New York, 487 U.S. 1, 108 S. Ct. 2225, 101 L. Ed. 2d 1 (1988).
Board of Directors of Rotary International v. Rotary Club of Duarte, 481 U.S. 537, 107 S. Ct. 1940, 95 L. Ed. 2d 474 (1987).
Roberts v. United States Jaycees, 468 U.S. 609, 104 S. Ct. 3244, 82 L. Ed. 2d 462 (1984).

CANON 3

A JUDGE SHALL PERFORM THE DUTIES OF THE JUDICIAL OFFICE IMPARTIALLY AND DILIGENTLY.

3A. Judicial Duties in General. The judicial duties of a judge take precedence over all the judge's other activities. The judge's judicial duties include all the duties of the judge's office prescribed by law. In the performance of these duties, the following standards apply.

3B. Adjudicative Responsibilities.

3B(1) A judge shall hear and decide matters assigned to the judge, except those in which disqualification is required.

3B(2) A judge shall be faithful to the law and maintain professional competence in it. A judge shall not be swayed by partisan interests, public clamor, or fear of criticism.

3B(3) A judge shall require order and decorum in proceedings before the judge.

3B(4) A judge shall be patient, dignified, and courteous to the litigants, court members, witnesses, lawyers, and others with whom the judge deals in an official capacity, and shall require similar conduct of lawyers, and of staff, court officials, and others subject to the judge's direction and control.

Commentary:

The duty to hear all proceedings fairly and with patience is not inconsistent with the duty to dispose promptly of the business of the court. Judges can be efficient and businesslike while being patient and deliberate.

3B(5) A judge shall perform judicial duties without bias or prejudice. A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice, including but not limited to bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation, or socioeconomic status, and shall not permit staff, court officials, and others subject to the judge's direction and control to do so.

Commentary:

A judge must refrain from speech, gestures, or other conduct that could reasonably be perceived as sexual harassment and must require the same standard of conduct of others subject to the judge's direction and control.

A judge must perform judicial duties impartially and fairly. A judge who manifests bias on any basis in a proceeding impairs the fairness of the proceeding and brings the judiciary into disrepute. Facial expressions and body language, in addition to oral communication, can give to parties or lawyers in the proceeding, court members, the media, and others an appearance of judicial bias. A judge must be alert to avoid behavior that may be perceived as prejudicial.

3B(6) A judge shall require lawyers in proceedings before the judge to refrain from manifesting, by words or conduct, bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation, or socioeconomic status, against parties, witnesses, counsel, and others. This Section does not preclude legitimate advocacy when race, sex, religion, national origin, disability, age, sexual orientation, socioeconomic status, or other similar factors are issues in the proceedings.

3B(7) A judge shall accord to every person who has a legal interest in a proceeding, or that person's lawyer, the right to be heard according to law. A judge shall not initiate, permit, or consider *ex parte* communications, or consider other communications made to the judge outside the presence of the parties concerning a pending or impending proceeding except that:

3B(7)(a) Where circumstances require, *ex parte* communications for scheduling, administrative purposes, or emergencies that do not deal with substantive matters or issues on the merits are authorized; provided:

3B(7)(a)(i) the judge reasonably believes that no party will gain a procedural or tactical advantage as a result of the *ex parte* communication, and

3B(7)(a)(ii) the judge makes provision promptly to notify all other parties of the substance of the *ex parte* communication and allows an opportunity to respond.

3B(7)(b) A judge may obtain the advice of a disinterested expert on the law applicable to a proceeding before the judge if the judge gives notice to the parties of the person consulted and the substance of the advice, and affords the parties reasonable opportunity to respond.

3B(7)(c) A judge may consult with court personnel whose function is to aid the judge in carrying out the judge's adjudicative responsibilities or with other judges.

3B(7)(d) A judge may, with the consent of the parties, confer separately with the parties and their lawyers in an effort to mediate or settle matters pending before the judge.

3B(7)(e) A judge may initiate or consider any *ex parte* communications when expressly authorized by law to do so.

Commentary:

The proscription against communications concerning a proceeding includes communications from lawyers, law teachers, and other persons who are not participants in the proceeding, except to the limited extent permitted.

To the extent reasonably possible, all parties or their lawyers shall be included in communications with a judge.

Whenever presence of a party or notice to a party is required by Section 3B(7), it is the party's lawyer, or if the party is unrepresented the party, who is to be present or to whom notice is to be given.

An appropriate and often desirable procedure for a court to obtain the advice of a disinterested expert on legal issues is to invite the expert to file a brief *amicus curiae*.

Certain *ex parte* communication is approved by Section 3B(7) to facilitate scheduling and other administrative purposes and to accommodate emergencies. In general, however, a judge must discourage *ex parte* communication and allow it only if all the criteria stated in Section 3B(7) are clearly met, subject to R.C.M. 802, as applicable. A judge must disclose to all parties all *ex parte* communications received regarding a proceeding pending or impending before the judge.

A judge must not independently investigate facts in a case and must consider only the

evidence presented. This provision does not preclude appellate courts from taking judicial notice during consideration of a case. This provision does not prevent a military judge from calling for additional evidence to be presented during trial (see Article 46, UCMJ, and R.C.M. 913(c)(1)(F)); nor does it prevent the Court of Criminal Appeals from exercising the fact finding powers provided by statute (Article 66(c), UCMJ).

A judge may request a party to submit proposed findings of fact and conclusions of law, so long as the other parties are apprised of the request and are given an opportunity to respond to the proposed findings and conclusions.

A judge must make reasonable efforts, including providing appropriate supervision, to ensure that Section 3B(7) is not violated through the actions of law clerks or other personnel on the judge's staff.

If communication between the trial judge and the appellate court with respect to a proceeding is permitted, a copy of any written communication or the substance of any oral communication must be provided to all parties.

3B(8) A judge shall dispose of all judicial matters promptly, efficiently, and fairly.

Commentary:

In disposing of matters promptly, efficiently, and fairly, a judge must demonstrate due regard for the rights of the parties to be heard and to have issues resolved without unnecessary cost or delay. Containing costs while preserving fundamental rights of parties also protects the interests of witnesses and the general public. A judge should monitor and supervise cases so as to reduce or eliminate dilatory practices, avoidable delays, and unnecessary costs. A judge should encourage and seek to facilitate settlement, but parties should not feel coerced into surrendering the right to have their controversy resolved by the courts.

Prompt disposition of the court's business requires a judge to devote adequate time to judicial duties, to be punctual in attending court and expeditious in determining matters under submission, and to insist that court officials, litigants, and their lawyers cooperate with the judge to that end.

3B(9) A judge shall not, while a proceeding is pending or impending in any court, make any public comment that might reasonably be expected to affect its outcome or impair its fairness or make any nonpublic comment that might substantially interfere with a fair trial or hearing. The judge shall require similar abstention on the part of court personnel subject to the judge's direction and control. This Section does not prohibit judges from making public statements in the course of their official duties or from explaining for public information the procedures of the court. This Section does not apply to proceedings in which the judge is a litigant in a personal capacity.

Commentary:

The requirement that judges abstain from public comment regarding a pending or impending proceeding continues during any appellate process and until final disposition. This Section does not prohibit a judge from commenting on proceedings in which the judge is a

litigant in a personal capacity, but in cases such as a writ of *mandamus* where the judge is a litigant in an official capacity, the judge must not comment publicly. The conduct of lawyers relating to trial publicity is governed by *Air Force Rules of Professional Conduct* (AFRPC) Rule 3.6 and Air Force Instruction (AFI) 51-201, *Administration of Military Justice*, paragraph 12.6.

3B(10) A judge shall not commend or criticize court members for their findings or sentence other than in a court order or opinion in a proceeding, but may express appreciation to the court members for their service to the judicial system and the community.

Commentary:

Commending or criticizing court members for their verdict may imply a judicial expectation in future cases and may impair a court member's ability to be fair and impartial in a subsequent case.

3B(11) A judge shall not disclose or use, for any purpose unrelated to judicial duties, nonpublic information acquired in a judicial capacity.

3C. Administrative Responsibilities.

3C(1) A judge shall diligently discharge the judge's administrative responsibilities without bias or prejudice and maintain professional competence in judicial administration, and should cooperate with other judges and court officials in the administration of court business.

3C(2) A judge shall require staff, court officials, and others subject to the judge's direction and control to observe the standards of fidelity and diligence that apply to the judge and to refrain from manifesting bias or prejudice in the performance of their official duties.

3C(3) A judge with supervisory responsibility for the judicial performance of other judges shall take reasonable measures to assure the prompt disposition of matters before them and the proper performance of their other judicial responsibilities.

References:

United States v. Mabe, 28 M.J. 326 (C.M.A. 1989), 30 M.J. 1254 (N.M.C.M.R. 1990), 33 M.J. 200 (C.M.A. 1991).
United States v. Ledbetter, 2 M.J. 37 (C.M.A. 1976).

3C(4) A judge shall not make unnecessary appointments. A judge shall exercise the power of appointment impartially and on the basis of merit. A judge shall avoid nepotism and favoritism. A judge shall not approve compensation of appointees beyond the fair value of services rendered.

Commentary:

Although military judges ordinarily lack specific powers of appointment, this Canon prohibits military judges from using their position as judges to exercise undue or improper

influence on the civil service or military personnel system.

Reference:

Article 37, UCMJ.

3D. Disciplinary Responsibilities.

3D(1) A judge who receives information indicating a substantial likelihood that another judge has committed a violation of this *Code* should take appropriate action. A judge having knowledge that another judge has committed a violation of this *Code* that raises a substantial question as to the other judge's fitness for office shall inform the appropriate authority.

3D(2) A judge who receives information indicating a substantial likelihood that a lawyer has committed a violation of the AFRPC should take appropriate action. A judge having knowledge that a lawyer has committed a violation of the AFRPC that raises a substantial question as to the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects shall inform the appropriate authority.

3D(3) Acts of a judge, in the discharge of disciplinary responsibilities, required or permitted by Sections 3D(1) and 3D(2) are part of a judge's judicial duties and shall be absolutely privileged, and no civil action predicated thereon may be instituted against the judge.

Commentary:

Military judges have a responsibility to ensure that the highest standards of justice and ethical responsibility are observed throughout the military justice system. This responsibility includes taking appropriate action upon observing conduct that might reasonably raise adverse perceptions about military justice. "Appropriate action" in the context of this rule is intended to mean that the judge is required to report to a disciplinary authority misconduct of lawyers and other judges and to encourage judges to take other remedial steps as appropriate, such as referring the judge or lawyer whose conduct is in question to a substance abuse treatment program. The rule was designed to reflect the standards for reporting professional misconduct that appear in AFRPC Rule 8.3. A military judge may report misconduct by other trial or appellate military judges or by lawyers to their chief judge or to The Judge Advocate General.

3E. Disqualification.

3E(1) A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances where:

Commentary:

Under this rule, a judge is disqualified and should recuse himself or herself whenever the judge's impartiality might reasonably be questioned, regardless of whether any of the specific rules in Section 3E(1) apply.

A judge should disclose on the record information that the judge believes the parties or

their lawyers might consider relevant to the question of disqualification, even if the judge believes there is no real basis for disqualification.

By decisional law, the rule of necessity may override the rule of disqualification. For example, a judge might be the only judge available in a matter requiring immediate judicial action, such as a hearing on witness production, speedy trial, or a temporary restraining order. In the latter case, the judge must disclose on the record the basis for possible disqualification and use reasonable efforts to transfer the matter to another judge as soon as practicable.

Reference:

United States v. Berman, 28 M.J. 615 (A.F.C.M.R. 1989).

3E(1)(a) the judge has a personal bias or prejudice concerning a party or personal knowledge of disputed evidentiary facts concerning the proceeding;

3E(1)(b) the judge served as lawyer in the matter in controversy, or a lawyer with whom the judge previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it;

Commentary:

A lawyer in a governmental agency does not ordinarily have an association with other lawyers employed by that agency within the meaning of Section 3E(1)(b); a judge formerly employed by a government agency, however, should disqualify himself or herself in a proceeding if the judge's impartiality might reasonably be questioned because of such association.

References:

R.C.M. 902.
United States v. Sherrod, 26 M.J. 30 (C.M.A. 1988).

3E(1)(c) the judge knows that the judge, individually or as a fiduciary, or the judge's spouse, parent, or child wherever residing, or any other member of the judge's family residing in the judge's household, has an economic interest in the subject matter in controversy or is a party to the proceeding or has any other than *de minimis* interest that could be substantially affected by the proceeding; and

3E(1)(d) the judge or the judge's spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:

3E(1)(d)(i) is a party to the proceeding, or an officer, director, or trustee of a party;

3E(1)(d)(ii) is acting as a lawyer in the proceeding;

3E(1)(d)(iii) is known by the judge to have a more than *de minimis* interest that could be substantially affected by the proceeding; or

3E(1)(d)(iv) is to the judge's knowledge likely to be a material witness in the proceeding.

Commentary:

The fact that a lawyer in a proceeding is affiliated with a law firm with which a relative of the judge is affiliated does not of itself disqualify the judge. Under appropriate circumstances, the fact that "the judge's impartiality might reasonably be questioned" under Section 3E(1), or that the relative is known by the judge to have an interest in the law firm that could be "substantially affected by the outcome of the proceeding" under Section 3E(1)(d)(iii) may require the judge's disqualification.

References:

Article 26, UCMJ.
United States v. Hilow, 29 M.J. 641 (A.C.M.R. 1989).
Leslie W. Abramson, "Judicial Disqualification under Canon 3 of the Code of Judicial Conduct" (American Judicature Society, 2d ed., 1992).

3E(2) A judge shall keep informed about the judge's personal and fiduciary economic interests, and make a reasonable effort to keep informed about the personal economic interests of the judge's spouse and minor children residing in the judge's household.

3F. Remittal of Disqualification. A judge disqualified by the terms of Section 3E and R.C.M. 902(a) may disclose on the record the basis of the judge's disqualification and may ask the parties and their lawyers to consider, out of the presence of the judge, whether to waive disqualification. If, following disclosure of any basis for disqualification other than personal bias or prejudice concerning a party, the parties and lawyers, without participation by the judge, all agree that the judge should not be disqualified, and the judge is then willing to participate, the judge may participate in the proceeding. The agreement shall be incorporated in the record of the proceeding.

Commentary:

A remittal procedure provides the parties an opportunity to proceed without delay if they wish to waive the disqualification. To assure that consideration of the question of remittal is made independently of the judge, a judge must not solicit, seek, or hear comment on possible remittal or waiver of the disqualification unless the lawyers jointly propose remittal after consultation as provided in the rule. A party may act through counsel if counsel represents on the record that the party has been consulted and consents. As a practical matter, a judge may wish to have all parties and their lawyers sign the remittal agreement.

CANON 4

A JUDGE SHALL CONDUCT THE JUDGE'S EXTRAJUDICIAL ACTIVITIES SO AS TO MINIMIZE THE RISK OF CONFLICT WITH JUDICIAL OBLIGATIONS.

4A. Extrajudicial Activities in General. A judge shall conduct all of the judge's extra-judicial activities so that they do not:

4A(1) cast reasonable doubt on the judge's capacity to act impartially as a judge;

4A(2) demean the judicial office; or

4A(3) interfere with the proper performance of judicial duties.

Commentary:

Complete separation of a judge from extra-judicial activities is neither possible nor wise; a judge should not become isolated from the community in which the judge lives. Military judges must follow carefully, and appear to follow carefully, the provisions of statutes, executive orders, and any applicable Air Force instructions prescribing rules to uphold the integrity and public confidence in military and federal public service.

Expressions of bias and prejudice by a judge, even outside the judge's judicial activities, may cast reasonable doubt on the judge's capacity to act impartially as a judge. Expressions which may do so include jokes or other remarks demeaning individuals on the basis of their race, sex, religion, national origin, disability, age, sexual orientation, or socioeconomic status. See Section 2C and accompanying Commentary.

4B. Avocational Activities. A judge may speak, write, lecture, teach, and participate in other extra-judicial activities concerning the law, the legal system, the administration of justice, and non-legal subjects, subject to the requirements of this *Code*.

Commentary:

As a judicial officer and person specially learned in the law, a judge is in a unique position to contribute to the improvement of the law, the legal system, and the administration of justice, including revision of substantive and procedural law and improvement of the military justice system. To the extent that a judge's time permits, a judge is encouraged to do so, either independently or through a bar association, judicial conference, or other organization dedicated to the improvement of the law. Judges may participate in efforts to promote the fair administration of justice, the independence of the judiciary, and the integrity of the legal profession, and may express opposition to the persecution of lawyers and judges in other countries because of their professional activities.

In this and other Sections of Canon 4, the phrase "subject to the requirements of this *Code*" is used, notably in connection with a judge's governmental, civic, or charitable activities. This phrase is included to remind judges that the use of permissive language in various Sections of the *Code* does not relieve a judge from the other requirements of the *Code* that apply to the specific conduct.

4C. Governmental, Civic, or Charitable Activities.

4C(1) A judge shall not appear at a public hearing before, or otherwise consult with, an executive or legislative body or official except on matters concerning the law, the legal system or the administration of justice or except when acting *pro se* in a matter involving the judge or the judge's interests.

Commentary:

See Section 2B regarding the obligation to avoid improper influence.

This Section does not apply to military judges who are required to attend conferences, professional military education courses, and other military gatherings associated with the obligation as officers of the United States Air Force; nor does it affect their obligation to assist in the continuing legal education and professional education of attorneys in or out of military or government service.

4C(2) A judge shall not accept appointment to a governmental committee or commission or other governmental position that is concerned with issues of fact or policy on matters other than the improvement of the law, the legal system, or the administration of justice. A judge may, however, represent a country, state, or locality on ceremonial occasions or in connection with historical, educational, or cultural activities.

Commentary:

Section 4C(2) prohibits a judge from accepting any governmental position except one relating to the law, legal system, or administration of justice as authorized by Section 4C(3). Insofar as this provision might interfere with an appointment in the United States Air Force as a regular or reserve officer, this provision does not apply to trial or appellate military judges. The appropriateness of accepting extra-judicial assignments must be assessed, in light of the demands on judicial resources created by crowded dockets and the need to protect the courts from involvement in extra-judicial matters that may prove to be controversial. Judges should not accept appointments that are likely to interfere with the effectiveness and independence of the judiciary.

Section 4C(2) does not govern a judge's service in a nongovernmental position. See Section 4C(3) permitting service by a judge with organizations devoted to the improvement of the law, the legal system, or the administration of justice and with educational, religious, charitable, fraternal, or civic organizations not conducted for profit.

4C(3) A judge may serve as an officer, director, trustee, or non-legal advisor of an organization or governmental agency devoted to the improvement of the law, the legal system, or the administration of justice or of an educational, religious, charitable, fraternal, or civic organization not conducted for profit, subject to the following limitations and the other requirements of this *Code*.

Commentary:

Section 4C(3) does not pertain to a judge's service in a governmental position unconnected with the improvement of the law, the legal system or the administration of justice; see Section 4C(2).

See Commentary to Section 4B regarding use of the phrase "subject to the following limitations and the other requirements of this *Code*." As an example of the meaning of the phrase, a judge permitted by Section 4C(3) to serve on the board of a fraternal institution may be prohibited from such service by Sections 2C or 4A if the institution practices invidious discrimination or if service on the board otherwise casts reasonable doubt on the judge's capacity to act impartially as a judge.

Service by a judge on behalf of a civic or charitable organization may be governed by other provisions of Canon 4 in addition to Section 4C. For example, a judge is prohibited by Section 4G from serving as a legal advisor to a civic or charitable organization.

4C(3)(a) A judge shall not serve as an officer, director, trustee, or non- legal advisor if it is likely that the organization:

4C(3)(a)(i) will be engaged in proceedings that would ordinarily come before the judge, or

4C(3)(a)(ii) will be engaged frequently in adversary proceedings in the court of which the judge is a member or in any court subject to the appellate jurisdiction of the court of which the judge is a member.

Commentary:

The changing nature of some organizations and of their relationship to the law makes it necessary for a judge regularly to reexamine the activities of each organization with which the judge is affiliated to determine if it is proper for the judge to continue the affiliation.

4C(3)(b) A judge as an officer, director, trustee, or non-legal advisor, or as a member of an organization:

4C(3)(b)(i) may assist the organization in planning fund-raising and may participate in the management and investment of the organization's funds, but shall not personally participate in the solicitation of funds or other fund-raising activities, except that a judge may solicit funds from other judges over whom the judge does not exercise supervisory authority;

4C(3)(b)(ii) may make recommendations to public and private fund-granting organization on projects and programs concerning the law, the legal system, or the administration of justice;

4C(3)(b)(iii) shall not personally participate in membership solicitation if the solicitation might reasonably be perceived as coercive or, except as permitted in Section 4C(3)(b)(i), if the membership solicitation is essentially a fund-raising mechanism; and

4C(3)(b)(iv) shall not use or permit the use of the prestige of judicial office for fund-raising or membership solicitation.

Commentary:

A judge may solicit membership or endorse or encourage membership efforts for an organization devoted to the improvement of the law, the legal system, or the administration of justice, or for a nonprofit educational, religious, charitable, fraternal, or civic organization so long as the solicitation cannot reasonably be perceived as coercive and is not essentially a fund-raising mechanism. Solicitation of funds for an organization and solicitation of memberships similarly involve the danger that the person solicited will feel obligated to respond favorably to the solicitor if the solicitor is in a position of influence or control. A judge must not engage in direct, individual solicitation of funds or memberships in person, in writing, or by telephone,

except in the following cases: (1) a judge may solicit, for funds or memberships, other judges over whom the judge does not exercise supervisory or appellate authority; (2) a judge may solicit other persons for membership in the organizations described above if neither those persons nor persons with whom they are affiliated are likely ever to appear before the court on which the judge serves and; (3) a judge who is an officer of such an organization may send a general membership solicitation mailing over the judge's signature.

Use of an organization letterhead for fund-raising or membership solicitation does not violate Section 4C(3)(b), provided the letterhead lists only the judge's name and office or other position in the organization, and, if comparable designations are listed for other persons, the judge's judicial designation. In addition, a judge must also make reasonable efforts to ensure that the judge's staff, court officials, and others subject to the judge's direction and control do not solicit funds on the judge's behalf for any purpose, charitable or otherwise. In evaluating the application of this guidance, the judge should consult the applicable DoD regulation.

A judge shall not be a speaker or guest of honor at an organization's fund-raising event, but mere attendance at such an event is permissible if otherwise consistent with this *Code* and the applicable DoD regulation.

4D. Financial Activities.

4D(1) A judge shall not engage in financial and business dealings that:

4D(1)(a) may reasonably be perceived to exploit the judge's judicial position, or

4D(1)(b) involve the judge in frequent transactions or continuing business relationships with those lawyers or other persons likely to come before the court on which the judge serves.

Commentary:

The Time for Compliance provision of this *Code* postpones the time for compliance with certain provisions of this Section in some cases.

When a judge acquires in a judicial capacity information, such as material contained in filings with the court, that is not yet generally known, the judge must not use the information for private gain. See Section 2B; see also Section 3B(11).

A judge must avoid financial and business dealings that involve the judge in frequent transactions or continuous business relationships with persons likely to come either before the judge personally or before other judges on the judge's court. In addition, a judge should discourage members of the judge's family from engaging in dealings that would reasonably appear to exploit the judge's judicial position. This rule is necessary to avoid creating an appearance of exploitation of office or favoritism, and to minimize the potential for disqualification.

Participation by a judge in financial and business dealings is subject to the general prohibitions in Section 4A against activities that tend to reflect adversely on impartiality, demean the judicial office, or interfere with the proper performance of judicial duties. Such

participation is also subject to the general prohibition in Canon 2 against activities involving impropriety, the appearance of impropriety, and the prohibition in Section 2B against the misuse of the prestige of judicial office. In addition, a judge must maintain high standards of conduct in all activities, as set forth in Canon 1. See the Commentary for Section 4B regarding use of the phrase "subject to the requirements of this *Code*."

4D(2) A judge may, subject to the requirements of this *Code*, hold and manage investments of the judge and members of the judge's family, including real estate, and engage in other remunerative activity.

Commentary:

This Section provides that, subject to the requirements of this *Code*, a judge may hold and manage investments owned solely by the judge, investments owned solely by a member or members of the judge's family, and investments owned jointly by the judge and members of the judge's family.

4D(3) A judge shall not serve as an officer, director, manager, general partner, advisor, or employee of any business entity, except that a judge may, subject to the requirements of this *Code*, manage and participate in:

4D(3)(a) a business closely held by the judge or members of the judge's family, or

4D(3)(b) a business entity primarily engaged in investment of the financial resources of the judge or members of the judge's family.

Commentary:

Subject to the requirements of this *Code*, a judge may participate in a business that is closely held either by the judge alone, by members of the judge's family, or by the judge and members of the judge's family.

Although participation by a judge in a closely-held family business might otherwise be permitted by Section 4D(3), a judge may be prohibited from participation by other provisions of this *Code* when, for example, the business entity frequently appears before the judge's court or the participation requires significant time away from judicial duties. Similarly, a judge must avoid participating in a closely-held family business if the judge's participation would involve misuse of the prestige of judicial office.

See also the requirements contained in TJAG Policy Memorandum, TJS-7, *Off-Duty Employment of Judge Advocates and Civilian Attorneys*.

4D(4) A judge shall manage the judge's investments and other financial interests to minimize the number of cases in which the judge is disqualified. As soon as the judge can do so without serious financial detriment, the judge shall divest himself or herself of investments and other financial interests that might require frequent disqualification.

4D(5) A judge shall not accept or knowingly permit a member of the judge's family residing in the judge's household to accept a gift, bequest, favor, or loan from anyone

except for:

Commentary:

Because a gift, bequest, favor or loan to a member of the judge's family residing in the judge's household might be viewed as intended to influence the judge, a judge must inform those family members of the relevant ethical constraints upon the judge in this regard and discourage those family members from violating them. A judge cannot, however, reasonably be expected to know or control all of the financial or business activities of all family members residing in the judge's household.

4D(5)(a) a gift incident to a public testimonial, books, tapes, or other resource materials supplied by publishers on a complimentary basis for official use, or an invitation to the judge and the judge's spouse or guest to attend a bar-related function or an activity devoted to the improvement of the law, the legal system, or the administration of justice;

Commentary:

Acceptance of an invitation to a law-related function is governed by Section 4D(5)(a); acceptance of an invitation paid for by an individual lawyer or group of lawyers is governed by Section 4D(5)(h).

A judge may accept a public testimonial or a gift incident thereto only if the donor organization is not an organization whose members frequently comprise or represent the same side in litigation, and the testimonial and gift are otherwise in compliance with other provisions of this *Code*. See Section 4A(1) and 2B.

4D(5)(b) a gift, award, or benefit incident to the business, profession, or other separate activity of a spouse or other family member of a judge residing in the judge's household, including gifts, awards, and benefits for the use of both the spouse and other family member and the judge (as spouse or family member), provided the gift, award, or benefit could not reasonably be perceived as intended to influence the judge in the performance of judiciary duties;

4D(5)(c) ordinary social hospitality;

4D(5)(d) a gift from a relative or friend, for a special occasion, such as a wedding, anniversary, or birthday, if the gift is fairly commensurate with the occasion and the relationship;

Commentary:

A gift to a judge, or to a member of the judge's family living in the judge's household, that is excessive in value raises questions about the judge's impartiality and the integrity of the judicial office and might require disqualification of the judge where disqualification would not otherwise be required. See, however, Section 4D(5)(e).

4D(5)(e) a gift, bequest, favor, or loan from a relative or close personal friend whose appearance or interest in a case would in any event require disqualification under Section

3E;

4D(5)(f) a loan from a lending institution in its regular course of business on the same terms generally available to persons who are not judges;

4D(5)(g) a scholarship or fellowship awarded on the same terms and based on the same criteria applied to other applicants; or

4D(5)(h) any other gift, bequest, favor, or loan, only if the donor is not a party or other person who has come or is likely to come or whose interests have come or are likely to come before the judge.

Commentary:

Section 4d(5) prohibits judges from accepting gifts, favors, bequests, or loans from lawyers or their firms if they have come or are likely to come before the judge; it also prohibits gifts, favors, bequests, or loans from clients of lawyers or their firms when the clients' interests have come or are likely to come before the judge.

Section 4D(5)(h) of the approved ABA *Uniform Code of Judicial Conduct* includes a requirement that gifts, bequests, favors, or loans may be accepted only if the judge reports any such gift, bequest, favor, or loan in excess of $150.00. That provision was not adopted for trial and appellate military judges because their conduct is already extensively regulated by DoD Directive 5500.7-R, Joint Ethics Regulation, which in turn implements the Ethics in Government Act and provides for appropriate financial disclosure reporting.

4E. Fiduciary Activities.

4E(1) A judge shall not serve as executor, administrator, or other personal representative, trustee, guardian, attorney-in-fact, or other fiduciary, except for the estate, trust or person of a member of the judge's family, and then only if such service will not interfere with the proper performance of judicial duties.

4E(2) A judge shall not serve as a fiduciary if it is likely that the judge as a fiduciary will be engaged in proceedings that would ordinarily come before the judge, or if the estate, trust, or ward becomes involved in adversary proceedings in the court on which the judge serves or one under its appellate jurisdiction.

4E(3) The same restrictions on financial activities that apply to a judge personally also apply to the judge while acting in a fiduciary capacity.

Commentary:

The Time for Compliance provision of the *Code* postpones the time for compliance with certain provisions of this Section in some cases.

The restrictions imposed by this Canon may conflict with the judge's obligation as a fiduciary. For example, a judge should resign as trustee if detriment to the trust would result from divestiture of holdings, the retention of which would place the judge in violation of Section 4D(4).

Section 4E applies to trial and appellate military judges only when a party or parties for whom the judge serves as executor, administrator, or other personal representative or other fiduciary may appear in the judge's court.

4F. Service as Arbitrator or Mediator. A judge shall not act as an arbitrator or mediator or otherwise perform judicial functions in a private capacity, unless authorized by law.

Commentary:

Section 4F does not prohibit a judge from participating in arbitration, mediation, or settlement conferences performed as part of judicial duties.

4G. Practice of Law. A judge shall not practice law, except in the performance of his or her judicial responsibilities. Notwithstanding this prohibition, a judge may act *pro se* and may, without compensation, give legal advice to, and draft or review documents for a member of the judge's family.

Commentary:

This prohibition refers to the practice of law in a representative capacity and not in a *pro se* capacity. A judge may act for himself or herself in all legal matters, including matters involving litigation and matters involving appearances before or other dealings with legislative and other governmental bodies. However, in so doing, a judge must not abuse the prestige of office to advance the interests of the judge or the judge's family. See Section 2B.

The *Code* allows a judge to give legal advice to and draft legal documents for members of the judge's family, so long as the judge receives no compensation. A judge must not, however, act as an advocate or negotiator for a member of the judge's family in a legal matter.

4H. Standards of Conduct. A judge is bound by the Ethics in Government Act and all DoD regulations governing standards of conduct of military personnel.

Commentary:

This provision has been modified from the approved draft of the *ABA Uniform Code of Judicial Conduct*. Trial and appellate military judges are bound by federal statutes, DoD regulations, and Air Force instructions governing their financial activities, to include the acceptance of gifts, bequests, honoraria, etc. Where this *Code* conflicts with federal, DoD, or Air Force law or directive, the law or directive governs. This *Code* provides general guidelines that should assist the military judge in determining the propriety of his or her activities under federal, DoD, or Air Force law or directive when those provisions may not be clear on a particular issue.

The *Code* does not prohibit a judge from accepting honoraria or speaking fees provided that the compensation is reasonable and commensurate with the task performed. A judge should ensure, however, that no conflicts are created by the arrangement. A judge must not appear to trade on the judicial position for personal advantage. Nor should a judge spend significant time away from court duties to meet speaking or writing commitments for

compensation. In addition, the source of the payment must not raise any question of undue influence or the judge's ability or willingness to be impartial.

4I. Disclosure of a judge's income, debts, investments, or other assets is required only to the extent provided in this Canon and in Sections 3E and 3F, or as otherwise provided by law or directive.

Commentary:

Section 3E requires a judge to disqualify himself or herself in any proceeding in which the judge has an economic interest. See "economic interest" as defined in the Terminology Part (Part III). Section 4D requires a judge to refrain from engaging in business and from financial activities that might interfere with the impartial performance of judicial duties. A judge has the rights of any other citizen, including the right to privacy of the judge's financial affairs, except to the extent that limitations established by law and regulation are required to safeguard the proper performance of the judge's duties and insure public confidence in the judiciary.

The trial and appellate military judge should be aware that not all private investments are free of ethical considerations. A pertinent example is the purchase of shares in a firm which has a contract with the Air Force or the DoD to perform drug testing.

CANON 5

A JUDGE OR JUDICIAL CANDIDATE SHALL REFRAIN FROM INAPPROPRIATE POLITICAL ACTIVITY.

Commentary:

Canon 5 is not adopted for trial and appellate military judges because the judge's duties, rights, and responsibilities in this area are already clearly defined by Air Force instructions and customs of the service.

PART V. APPLICATION OF THE CODE OF JUDICIAL CONDUCT

A. Anyone, whether or not a lawyer, who is an officer of a judicial system and who performs judicial functions, including an officer such as a magistrate, court commissioner, special master, or referee, is a judge within the meaning of this *Code*. All judges shall comply with this *Code* except as provided below.

Commentary:

The four categories of judicial service in other than a full-time capacity are necessarily defined in general terms because of the widely varying forms of judicial service. For the purposes of this Section, as long as a retired judge is subject to recall the judge is considered to

"perform judicial functions." The determination of which category and, accordingly, which specific *Code* provisions apply to an individual judicial officer, depend upon the facts of the particular judicial service.

B. Retired Judge Subject to Recall. A retired judge subject to recall who by law is not permitted to practice law is not required to comply:

(1) except while serving as a judge, with Section 4F; and

(2) at any time with Section 4E.

Commentary:

This provision is meant to apply only to retired reserve military judges who may be prohibited by the laws of their state from practicing law.

C. Continuing Part-Time Judge. A continuing part-time judge:

(1) is not required to comply

(a) except while serving as a judge, with Section 3B(9), and

(b) at any time with Sections 4C(2), 4D(3), 4E(1), 4F, 4G, and 4H; and

(2) shall not practice law in the court on which the judge serves or in any court subject to the appellate jurisdiction of the court on which the judge serves, and shall not act as a lawyer in a proceeding in which the judge has served as a judge or in any other proceeding related thereto.

Commentary:

When a person who has been a continuing part-time judge is no longer a continuing part-time judge, including a retired judge no longer subject to recall, that person may act as a lawyer in a proceeding in which he or she has served as a judge or in any other proceeding related thereto only with the express consent of all parties pursuant to AFRPC Rule 1.12(a).

D. Periodic Part-Time Judge. A periodic part-time judge:

(1) is not required to comply

(a) except while serving as a judge, with Section 3B(9),

(b) at any time, with Sections 4C(2), 4C(3)(a), 4D(1)(b), 4D(3), 4D(4), 4D(5), 4E, 4F, 4G, and 4H; and

(2) shall not practice law in the court on which the judge serves or in any court subject to the appellate jurisdiction of the court on which the judge serves, and shall not act as a lawyer in a proceeding in which the judge has served as a judge or in any other proceeding

related thereto.

Commentary:

When a person who has been a periodic part-time judge is no longer a periodic part-time judge (no longer accepts appointments), that person may act as a lawyer in a proceeding in which he or she has served as a judge or in any other proceeding related thereto only with the express consent of all parties pursuant to AFRPC Rule 1.12(a).

E. Pro Tempore Part-Time Judge. A pro tempore part-time judge:

(1) is not required to comply

(a) except while serving as a judge, with Sections 2A, 2B, 3B(9), and 4C(1),

(b) at any time with Sections 2C, 4C(2), 4C(3)(a), 4C(3)(b), 4D(1)(b), 4D(3), 4D(4), 4D(5), 4E, 4F, 4G, and 4H;

(2) a person who has been a *pro tempore* part-time judge shall not act as a lawyer in a proceeding in which the judge has served as a judge or in any other proceeding related thereto, except as otherwise permitted by AFRPC Rule 1.12(a).

F. Time for Compliance. A person to whom this *Code* becomes applicable shall comply immediately with all provisions of this *Code* except Section 4D(2), 4D(3), and 4E, and shall comply with these Sections as soon as reasonably possible and shall do so in any event within the period of one year.

Commentary:

If serving as a fiduciary when selected as judge, a new judge may, notwithstanding the prohibitions in Section 4E, continue to serve as fiduciary, but only for that period of time necessary to avoid serious adverse consequences to the beneficiary of the fiduciary relationship and in no event longer than one year. Similarly, if engaged at the time of judicial selection in a business activity, a new judge may, notwithstanding the prohibitions in Section 4D(3), continue in that activity for a reasonable period, but in no event longer than one year.

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Attachment 6

REGULATIONS AND PROCEDURES RELATING TO JUDICIAL DISCIPLINE

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I. INTRODUCTION

These regulations and procedures are based on the federal statute dealing with the discipline of federal judges, 28 U.S.C. Section 372(c), the *ABA Model Standards of Judicial Discipline*, and the most recent judicial precedent addressing the initiation, screening, investigation, review, and appeal of judicial disciplinary proceedings. Information obtained from the Administrative Office of United States Courts, the Judicial Conference of the United States, the National Center for State Courts, the National Judicial College, and the American Bar Association has also been consulted. In addition, numerous law review articles addressing the issue of judicial disciplinary procedures, including analyses of specific rules and procedures adopted by state and federal courts, have been reviewed. The basic premise of these authorities is that to preserve the independence and integrity of the judiciary—judges should judge judges. That premise is the benchmark of these regulations and procedures.

II. POLICY

These regulations and procedures relating to judicial discipline are established to ensure that allegations of unprofessional conduct by trial and appellate military judges are examined by the military judiciary and that proper determination and action is taken regarding that conduct to preserve and promote the integrity, independence, and impartiality of the military judiciary. This purpose and these regulations and procedures are independent of any other investigation or actions regarding alleged misconduct of trial and appellate military judges. The deliberative processes of the military judiciary, however, shall be preserved from public disclosure in all instances to the extent possible under recognized qualified judicial privilege precedent. In the absence of an allegation of fraud or a corrupt motive on the part of a judge, these regulations and procedures for judicial discipline must not be used as a means for taking action against a judge for reaching an erroneous factual or legal conclusion or misapplying the law in any particular case. An erroneous decision by a judge must be left to the regular appellate process. See *Chandler v. Judicial Council*, 382 U.S. 1003 (1966), 398 U.S. 74 (1970).

III. PURPOSE

The purpose of the complaint procedure is to ensure application of the highest standards of judicial conduct and competence in the court-martial process. The maintenance of such standards is the responsibility of The Judge Advocate General (TJAG), as set forth in Rules for Courts-Martial (R.C.M.) Rule 109. These regulations and procedures include taking action when judges have engaged in conduct that does not meet the standards expected of military judicial officers. All military judges, trial and appellate, former and currently assigned, are subject to the application of these rules and regulations for any unprofessional conduct which is alleged to have occurred during their assignment as judges. These procedures will contribute to the integrity of court-martial proceedings and thereby preserve and enhance public confidence in the fairness and correctness of military justice.

IV. TERMINOLOGY

***Air Force Uniform Code of Judicial Conduct* (the *Code*)** refers to the code which is Attachment 1 to this policy memorandum.

Air Force Judicial Ethics Advisory Council (JEAC) refers to the council established by Attachment 4 to this policy memorandum.

Chief Trial Judge. The Chief Trial Judge of the USAF Trial Judiciary.

Complaint refers to an allegation of unprofessional conduct. See definition *infra.*

Complained-against-judge is the person holding a military judicial assignment with either the trial or appellate military court, who has had a complaint of misconduct filed against him or her.

Deliberative process is defined by the law related to Military Rules of Evidence Rule 509 as follows: "Except as provided in Mil.R.Evid. 606, the deliberations of courts and grand and petit juries are privileged to the extent that such matters are privileged in trial of criminal cases in the

United States district courts, but the results of the deliberations are not privileged."

Discipline means action taken pursuant to these rules and procedures as a result of the filing of a complaint of unprofessional conduct on the part of a trial or appellate military judge.

Judge refers to a trial military judge who has been certified in accordance with Article 26, Uniform Code of Military Justice (UCMJ), or an appellate military judge assigned to the Air Force Court of Criminal Appeals in accordance with Article 66, UCMJ, and who is assigned to judicial duties on a full-time basis, or part-time basis (detailed to at least one case), at the time of the alleged unprofessional conduct.

The Judge Advocate General (TJAG) refers to The Judge Advocate General of the United States Air Force.

Judicial Inquiry Commission (JIC) is a one-judge or multi-judge body appointed by the Chief Trial Judge or TJAG, as appropriate, to conduct an investigation into alleged unprofessional conduct subsequent to a finding of sufficient cause.

Judicial privilege is a privilege in law applying to the judicial process, which protects the confidentiality of communications among judges and their staff relating to official judicial business, most particularly the deliberative processes, such as voting, the basis for a decision, and the framing and researching of opinions, orders, and rulings.

Judicial Privilege Review Commission (JPRC) is an *ad hoc* body composed of judges appointed by TJAG to resolve issues involving a claim of judicial privilege by trial or appellate military judges.

Sufficient cause is the screening standard that must be met before a JIC is appointed to investigate a complaint alleging unprofessional conduct. Sufficient cause to proceed means that the complaint against the judge alleges unprofessional conduct.

Unprofessional conduct is any conduct that violates a provision of the *Code*. It does not require a finding of a violation of the UCMJ. Examples of unprofessional conduct include, but are not limited to:

1. conviction of a serious offense (felony or equivalent conviction);

2. willful misconduct in office (acting in bad faith while acting in a judicial capacity, including the interference or attempted interference with the independence, integrity, or impartiality of the judge);

3. willful misconduct which, although not related to judicial duties, brings the judicial office into disrepute (minor criminal offenses);

4. conduct prejudicial to the administration of justice or conduct unbecoming a judicial officer, whether conduct in office or outside of judicial duties, that brings the conduct that gives the

appearance of impropriety; and

5. any conduct that constitutes a violation of the rules of professional conduct for lawyers.

V. INVESTIGATION

A. Confidentiality. Confidentiality is required during the initial investigatory procedures undertaken pursuant to this regulation so that a judge is protected from frivolous complaints. If all complaints were publicly announced, meritless complaints could have irreversible ramifications not only for the complained-against-judge but for the military justice system as a whole. Furthermore, confidentiality encourages litigants and attorneys to report their complaints without fear of reprisal from the judge or other authority.

B. Judicial Privilege. The judicial privilege is a qualified privilege. A judge invoking a claim of judicial privilege before a JIC has the burden of demonstrating that the matters under inquiry fall within the confines of the privilege. Once the judge has met the burden, those matters are presumptively privileged and need not be disclosed unless the JIC determines that its need for the materials is sufficiently great to overcome the privilege.

The privilege is qualified in that it must sometimes yield to other considerations. In making that determination, the JIC will consider such factors as the importance of the inquiry for which the privileged information is sought, the relevance of that information to its inquiry, and the difficulty of obtaining the desired information through alternative means.

The JIC must then weigh the demonstrated need for the information against the degree of intrusion upon the confidentiality of privileged communications necessary to satisfy that need. If the JIC determines that the qualified judicial privilege must yield, the JIC shall record its reasons by making written essential findings.

The complained-against-judge can appeal to the appointing authority the findings and ruling of the JIC that the qualified judicial privilege must yield. The appointing authority must consult on this issue with the JPRC. The appointing authority shall conduct a *de novo* review in assessing the appeal of the JIC's findings and ruling on judicial privilege. The appointing authority shall advise the judge claiming the privilege of the appointing authority's decision in writing.

References:

Navy-Marine Corps Court of Military Review v. Carlucci, 26 M.J. 328, 337-341 (C.M.A. 1988).
In the Matter of Certain Complaints Under Investigation by an Investigating Committee of the Judicial Council of the Eleventh Circuit v. Mercer, 783 F.2d 1438, 1520-1525 (11th Cir. 1986).

C. Judicial Ethics Advisory Council. During any stage of the investigation, the Judicial Ethics Advisory Council may be consulted. The Judicial Ethics Advisory Council is composed of three persons appointed by TJAG pursuant to Part III of this policy memorandum. The

opinions of the Judicial Ethics Advisory Council are not binding.

D. Judicial Privilege Review Commission. Before the appointing authority determines that any claim of judicial privilege must yield, he or she shall obtain an opinion from the JPRC. TJAG shall appoint three Air Force Court of Criminal Appeals judges who should ordinarily be of the same or higher grade as the complained-against-judge, to resolve a claim of judicial privilege as a whole claims judicial privilege, a Commission composed of at least three judges sitting on other service Courts of Criminal Appeals shall be appointed by TJAG with the approval of the other service Judge Advocate Generals from whose service Courts of Criminal Appeals the members are drawn.

E. Temporary Suspension Authority. The Chief Trial Judge, with respect to trial judges, or TJAG, with respect to any judge, may temporarily suspend, without prejudice, a judge from the performance of the judge's judicial duties at any stage of an investigation into alleged judicial misconduct.

F. Complaint Procedure.

1. Submission of Complaint.

a. Any person may submit a complaint, orally or in writing, giving a brief statement of the facts constituting such conduct. Any complaint shall be forwarded to any judge advocate or law specialist, preferably a staff judge advocate, legal officer, or military judge.

b. Any judge who believes that his or her judicial independence or integrity has been or is being threatened, in addition to any other remedies available to him or her pursuant to Air Force instructions, may submit a complaint to the Chief Trial Judge, if the complainant is a trial judge, or to TJAG, if the complainant is the Chief Trial Judge or an appellate judge.

c. If the complaint received involves a judge's concern that his or her judicial independence or integrity has been or is being threatened by someone who is not a judge, such complaint shall be processed in accordance with Articles 98 or 138, UCMJ, the Manual for Courts-Martial, or other applicable Air Force instructions.

2. Referral of Complaint.

a. If the complained-against-judge is a trial judge, the officer receiving such complaint shall forward it promptly to the Chief Trial Judge.

b. If the complained-against-judge is an appellate judge or the Chief Trial Judge, the officer receiving such complaint shall forward it promptly to TJAG.

c. The Chief Trial Judge (unless he or she is the complained-against- judge) with respect to trial judges, or TJAG with respect to any judge, may find, *sua sponte*, sufficient cause to appoint a JIC.

3. Screening of Complaint.

a. Trial judges. Upon receipt of a complaint against a trial judge filed under paragraph 1a of this subsection, the Chief Trial Judge, or his or her appointee (who must be a currently assigned trial military judge or appointed appellate military judge, who should ordinarily be of the same or higher grade as the complained-against-judge, and who must not be subordinate in the performance rating chain to the complained-against-judge) shall promptly record the receipt of the complaint and screen the complaint for sufficient cause.

b. Appellate judges or Chief Trial Judge. Upon receipt of a complaint against an appellate military judge or the Chief Trial Judge filed under paragraph 1b of this subsection, TJAG or his or her appointee (who must be a currently assigned trial military judge or appointed appellate military judge, who should ordinarily be of the same or higher grade as the complained-against-judge, and who must not be subordinate in the performance rating chain to the complained-against-judge) shall promptly record the receipt of the complaint and screen the complaint for sufficient cause.

4. Results of Screening. After the complaint has been expeditiously screened and a sufficient cause determination made, the Chief Trial Judge, or TJAG, as appropriate, by written order stating the reasons, may:

a. if there is not sufficient cause to proceed, dismiss the complaint and transmit copies of any written order to the complainant, if known, and the complained-against-judge; or

b. if sufficient cause is found, refer the complaint to a JIC. Under R.C.M. 109(c)(4), prior to the commencement of an initial inquiry, the complained- against-judge shall be notified that a complaint has been filed and that an initial inquiry will be conducted.

G. Judicial Inquiry Commission.

1. Appointment. Where sufficient cause is found, the Chief Trial Judge, or TJAG, as appropriate, shall appoint a JIC. The Chief Trial Judge may appoint himself or herself as the JIC. If the Chief Trial Judge designates another judge as the JIC, or when TJAG appoints a judge to a JIC, that judge must be a currently assigned military trial or appellate judge, who should ordinarily be of the same or higher grade as the complained- against-judge, and who must not be subordinate in the performance rating chain to the complained-against-judge. The JIC shall investigate the complaint, and after giving the complained-against-judge the opportunity to respond to the allegations, make findings of fact, including whether unprofessional conduct occurred.

2. Conduct of investigation. The JIC appointed hereunder shall conduct an investigation which is as extensive and as formal as it considers necessary, and shall expeditiously file a comprehensive written report thereon with the Chief Trial Judge or TJAG, as appropriate. The purpose of the JIC in conducting an investigation is solely to gather information, make findings of fact based upon its evaluation of the evidence and information received, and submit a written report of its investigation, including its findings of fact, to the authority who appointed it.

Findings of fact must be as specific as possible, with each fact made a separate finding, if possible. See R.C.M. 905(d). Findings of fact include finding that the allegation of unprofessional conduct is or is not substantiated. The JIC shall not report opinions or recommendations. It has the authority to administer oaths (see Article 136, UCMJ; AFI 51-504, *Legal Assistance, Notary, and Preventive Law Programs*). The Military Rules of Evidence are not binding but may be used as a guide. The complained-against-judge has no right to a personal appearance before the JIC, nor a right of confrontation or cross-examination, but does have the right to review all evidence against him or her and to present any matters to the JIC before findings of fact are made.

VI. ACTION ON THE REPORT OF THE JUDICIAL INQUIRY COMMISSION

Upon receipt of a report filed from a JIC, the Chief Trial Judge or TJAG, as appropriate, shall:

1. conduct or direct any additional investigation considered necessary;

2. approve or disapprove the findings or make findings of his or her own;

3. close the case and inform the complained-against-judge if he or she finds the alleged unprofessional conduct is not substantiated;

4. take appropriate action if he or she finds the alleged unprofessional conduct is substantiated;

5. refer the matter to other authorities for appropriate disposition whether or not the allegation of unprofessional conduct is or is not substantiated;

6. immediately provide written notice to the complainant, if known, that the matter has been concluded; and

7. immediately notify the complained-against-judge of any action taken under this paragraph or contemplated under Part VII.

VII. IMPLEMENTATION OF THE ACTION BY THE CHIEF TRIAL JUDGE OR THE JUDGE ADVOCATE GENERAL

A. Non-Adverse Action. Where the Chief Trial Judge or TJAG makes a final decision that the allegation of unprofessional conduct is not substantiated, the case is closed.

B. Due Process Rights before Certain Adverse Actions are Taken. Where TJAG determines that an allegation of unprofessional conduct has been substantiated and that he or she may take adverse action that includes removal of the judge from his or her assignment as a trial or appellate military judge, decertification from judicial duties, or referral to the complained-against-judge's state bar, then the complained-against-judge is entitled to written notice of the contemplated adverse action, the assistance of counsel, the opportunity to submit a written response, and the opportunity for a personal appearance before TJAG. The complained-against-judge has 15 days after receipt of notification to inform TJAG of his or her decision to exercise any and all of these due process rights.

VIII. FINALITY

TJAG's decision to authorize further investigation is within his or her discretion and is final. TJAG's decision on the resolution of judicial privilege issues is final. TJAG's decision as to any adverse action taken pursuant to these rules and procedures relating to judicial discipline is also final.

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Attachment 7

THE AIR FORCE JUDICIAL ETHICS ADVISORY COUNCIL

I. ESTABLISHMENT

A Judicial Ethics Advisory Council (Council) shall be established pursuant to Rule for Courts-Martial 109(d) for the purpose of issuing advisory opinions on questions relating to the propriety of judicial conduct under the Uniform Code of Judicial Conduct (the *Code*). Opinions of the Council shall be provided to military judges at their request, Judicial Inquiry Commissions, Judicial Privilege Review Commissions, or to persons or agencies designated by The Judge Advocate General (TJAG) or his designee.

II. PURPOSE

The Council shall provide advisory opinions on the scope and meaning of the *Code* and its practical application.

III. COMPOSITION

The Judicial Ethics Advisory Council shall be appointed by TJAG for a minimum of one year. The Council shall be composed of at least three active duty or reserve judge advocates: one will be a currently-certified military trial judge, one will be a currently-certified military appellate judge, and one will be a judge advocate serving in another capacity. No member of the Council may serve concurrently on a Judicial Inquiry Commission or a Judicial Privilege Review Commission.

IV. DUTIES AND RESPONSIBILITIES OF THE COUNCIL

The Judicial Ethics Advisory Council shall:

(1) by the concurrence of a majority of its members, express, in writing, its opinion on the propriety of judicial conduct with respect to the provisions of the *Code*;

(2) make periodic recommendations to TJAG for amendment of the *Code*; and

(3) adopt rules relating to the procedures to be used in expressing opinions, including rules to assure a timely response to inquiries.

V. ACTION PENDING OPINION

When the Council has been requested to provide an opinion concerning a question of judicial ethics and there is an urgent need for resolution of the question such that the administration of military justice may otherwise be impeded, the requesting judge should notify the Council of the urgency for resolution of the question before it. The Council should then provide an opinion expeditiously. An oral opinion followed by written confirmation is acceptable. Pending an opinion of the Council, a judge should normally refrain from

participating in the conduct to which the question before the council relates. If some immediate action is required, the judge should consider other procedures for resolution of the matter (e.g., notification of the parties, voir dire, or recusal).

VI. RELIANCE ON OPINIONS

Opinions of the Council are not binding; however, TJAG and any Judicial Inquiry Commission will consider any good faith reliance on a Council's opinion in determining the propriety of questioned judicial conduct that is the subject of a disciplinary proceeding. A judge who has requested and complied with an opinion should not normally be disciplined for conduct consistent with that opinion. A Council opinion may always be used as mitigation or, when appropriate, as a defense.

VII. PUBLICATION

Opinions issued pursuant to this rule shall be filed with the Office of TJAG. Such opinions are confidential and not public information unless TJAG so directs. TJAG, however, shall cause an edited version of each opinion to be prepared, in which the identity and geographic location of the person who has requested the opinion, the specific court involved, and the identity of other individuals, organizations or groups mentioned in the opinion are not disclosed. Opinions so edited shall be published and circulated in a timely manner to all sitting trial and appellate military judges. The Chief Trial Judge will number such opinions consecutively and retain the record copy.

In order to make these opinions available to other jurisdictions, each opinion should also be reviewed and a determination made whether to send a copy to the Center for Judicial Conduct Organizations. The Center for Judicial Conduct Organizations is an informational source and study center for judicial discipline operated by the American Judicature Society (Web site: http://www.ajs.org).