

3. PRETRIAL MATTERS

3.A. COURTS-MARTIAL CONVENING AUTHORITIES

3.A.1. General Courts-Martial Convening Authorities

By virtue of the authority of Article 22, UCMJ, the Secretary has designated the following commanding officers of the Coast Guard or their successors in command as general court-martial convening authorities [*see*, enclosure (9)]:

- a. Commandant of the Coast Guard.
- b. Commander of any Coast Guard Area.
- c. Commander of any Coast Guard District.
- d. Commander of any Maintenance and Logistics Command.
- e. Superintendent, Coast Guard Academy.

3.A.2. Special Courts-Martial Convening Authorities

By virtue of the authority of Article 23, UCMJ, the Secretary has designated the following commanding officers of the Coast Guard or their successors in command as special court-martial convening authorities [*see*, enclosure (9)]:

- a. Commanding officers of all Coast Guard units, some of whom have specific statutory authority.
- b. Commanding Officer, Headquarters Staff, USCG Headquarters.
- c. Commanding Officer, Staff Enlisted Personnel, Atlantic and Pacific Area.
- d. Commanding Officer, Staff Enlisted Personnel, Coast Guard Maintenance and Logistics Command, Atlantic and Pacific.
- e. Commanding Officer, Staff Enlisted Personnel, at each Coast Guard District Office.
- f. Commanding Officer, Enlisted Personnel, USCG Academy.
- g. Commanding Officer, Enlisted Personnel, USCG Yard.

- h. Commanding Officer, Military Personnel, USCG, National Pollution Funds Center.

3.A.3. Areas of Responsibility

3.A.3.a. Authority Not Limited By Geography

The authority to convene general and special courts-martial is universal and is not limited by geography, unit or personnel assignment, unit location or chain of command. A properly constituted court-martial may try any person subject to the UCMJ, even if the accused is not under the command of the convening authority [*see*, RCM 601(b)]. Geographic areas of primary responsibility are designated for administrative purposes only and neither creates exclusive jurisdiction with any of the individual officers exercising general and special courts-martial jurisdiction nor operate as a limitation on jurisdiction. As a practical matter, however, the accused ordinarily will have to be subject to the orders of the convening authority or otherwise under the convening authority's control to assure appearance of accused at trial. It is strongly recommended that prior to referral of charges, if the member against whom charges have been preferred is not a member of or under the command of the convening authority, Coast Guard convening authorities advise the member's commanding officer of the impending referral.

3.A.3.b. Primary General Court-Martial Jurisdiction

(1) District and Area Units

District Commanders exercise primary general court-martial jurisdiction over personnel of their respective District units. Area Commanders exercise primary general court-martial jurisdiction over personnel of their respective Area units. Area Commanders may forward charges to subordinate convening authorities for disposition. Area Commanders may authorize the cognizant MLC Commander to exercise primary general court-martial jurisdiction over personnel assigned to the respective Area staff, Area units, and District units over which the Area commander exercises authority as the District Commander.

(2) MLC and Headquarters Units

MLC Commanders exercise primary general court-martial jurisdiction over personnel of all MLC and headquarters (including Headquarters) units assigned to, or operating within, their respective areas.

(3) Non-Coast Guard Commands

MLC Commanders exercise primary general court-martial jurisdiction over Coast Guard personnel assigned to all non-Coast Guard commands, such as joint commands, joint task forces, unified commands, or other specified combatant commands, operating within their respective areas, for matters forwarded for parent service disposition.

(4) Coast Guard Academy

Superintendent, Coast Guard Academy exercises general court-martial jurisdiction over all Coast Guard units and personnel assigned to the Coast Guard Academy.

3.B. RESTRICTION ON EXERCISE OF COURT-MARTIAL JURISDICTION

3.B.1. Limitation on Authority by Superior Commander

Superior authority may restrict the exercise of authority to convene summary and special courts-martial. [*See*, RCM 504.]

3.B.2. Normal Convening Authority is an Accuser

A commanding officer who is an accuser or is otherwise disqualified in a case may not refer the charges in that case to trial by general or special court-martial. In such a case, the draft charges and accompanying paperwork shall be forwarded to the next superior in the chain of command authorized to convene the type of court-martial deemed appropriate [*see*, section 3.A above]. The definition of an “accuser” as used in this section is broader than the individual who swears, or makes charges against another [*see*, Article 1(9), UCMJ, RCM 307(a) Discussion]. An “accuser” is also an individual who was a victim of the alleged offense(s) or whose personal interest outweighs his or her professional responsibilities. The advice of the command’s servicing legal office should be sought in any case in which a potential convening authority believes he or she might be disqualified or might be considered an accuser in the broadest sense of that term.

3.B.3. Jurisdiction Limitations Under Articles 2 and 3, UCMJ

3.B.3.a. Retired Members

No case of a retiree amenable to jurisdiction under Article 2(a)(4) or (5), UCMJ will be referred for trial by court-martial without the prior authorization of the Chief Counsel. This rule applies to offenses allegedly committed by such persons regardless of whether they were on active duty either at the time of the alleged offense or at the time they were accused or suspected of the offense. Specific authorization from the Chief Counsel should also be obtained for the apprehension, arrest, or confinement of any person amenable to trial by court-martial solely by reason of the provisions of Articles 2(a)(4)-(5), UCMJ.

3.B.3.b. Public Health Service Members

Prior to taking action under the UCMJ against an active duty member of the Public Health Service [PHS] assigned to duty and serving with the Coast Guard, the convening authority should contact his or her servicing legal office to obtain a copy of the current

USCG - USPHS Memorandum of Understanding, which may contain procedural guidance concerning military justice and disciplinary proceedings involving PHS employees.

3.B.3.c. Reservists

The OEGCMJ will obtain prior approval from Commandant (G-WTR) if confinement or other restraints on liberty are contemplated as punishments in the case of a Reservist ordered to active duty for trial. [See, Article 2(d)(5), UCMJ; section 3.E below.; chapter 3, Reserve Policy Manual, COMDTINST M1001.28 (series)].

3.B.3.d. Jurisdiction to Try Certain Personnel Under Article 3, UCMJ

No case in which jurisdiction is based on Article 3(a)-(c), UCMJ, should be referred for trial by court-martial without the prior authorization of the Chief Counsel. Specific authorization from the Chief Counsel should also be obtained for the apprehension, arrest, or confinement of any person amenable to trial by court-martial solely by reason of the provisions of Article 3, UCMJ.

3.B.3.e. Waiver of Limitation

Requests for waiver of the limitations in subparagraphs 3.B.3.a-d. shall be addressed to Commandant (G-LMJ) for further forwarding to the Commandant (G-WTR) or the Chief Counsel, as appropriate, and shall be forwarded by mail or other expeditions means. Requests should normally be forwarded by mail but may, if considered necessary, be requested by message, fax, e-mail, or telephone. Each request shall contain the following information:

- (1) The nature of the offense or offenses charged;
- (2) A summary of the evidence in the case;
- (3) The facts showing amenability of the accused to trial by court-martial;
- (4) Whether civil jurisdiction exists;
- (5) The military status of the accused or suspected person at the present and at the time of the alleged offense; and
- (6) The reasons that make trial by court-martial advisable.

If authorization is withheld under this paragraph or the waiver denied, the Chief Counsel may direct alternative action or actions, if any, to the convening authority. The foregoing rules shall not impede the preferring and processing of sworn charges under Article 30, UCMJ, when such preferring and processing are necessary to prevent the barring of trial by the statute of limitations [see, Article 43, UCMJ].

3.B.4. Cases Adjudicated or Pending Adjudication in Domestic or Foreign Criminal Courts

No person in the Coast Guard may be tried for the same acts that constitute an offense against state or foreign law, and for which the accused has been tried or is pending trial by the state or foreign country, without first obtaining authorization from the Chief Counsel. Letter requests for authorization shall contain complete justification as to why deviation from the general policy against second trials [*see*, RCM 201(d)] is appropriate. This policy is based on comity between the Federal Government and State/Foreign Governments and is not intended to confer additional rights upon the accused. "Pending trial" means that an indictment or information has been brought against the accused or that the accused is being held over for trial based on a judicial probable cause hearing. Any pre-trial diversion or similar program does not amount to being "tried" or "pending trial." In any case, close coordination with officials of other jurisdictions may be necessary to ensure that the policy against second trials is followed, and because many such jurisdictions have laws prohibiting second trials for persons tried in federal courts or courts-martial. This requirement for prior approval from the Chief Counsel applies also to trial by summary court-martial and NJP for offenses tried or pending trial by state or foreign country.

3.B.5. Other Agreements

Overseas, international agreements, such as Status of Forces Agreements [SOFA], may affect the decision of whether to exercise court-martial jurisdiction.

3.B.6. Cases Involving Classified Information

Special procedures apply where evidence at a court-martial may be classified [*see*, MRE 505 for procedures relating to trial of cases involving classified information]. Early action to obtain security clearances for court personnel should be taken to avoid speedy trial issues. [*See*, Information Security Program, COMDTINST M5510.21 (series), for additional precautions regarding classified information handling.] Additional special procedures and policies apply where evidence at the court-martial may involve cryptographic systems and publications. [*See*, unit Security Manager for most current guidance.] The convening authority will notify the Chief Counsel of any case involving classified information. [*See*, section 4.A below.]

3.B.7. Major Federal Offenses

3.B.7.a. Background

Federal civil authorities may have concurrent jurisdiction with military authorities over offenses committed by military personnel that violate both federal criminal law and the UCMJ. The Attorney General and the Secretary of the Department of Transportation have agreed on guidelines for determining which authorities shall have jurisdiction to investigate and prosecute major crimes in particular cases [*see*, Appendix 3.1, MCM;

enclosure (24a)]. Coordination between the servicing legal office and the Chief Counsel should begin as soon as this issue is identified.

3.B.7.b. Limitations on Court-Martial Jurisdiction

Commanding officers receiving information indicating that Coast Guard personnel have committed a major Federal offense (including any major criminal offense committed on a Coast Guard installation) may refrain from taking action with a view towards trial by court-martial and cause further investigation by CGIS. In the event that the investigation of any such case is referred to a Federal civilian investigative agency, the cognizant U.S. Attorney, subject to the exceptions set forth below, will normally conduct any resulting prosecution.

3.B.7.c. Exceptions

(1) Where it appears Coast Guard personnel have committed several offenses, including both major federal offenses and serious but purely military offenses, Coast Guard authorities are authorized to investigate all of the suspected military offenses, and such of the civil offenses as may be practical, and to retain the accused for prosecution. Any such action should be reported immediately to the Chief Counsel, the servicing legal office, and OEGCMJ.

(2) When, following referral of a case to a civilian federal investigative agency for investigation, the cognizant U.S. Attorney declines prosecution, the investigation may be resumed by Coast Guard military authorities. The command may notify the Chief Counsel and commence court-martial proceedings if circumstances warrant.

(3) If during a federal civilian investigative agency investigation, circumstances arise that favor the exercise of jurisdiction by Coast Guard authorities, the OEGCMJ will contact the cognizant U.S. Attorney to seek approval for trial by court-martial and inform the Chief Counsel. If agreement cannot be reached at the local level, the matter shall be referred to the Chief Counsel for disposition.

3.B.7.d. Related Matters

[See, section 7.B below for delivery of personnel to federal authorities.]

3.B.8. Capital Offenses

Coast Guard special court-martial convening authorities are not authorized to refer offenses that have a potential maximum punishment of death or life imprisonment to special courts-martial without first obtaining the written consent of the OEGCMJ. *[See, RCM 201(f)(2)(A).]*

3.C. PRETRIAL RESTRAINT AND CONFINEMENT

3.C.1. General

3.C.1.a. Pretrial Restraint

Pretrial restraint is either a moral or physical restraint on a member imposed before or during disposition of offenses. No person may be ordered into restraint before trial except for probable cause. Probable cause to order pretrial restraint exists when there is a reasonable belief that:

- (1) The member committed an offense under the UCMJ; and
- (2) The restraint is required by the circumstances (generally, when the member may be a danger to the community or is a flight risk).

Pretrial restraint may not be used as a form of punishment. The restraint should not be more rigorous than the circumstances require to ensure the presence of the member restrained and to prevent foreseeable serious criminal misconduct. RCM 304 contains specific guidance regarding pretrial restraint including: types of pretrial restraint, who may order pretrial restraint, when a person may be restrained, procedures for ordering pretrial restraint, prohibition against pretrial restraint as punishment, release, and administrative restraint.

3.C.1.b. Pretrial Restraint of Reservist

(1) Pretrial restraint in the form of restriction or arrest should not be imposed on a reservist who is not on active duty. If it is necessary to confine a reservist who is not on active duty, he or she should be ordered to active duty as soon as possible thereafter.

(2) A reservist may be retained on active duty until the completion of action in a case where the offense is such as to warrant trial by court-martial. [*See*, chapter 3, Reserve Policy Manual, COMDTINST M1001.28 (series).] Retaining a reservist on active duty does not constitute pretrial restraint.

3.C.1.c. Pretrial Confinement

Pretrial confinement is physical restraint depriving a member of freedom pending disposition of charges. RCM 304 and 305 and this section shall be consulted in all cases in which a Coast Guard member is restrained or confined pending disposition of charges. No person may be ordered into pretrial confinement except for probable cause. Probable cause to order pretrial confinement exists when there is a reasonable belief that:

- (1) The member committed an offense under the UCMJ,
- (2) The member is either flight risk (*i.e.*, he or she will not appear at trial absent confinement) or likely to commit additional serious criminal misconduct (*i.e.*, future misconduct), and

- (3) Less severe forms of restraint are inadequate.

Pretrial confinement is only appropriate in contemplation of disposition at a special or general court-martial. RCM 305 contains specific guidance regarding pretrial confinement, including: who may be confined; who may order confinement; when a member may be confined; advice to the accused upon confinement; military counsel rights; who may direct release from confinement; notification and action required of the commander of the confinee; procedures for review of pretrial confinement; provision for review by the military judge; remedy for noncompliance; and exceptions to the application of the provisions of the rule. A sample letter from the member's commanding officer notifying the member of the imposition of pretrial confinement and his or her rights is in enclosure (8a). Confinees shall be afforded facilities and treatment in accordance with Article 8.F., Coast Guard Personnel Manual, COMDTINST M1000.6 (series) and applicable regulations of the confinement facility into which ordered.

3.C.1.d. Ordering Pretrial Confinement

Only a commanding officer to whose authority an officer is subject may order pretrial confinement of that officer [*see*, RCM 304(b)(1)]. Any commissioned officer may order any enlisted member into pretrial confinement [*see*, RCM 304(b)(2)]. A confinement order [Form NAVPERS 1640/4] will be used. The form is available on Jetform Filler in the OGA section and a blank form is found at enclosure (8g). Enclosures (8f) and (8h) are a sample confinement (pretrial) order and instructions for completing the confinement order.

3.C.2. Military Attorney

A member ordered into pretrial confinement must be advised he or she is entitled to consult with a military attorney. A member who requests a military attorney shall be provided with a detailed military attorney [*see*, paragraph 3.H.2 below] for the purpose of the initial review required by RCM 305(i). The member has no right to an individual military attorney of his or her own selection.

3.C.3. Commanding Officer's Review of Pretrial Confinement

3.C.3.a. Responsibilities

- (1) The commanding officer should promptly consult his or her servicing legal office;

- (2) The commanding officer must ensure that a neutral and detached officer determines within 48 hours of confinement whether probable cause exists to continue pretrial confinement; and,

- (3) The commanding officer must personally decide within 72 hours whether pretrial confinement will continue and prepare a written memorandum documenting his or her decision [*see*, RCM 305(h)(2)(C)].

3.C.3.b. Single Determination

The 48-hour determination and 72-hour review may be combined into a single determination and written memorandum completed by the commanding officer within 48 hours of confinement [*see*, RCM 305(h)(2)(A)]. A commanding officer who ordered pretrial confinement is not precluded from making the 48-hour determination if he or she is otherwise neutral and detached regarding the case. Preparation of the commanding officer's memorandum should be coordinated with the servicing legal office. A sample memorandum from the commanding officer to the initial review officer that fulfills both the 48-hour and 72-hour requirements is found in enclosure (8a).

3.C.3.c. Pretrial Restriction Tantamount to Confinement

Pretrial confinement includes pretrial restriction that is tantamount to confinement. Pretrial restriction is tantamount to confinement when the restraints on the member's liberty and freedom of movement so closely resemble confinement that their effect upon the accused is the practical equivalent of confinement. The actual nature of the restraint imposed, and not the characterization of it by the officer imposing it, will be the controlling factor in distinguishing between pretrial restriction and pretrial restriction tantamount to confinement.

3.C.4. Review of Pretrial Confinement by Initial Review Officer [IRO]

3.C.4.a. General

Under RCM 305, a review of the adequacy of probable cause to believe a member in pretrial confinement committed an offense, the necessity for continued pretrial confinement, and the conditions of confinement, must be conducted by a neutral and detached officer within 7 days of the imposition of confinement.

3.C.4.b. Designating IROs

Each OEGCMJ having a DoD military correctional facility located within his or her geographic area of responsibility shall designate one or more officers of the grade of O-4 or higher to act as the IRO for purposes of RCM 305(i)(2). Officers designated as IRO should be neutral and detached, should be selected for their maturity and experience, and, if practicable, should have had command experience. The OEGCMJ shall authorize each IRO to approve continued confinement or order the immediate release of pretrial confinees whose cases are referred to him or her for initial review.

3.C.4.c. Using the DoD Confinement Facility IRO

The OEGCMJ may authorize and accept the RCM 305 initial review conducted by a duly designated IRO assigned to the confinement facility. Most DoD confinement facilities have permanently assigned IROs and will conduct an RCM 305 review of the pretrial confinement order independent of a Coast Guard review.

3.C.4.d. Procedure

(1) After a member is ordered into pretrial confinement, the member's commanding officer shall prepare a memorandum in accordance with RCM 305(h)(2)(C). This memorandum shall be forwarded, by the most expeditious means, to the appropriate servicing legal office. A copy of the memorandum shall be forwarded to the military attorney assigned to represent the member at the IRO hearing. In addition to the information specifically required by RCM 305(h)(2) the commanding officer shall include in the memorandum any other information necessary for the IRO to make a complete and informed review of the commanding officer's confinement decision.

(2) The servicing legal office shall promptly pass the commanding officer's confinement memorandum to the IRO appointed to review the confinement decision.

(3) Upon receipt of the commanding officer's confinement memorandum, and in any event within 7 calendar days of the imposition of confinement, the IRO shall review the memorandum submitted by the accused's commanding officer, ensure the accused is notified of his rights [see, enclosure (8c)] and may also:

(a) Consider additional written matters submitted by the accused; or

(b) Hold either a personal or telephonic interview with the accused and the accused's attorney, if any, at which a representative of the accused's command may also appear, the purpose of which is to hear statements made by either or both parties regarding the continued pretrial confinement of the accused.

(4) The personal or telephonic interview should be informal and non-adversarial in nature. With the exception of Military Rules of Evidence [MRE], Section V (Privileges) and MRE 302 and 305, the Military Rules of Evidence shall not apply to the matters considered. An Initial Review Procedure Guide and an acknowledgment of rights form can be found in enclosures (8b) and (8c). Enclosure (8d) is a suggested format for a record of the proceeding.

(5) RCM 305 authorizes the IRO, for good cause, to extend the time limit for completion of the initial review to 10 days after the imposition of pretrial confinement.

(6) If the necessity for pretrial confinement is not proved by a preponderance of the evidence, the IRO shall promptly order the accused's release and advise the confinement facility and the command ordering the accused into confinement. That command may thereafter impose any form of pretrial restraint, other than confinement, deemed necessary in accordance with the provisions of RCM 304.

(7) The IRO shall also review the conditions of the accused's pretrial confinement. The purpose of this review is to assure that the conditions of confinement do not amount to punishment in violation of Article 13, UCMJ. Conditions that are in-

tended to punish the pretrial confinee violate Article 13, UCMJ, unless they are imposed for infractions of discipline while confined. If the IRO finds that confinement conditions violate Article 13, UCMJ, those conditions shall be brought to the attention of the commanding officer and servicing legal office for the responsible OEGCMJ. The commanding officer, in consultation with the servicing legal office, shall review those conditions and determine whether they violate Article 13, UCMJ. Upon determining that the conditions violate Article 13, UCMJ the commanding officer shall correct them, move the accused to a facility where such violations do not exist, or release the accused from pretrial confinement.

(8) Promptly after the conclusion of the informal hearing the IRO shall determine whether the accused should remain in confinement. The decision to release the member or continue confinement shall be reduced to a written memorandum and include the IRO's conclusions, including the factual findings on which they are based. Enclosure (8e) contains a sample format for the IRO's written decision. A copy of the decision memorandum shall be promptly provided to the accused, the command, and servicing legal office for the responsible OEGCMJ. The original memorandum and all documents considered by the IRO shall be delivered to the command ordering the accused into pretrial confinement where they shall be maintained until trial counsel is assigned and takes possession of the documents.

(9) Once ordered released by the IRO, the accused may be returned to confinement only as provided by RCM 305(l). If returned to confinement, the provisions of RCM 305 and this section apply anew.

(10) The decision of the IRO is final except as provided by RCM 305(j). If release from confinement is denied, however, the accused may later petition the IRO for a new consideration of the case. Such a petition must be based on new circumstances that have arisen since the initial determination was made or on new information available concerning the legality or appropriateness of confinement. The IRO may hold a new hearing.

(11) In the rare case where the IRO to whom the OEGCMJ assigns a case is not neutral and detached with respect to the order into confinement, he or she shall promptly advise the OEGCMJ, who shall assign the case to another IRO.

(12) Any OEGCMJ is authorized to empower any IRO of the military service operating a confinement facility in which a Coast Guard member is in pretrial confinement to release a Coast Guard pretrial confinee on the terms of the regulations applicable to the pretrial confinement review system of that service. Such decision if neutral and detached and in accordance with RCM 305 satisfies the requirements of RCM 305 and this section.

(13) When Commandant (G-WPM) has authorized pretrial confinement in a civilian facility pursuant to Article 8.F.4.C., Coast Guard Personnel Manual, COMDTINST M1000.6 (series), that authorization shall direct either the District or MLC Commander within whose geographical area of responsibility the civilian facility is lo-

cated, to provide for review by an IRO in the same manner as prescribed herein for members confined in military confinement facilities.

(14) The OEGCMJ may, at the request of a command within his or her area of responsibility, make available a neutral and detached review officer to hold a hearing in the case of an accused prior to any initial order into pretrial confinement. In that case the reviewing officer shall make the initial determination as to the appropriateness of pretrial confinement, and there need not be an additional reviewing officer's hearing except as provided in subparagraphs 3.C.4.(9)-(10).

(15) This section does not apply to cases of Coast Guard members assigned to units of another military service who are placed in pretrial confinement by an officer of that service. The pretrial confinement review program of the military service to which the accused is assigned shall apply. It is important to note that while a member may be ordered to perform duties with another service he or she may actually be assigned to a Coast Guard commander and, in that case, the Coast Guard commander is responsible for executing the provisions of this section.

3.D. PREPARATION AND FORWARDING OF CHARGES

3.D.1. Preparation of Charge Sheet

Proper preparation of the charge sheet (Form DD-458) is the foundation of each trial and describes in precise terms the crime with which an accused is charged and must defend against and also the crime that the government must prove. [See, RCM 307.] Form DD-458 is available on the standard workstation. The servicing legal office should be consulted prior to preparing a charge sheet. Preferral of charges (*i.e.*, signing block 11.d. of the charge sheet) has critical legal ramifications because it may constitute the start of time for speedy trial purposes. *Charges shall not be signed and sworn* (block 11.d.) *without prior consultation with the servicing legal office*. Failure to comply with the procedural requirements for preferral and notice of charges under RCMs 307, 308, and 707 may preclude military justice action, if speedy trial provisions are violated. A blank charge sheet is found at enclosure (10a). Appendix 4, MCM and enclosure (10b) contains a sample charge sheet. Enclosure (10c) contains detailed instructions for the preparation of the charge sheet. Errors in the charge sheet may be corrected in accordance with RCM 603. The officer making corrections on the charge sheet should initial them. When charges are recommended as a result of an administrative investigation under the Administrative Investigations Manual, COMDTINST M5830.1 (series), a draft charge sheet (not signed and sworn) may be submitted as an enclosure to an investigative report.

3.D.2. Forwarding of Charges

3.D.2.a. Special and Summary Court-Martial Cases

When a commanding officer taking action on charges deems trial by special or summary court-martial appropriate, but is not authorized to convene the court-martial, the charges and accompanying paperwork shall be forwarded to the next superior in the chain of command authorized to convene the type of court-martial deemed appropriate. In the case of commanding officers of headquarters units, the charges and accompanying paperwork will be forwarded to the OEGCMJ. [*See*, subparagraph 3.A.3.b(2) above.]

3.D.2.b. General Courts-Martial Cases

When a commanding officer taking action on an investigation in compliance with the provisions of Article 32, UCMJ, deems trial by general court-martial to be appropriate, but is not authorized to convene such court-martial or finds the convening of such court-martial impracticable, the charges and accompanying paperwork will be forwarded to the OEGCMJ, along with the commanding officer's recommendation.

3.D.2.c. Forwarding with Disposition Recommendation

A commanding officer may always forward charges and accompanying paperwork to the next superior in the chain of command with a recommendation for disposition and an explanation why the matter is forwarded for disposition. [*See*, RCM 401(c)(2).] This may be done, for example, by a special court-martial convening authority who believes that a charge(s) should be investigated at an Article 32, UCMJ investigation and, after consulting with the servicing legal office and the superior commander, believes the superior commanding officer has more resources with which to comply with the requirements of Article 32, UCMJ and RCM 405.

3.D.3. Disposition of Investigations when a Member has Transferred

3.D.3.a. Investigating Command

When a member transfers from a command prior to the completion of an investigation into matters that may form the basis for charges against that member under the UCMJ, or, a command obtains information that a member, while previously attached to the command, committed acts that may form the basis for charges against that member under the UCMJ, the command from which the member has transferred retains responsibility to determine if an investigation is warranted, and if so, promptly complete an investigation of the matter.

3.D.3.b. Prosecutorial Discretion

Upon completion of an investigation, the commanding officer of the investigating command should determine an appropriate disposition of the matter. In making this determination, the matter should be discussed with the servicing legal office. The commanding officer may forward the matter with a recommendation for disposition to

another appropriate convening authority or to the current command of the member. The recommended disposition may be no further action, further investigation by another command, administrative action, NJP, or court-martial. If empowered, the commanding officer of the investigating command may opt to convene a court-martial. A properly constituted court-martial may try any member subject to the UCMJ, even if the accused is not under the command of the convening authority so long as the member is properly ordered to report before the court-martial. Factors that a convening authority may consider in deciding whether to convene a court-martial of a member not currently under the command of the convening authority include, but are not limited to:

- (1) The effect upon discipline at that command;
- (2) The effect upon operations;
- (3) Location of parties, evidence and witnesses; and
- (4) Costs.

Consultation between a convening authority not having the member in his or her command and the current commanding officer of the member is essential to ensure all factors are properly considered and to ensure administrative and logistical support. Lack of such consultation, while unwise, will not deprive a properly constituted court-martial of jurisdiction.

3.D.3.c. Forwarding Investigation to Another Command

The investigating command may take the following actions if the commanding officer decides the matter should be disposed of by another command:

(1) Forward the investigation (e. g., CG-4608 (Report of Investigation) or CG-4910 (Report of Offense and Disposition)), via his or her OEGCMJ and the receiving command's OEGCMJ, to the receiving command (typically, the commanding officer or officer-in-charge of the member who was the subject of the investigation). If the investigating command and the receiving command have the same OEGCMJ, the investigation shall be forwarded via that officer.

(2) Include with the investigation a recommended disposition of the matter, the reason for the recommended disposition, and the reason why the investigating command forwarded the investigation.

(3) Include, unless clearly unwarranted, *draft and unsigned* proposed charges for use by the OEGCMJ or the receiving command. Draft charges will focus the receiving command upon the relevant issues of the case. Charges should not be preferred (signed or sworn to) without consulting the servicing legal office. Charges shall not be preferred when an investigating command chooses to forward the investigation unless referral is coordinated with the receiving command. Referral of charges has critical legal ramifications because it may constitute the start of time for speedy trial purposes. [See, RCM 707.]

3.D.3.d. Action by Receiving Command

When a command receives an investigation and draft charges concerning an attached member, the receiving command will review and analyze the investigation and draft charges to determine appropriate disposition. The receiving command may elect to do nothing, take appropriate administrative action, impose NJP or, if empowered, convene a court-martial. The command should consult with its servicing legal office to determine appropriate disposition. Consultation with the investigating command is strongly recommended. Upon determination of an appropriate disposition, the receiving command shall report that determination to its servicing legal office and the reasons for that determination.

3.E. ORDER TO ACTIVE DUTY OF A RESERVIST

3.E.1. Order to Active Duty for Pretrial Investigation under Article 32, UCMJ

If charges against a reservist not on active duty are to be submitted to an Article 32, UCMJ pretrial investigation, the reservist will be ordered to active duty for the investigation. The OEGCMJ who convenes, or approves the convening of the Article 32, UCMJ pretrial investigation, shall issue any necessary recall orders. The reservist should be released from active duty within one working day of the close of the taking of evidence. To minimize the disruption on civilian life and employment, a reservist may be released from active duty during any extended adjournment and recalled when the proceedings reconvene.

3.E.2. Reservist Ordered to Active Duty for Courts-Martial

An accused reservist must be on active duty to be tried by a special or general court-martial. [For summary courts-martial, *see*, paragraph 2.E.5 above.] The reservist must be recalled before arraignment [*see*, RCM 204(b)(1)]. If a reservist is not already on active duty, the convening authority shall request the cognizant OEGCMJ order the reservist to active duty. [*See*, paragraph 3.B.3.c above.] Such an order must be approved by Commandant (G-WTR) if confinement is to be an authorized punishment. To minimize the disruption on civilian life and employment, a reservist may be released from active duty during any extended adjournment and recalled when the proceedings reconvene. A reservist ordered to active duty may be retained on active duty to serve any adjudged confinement or other restriction on liberty if the order to active duty was approved in accordance with Article 2(d)(5), UCMJ, but such member may not be retained on active duty after service of the confinement or other restriction on liberty. [*See*, RCM 1003(c)(3)] All punishments remaining unserved at the time the reservist is released from active duty may be carried over to subsequent periods of inactive-duty training or active duty.

3.E.3. Procedure

An order to active duty under this chapter will be issued only by an OEGCMJ. [See, section 3-D, Reserve Policy Manual, COMDTINST M1001.28 (series).]

3.F. PRETRIAL INVESTIGATIONS UNDER ARTICLE 32, UCMJ

3.F.1. General

Prior to referring a case to a general court-martial an investigation must be conducted to inquire into the truth of the matters set forth in the charges, the form of the charges, and the recommended disposition of the charges. [See, RCM 405.]

3.F.2. Who May Direct a Pretrial Investigation

When in receipt of charges that may warrant trial by general court-martial, a commanding officer exercising summary or special court-martial jurisdiction may order an Article 32, UCMJ pretrial investigation, or may request the OEGCMJ over his or her command to order a pretrial investigation under Article 32, UCMJ, and RCM 405. [See, RCM 403 and 404.] When an OEGCMJ over a command from which charges originate receives a request for an investigation of those charges, he or she may order a pretrial investigation in accordance with the provisions of RCM 405 after which additional action under RCM 407 may be taken, as appropriate. An OEGCMJ is not required to conduct an investigation under Article 32, UCMJ when matters are referred to him or her for that purpose. The convening of an Article 32, UCMJ investigation is solely a matter within the discretion of the convening authority and, in some cases, other forum(s) for determining appropriate action might be determined more appropriate.

3.F.3. Investigating Officer

The officer convening the pretrial investigation may request assistance from Commandant (G-LPD) in identifying a law specialist available to serve as an Article 32, UCMJ investigating officer. Requests shall be made by submitting a letter or message request to Commandant (G-LPD), copy to Commandant (G-LMJ). The request shall contain the following information:

- a. Case name;
- b. Tentative convening date;
- c. Estimated duration of the investigation;
- d. General nature of the charge(s);
- e. Name of any attorney, if assigned;
- f. Whether the accused is in pretrial confinement; and,

- g. The date charges were preferred, if at all.

3.F.4. Reporter

A reporter will not be detailed to an investigation under Article 32, UCMJ unless the OEGCMJ over the accused so authorizes in unusual or complex cases. Any request that a recorder be detailed to the investigation will be forwarded to the convening authority for a decision.

3.F.5. Procedure

Enclosure (12a) is an Article 32, UCMJ procedural guide. A sample IO report in both letter and Form DD-457 format are located at enclosures (12b) and (12c), respectively. A blank Form DD-457 can be obtained from Jet Form Filler or can be found at enclosure (12d). A sample IO letter to the accused in preparation for the hearing is found at enclosure (12e). A suggested script for an Article 32, UCMJ hearing is found at enclosure (12f). The most current versions of the procedural guide and script are posted on the Commandant (G-LMJ) web page.

3.F.6. Claims of Privilege at Investigations

3.F.6.a. General

Military Rules of Evidence governing privileges are found in Part III, Section V, MCM [*see*, MRE 501-513]. These privileges include attorney-client communications (MRE 502), communications to clergy (MRE 503), husband-wife communications (MRE 504), classified information (if disclosure would be detrimental to the national security) (MRE 505), other government information (if disclosure would be detrimental to the national security) (MRE 506), identity of informant (MRE 507), disclosure of political vote (MRE 508), deliberations of courts and juries (MRE 509), and a limited psychotherapist-patient privilege (MRE 513).

3.F.6.b. Mishap Investigations

Information sought or obtained from a MISHAP investigation may be privileged depending on whether the mishap report is classified as a Limited Use Report or a General Use Report. Enclosure (2) to the Safety and Environmental Health Manual, COMDTINST M5100.47 (series), provides policy regarding use of information from MISHAP investigations.

(1) Limited Use Reports

(a) With the exception of factual information, Limited Use Reports are privileged from disclosure in their entirety;

(b) In accordance with the Safety and Environmental Health Manual, the decision to release any information from a Limited Use Report, including

factual information obtained therefrom, requires the express consent of Commandant (G-WK), who will consult with the Chief Counsel. In military justice proceedings, requests for release of any information from a Limited Use Report, including factual information contained therein, shall be sent to Commandant (G-WK), via Commandant (G-LMJ). This request shall specify the proceeding, the specific information sought from or anticipated to be contained in the Limited Use Report, why it is essential to use such information in the proceeding, why such information cannot be obtained through other means, and why release of such information would promote the interests of justice. If the issue of discovery or disclosure of a Limited Use Report arises in a court-martial, close coordination with Commandant (G-LMJ) and Commandant (G-WK) is required prior to any release of such information or assertion of a privilege under MRE 506.

(c) Nothing in this subparagraph should be interpreted to prohibit an investigating officer from obtaining the evidence contained in the Limited Use Report from the same sources that provided the evidence to the MISHAP investigation. The privilege with respect to Limited Use Reports does not run with the information; only the Report itself is privileged. Therefore, should a witness or party before the MISHAP investigation provide evidence at the Article 32 investigation or provide evidence or a statement in any other administrative or military justice proceeding, nothing in this subparagraph would bar the investigating officer from considering that evidence or statement.

(2) General Use Reports

General Use Reports are not privileged from disclosure.

3.F.7. Use of Investigative Material

In order to obtain necessary information on preliminary issues, such as which witnesses to question and initial determinations on witness and evidence availability, the investigating office may refer to investigative materials, such as a PIO report or a CGIS Report of Investigation. Such materials will not be considered in making the findings required in RCM 405(j)(2)(H) and (I) unless produced at the investigation in accordance with RCM 405(g).

3.G. REFERRAL OF CHARGES TO SPECIAL OR GENERAL COURTS-MARTIAL

3.G.1. Notification

a. After determination to refer a case to special or general court-martial, the servicing legal office of the appropriate OEGCMJ shall follow the procedures set forth in subparagraph 3.H.1.a below to obtain a military judge.

b. When charges are referred to trial by court-martial, a copy of the charge(s) and specification(s), and a copy of the convening order shall be forwarded to

the trial counsel, defense counsel, Commandant (G-L-4) and military judge detailed to the court-martial.

d. When trial is to be by general court-martial, a copy of the pretrial investigation conducted pursuant to Article 32, UCMJ, and the pretrial advice will be furnished to both trial and defense counsel at or before the time charges are referred to trial.

3.G.2. Contents of Convening Order

The text of the convening order is provided in the forms in Appendix 6, MCM, and the notes therein. For convenience in adapting the forms in Appendix 6, MCM to Coast Guard format, a sample summary court-martial and special court-martial convening order and an example of amendments to a convening order are contained in enclosures (11a) through (11d).

3.G.3. Signature of Convening Authority

The convening authority shall personally subscribe convening orders and amending orders. Subordinate officers serving in command in an “acting” capacity qualify as a convening authority [*see*, RCM 601]. If during the course of a trial, the trial is unable to proceed because the court has been reduced below a legal quorum and the convening authority is still in command but unavailable to sign an amendment to the convening order due to conducting business away from the command he or she may orally amend the convening order and confirm the amendment in writing prior to authentication of the record of trial.

3.G.4. Distribution of Convening Order

A copy of the convening order and each amending order shall be provided to each member named in the order, the military judge, and defense counsel. The original shall be provided to trial counsel.

3.H. COURT-MARTIAL PERSONNEL

3.H.1. Detailing Military Judges to Courts-Martial

The following procedures shall be followed for detailing military judges for general and special courts-martial.

3.H.1.a. Request for Detail of Military Judges to Courts-Martial

The OEGCMJ, or the convening authority, if trial counsel is on the convening authority’s staff, shall request that the Chief Trial Judge detail a military judge by submitting a letter,

e-mail, or message request to Commandant (G-L-4), copy to Commandant (G-LMJ). This request shall contain the following information:

- (1) Convening authority and type of court;
- (2) Case name;
- (3) Trial location;
- (4) Preferred trial date, and backup date if any;
- (5) Estimated trial duration;
- (6) General nature of charges or UCMJ Article numbers;
- (7) Names, telephone numbers, facsimile numbers, and email addresses of both trial and defense counsel;
- (8) State whether the accused is in pretrial confinement and date confined; and,
- (9) Speedy trial deadline under RCM 707.

3.H.1.b. Detail Pursuant to RCM 503(b)(1)

The Chief Trial Judge shall detail military judges to general and special courts-martial. During periods of unavailability due to leave or illness, the next senior general court-martial judge may detail judges. If a next senior general court-martial judge is not assigned, the Chief Counsel will designate a certified military judge to so act.

3.H.1.c. Docket Control

The Chief Trial Judge, with the assistance of Commandant (G-LPD), shall maintain the docket for all general and special court-martial military judges. The Chief Trial Judge will forward a copy of the docket monthly to Commandant (G-LMJ). The Chief Trial Judge (Commandant (G-L-4)) may establish additional procedures for docketing courts-martial.

3.H.1.d. Restrictions

(1) A part-time special court-martial military judge shall not be detailed to a special court-martial if he or she is assigned to the staff of the convening authority or the OEGCMJ over the command of the convening authority or is in the performance evaluation or reviewing chain for any participating counsel.

(2) By policy, a Coast Guard special court-martial must have a military judge detailed.

3.H.1.e. Continuances

Once detailed, the military judge has sole authority to grant continuances.

3.H.1.f. Message Traffic

(1) Message traffic originated by the military judge shall include the phrase “JUDGE [*last name*] SENDS”.

(2) Message traffic addressed to the military judge shall include the phrase, “FOR JUDGE [*last name*]”.

3.H.2. Detailing Certified Defense Counsel to Special and General Courts-Martial

3.H.2.a. General

The cognizant MLC will detail Article 27(b), UCMJ certified defense counsel in accordance with their established procedures. At the time the charges are preferred, the servicing legal office should contact the cognizant MLC to arrange for detail of defense counsel. The process for obtaining detailed defense counsel will not be delayed because doing so may delay the court-martial unnecessarily. Detailed defense counsel may be a Coast Guard law specialist or a military attorney from any other DoD military service pursuant to an inter-service agreement [*see*, enclosure (24b)]. Defense counsel should not normally be detailed from the staff of the convening authority or of the OEGCMJ. Defense counsel should not normally be within the rating chain of the cognizant SJA. Any demand for detailed counsel who is not on the convening authority’s or OEGCMJ’s staff or in the rating chain of the SJA should be forwarded immediately to the convening authority for action. The accused is not entitled to be represented by more than one military attorney [*see*, RCM 506(a)]. Normally, the cognizant MLC will fund travel for any military counsel provided at government expense to the accused.

3.H.2.b. Restriction

The detailing authorities shall ensure that neither the SJA detailing trial counsel nor the trial counsel are in the rating chain of the detailed defense counsel.

3.H.2.c. Excuse or Withdrawal of Detailed Defense Counsel

A detailed defense counsel may be excused only with the express consent of the accused, or by a military judge upon application for withdrawal by the detailed defense counsel for good cause shown. [*See*, RCM 506(c).]

3.H.3. Obtaining Individual Military Counsel [IMC]

3.H.3.a. General

Article 38, UCMJ provides that an accused has a right to be represented before a general or special court-martial or at an investigation under Article 32, UCMJ, by military counsel of his own selection if that counsel is reasonably available. Counsel serving in the Coast Guard or Department of the Navy are “reasonably available” to represent a Coast

Guard accused unless they are unavailable within the meaning of RCM 506, this paragraph or under regulations of the Secretary of the Navy [*see*, JAGMAN Section 0131].

3.H.3.b. Categorical Determinations of Non-Availability

(1) Persons Deemed “Not Reasonably Available”

Under the authority of RCM 506(b)(1) the following Coast Guard personnel, in addition to those listed in RCM 506(b)(1) are, by regulation, deemed “not reasonably available” because of the nature of their assignments:

- (a) Persons on terminal leave or not on active duty;
- (b) Persons assigned to an out-of-specialty or non-legal billet;
- (c) Persons assigned as a full-time military judge or active as a part-time military judge;
- (d) Persons assigned to Coast Guard appellate advocacy duties (either government or defense) and their supervisors;
- (e) Persons assigned to an organization, activity, or agency other than any of the armed forces of the United States; and,
- (f) Persons assigned to duty at the departmental level or higher.

(2) Exception

(a) Existing Attorney-Client Relationship

If an attorney in one of the categories in subparagraph 3.H.3.b(1) above has an existing attorney-client relationship with the accused regarding a charged offense, the attorney’s availability must be determined under the procedures in subparagraph 3.H.3.c below. [*see*, RCM 506(b)(2)].

(b) Defined

An attorney-client relationship exists between the accused and requested counsel when it has been properly authorized by the responsible authority, the requested counsel and the accused have had a privileged conversation relating to a charge pending before a proceeding (*e.g.*, GCM, SPCM, Article 32 investigation), and the requested counsel has engaged in active pretrial preparation and strategy with regard to that charge. A counsel will be deemed to have engaged in active pretrial preparation and strategy if that counsel has taken action on the case that materially limits the range of options available to the accused at said proceeding. Examples of active pretrial preparation include, but are not limited to: advising the accused to waive or assert a legal right, other than simply asserting the right to remain silent, where the accused followed such advice by waiving or asserting that right; representing the accused at an Article 32 investigation dealing with the same subject matter as any charge pending before the proceeding; submitting evidence for testing or analysis; offering a pretrial agreement on behalf of the accused;

submitting a request for an administrative discharge in lieu of trial on behalf of the accused; or interviewing witnesses relative to any charge pending before the proceeding.

(c) Relationships That Do Not Qualify for Exception to Categorical Determination of “Not Reasonably Available”

If the attorney-client relationship were created solely to provide advice to a member pursuant to paragraph 1.C.2., (*U.S. v. Booker*), solely for representation of the accused at a pretrial confinement IRO hearing pursuant to RCM 305(f), or to represent the accused as an appellate counsel pursuant to Article 70, UCMJ [*see*, paragraph 5.C.5 below], this exception does not apply. Contact with a prospective IMC to discuss the IMC’s availability does not create an “existing” attorney-client relationship and the exception does not apply. Simply discussing the legal and factual issues in the case with the accused, or conducting legal research concerning an issue in the case does not constitute active pretrial preparation and strategy and the exception does not apply.

3.H.3.c. Submitting Individual Military Counsel [IMC] Requests

Requests for IMC shall be submitted to the convening authority via the trial counsel and the convening authority’s SJA. The request shall include any matters to be considered in favor of providing the requested counsel. If the accused has an existing attorney-client relationship with the requested attorney regarding a charged offense, the request shall include the general circumstances and authority under which the relationship was established, the approximate dates of the relationship, and the specific charged offenses that were the subject of the relationship, without revealing privileged information. If the requested attorney is one of those “not reasonably available” under subparagraph 3.H.3.b(1) above because of the nature of that attorney’s current assignment, the request shall state whether the attorney is expected to be available at the time of the proceedings, and the reasons therefor.

3.H.3.d. Action on Requests for Attorneys Categorically Deemed “Not Reasonably Available”

If an accused before a general or special court-martial requests an IMC who is deemed “not reasonably available” under subparagraph 3.H.3.b(1) above and the request does not assert an exception under subparagraph 3.H.3.b(2) above the convening authority shall deny the request and state the reasons therefor, citing this section and RCM 506(b)(1).

3.H.3.e. Action on Other Cases

In other cases, if an accused before a general or special court-martial requests an IMC, the convening authority shall forward the request to the commander or head of the organization, activity, or agency to which the requested person is assigned. For attorneys assigned to duty with another armed service, the procedures of that service shall be used. For attorneys assigned to Coast Guard commands:

(1) The request shall be forwarded to the SJA for the requested IMC’s commanding officer (*i.e.*, IMC’s SJA). The request should be forwarded by message, fax,

overnight mail, or similarly expeditious means, with copies to the cognizant MLC [*see*, paragraph 3.H.2 above] (the “detailing authority”), the military judge (if detailed), and other appropriate commands. The IMC’s SJA shall determine whether the requested IMC is reasonably available, using the criteria in subparagraph 3.H.3.f below.

(2) If the IMC’s SJA concludes that the requested IMC is not reasonably available, he or she shall forward the request to the attorney’s commanding officer who shall determine the matter. To provide a basis for review, all determinations that a requested IMC is not reasonably available shall be in writing, shall contain the reasons therefor, and shall be provided to the accused or counsel via the convening authority.

(3) When counsel is determined to be available, the IMC’s SJA shall notify the detailing authority, who shall detail the counsel, and may excuse previously detailed counsel, in accordance with RCM 506(b)(3).

3.H.3.f. Factors for Determining Availability

In determining the availability of counsel to serve as IMC, all relevant factors may be considered, including, but not limited to, the following:

(1) The existence of an attorney-client relationship between the accused and the requested IMC regarding a charged offense. If the attorney was detailed as counsel to the accused, *see* RCM 505(d)(2)(B).

(2) Any disqualifying factors relating to the requested IMC’s duty assignment; any previous involvement with the case as an investigating officer or a witness; or assignment to the same rating chain of the trial counsel or cognizant SJA (rating chain disqualification’s ordinarily may be remedied with an express knowing waiver by the accused) [*see*, subparagraph 3.H.2.b above].

(3) The requested IMC’s duty, position, responsibilities, and workload.

(4) Any ethical considerations that might prohibit or limit the participation of the requested IMC.

(5) Time and distance factors (*e.g.*, travel to and from the sites, anticipated date, length of the trial or hearing, the nature and complexity of the charges and legal issues involved in the case, associated costs and availability of funding). Availability of funding may be determined by consultation with the detailing authority, or arrangements may be made for funding from other sources.

(6) The effect of requested IMC’s absence on the proper representation of the requested IMC’s other clients.

(7) Overall impact of the requested IMC's absence on the ability of the requested IMC's office to perform its required mission (e.g., personnel strength, scheduled departures or leaves, and unit training and mission requirements).

(8) The detailing authorities shall ensure that neither the SJA detailing trial counsel nor the trial counsel are in the rating chain of the IMC. The accused may waive this protection.

3.H.3.g. Review of Determinations that Requested IMC is Not Reasonably Available

(1) When a request for IMC is denied in accordance with subparagraph 3.H.3.d above an accused has no right to review of this decision except by motion before a court-martial.

(2) Where a determination that an IMC assigned to duty with another service is not reasonably available is based on that service's determination of unavailability, any appeal must be submitted in accordance with that service's regulations.

(3) In other cases, an accused may, upon timely request, obtain review for abuse of discretion of a determination of unavailability by the OEGCMJ over the command making such determination. If the OEGCMJ or higher authority made the determination, review shall be by the next higher authority in the chain of command. An accused is not entitled to such review if the reviewing authority under this subparagraph is Commandant (G-C).

(4) Any request for review of a determination of unavailability must be submitted promptly. In the absence of circumstances justifying a longer delay, review may be denied as untimely if the request is submitted more than (3) working days after the accused's receipt of the adverse determination.

(5) Requests for review of determination that requested IMC is not reasonably available shall be made by message or letter to the appropriate authority, with copies to the other involved commands. The request for review shall contain a copy of the determination and articulate why such determination was an abuse of discretion.

3.H.3.h. Excuse or Withdrawal of IMC

Like detailed defense counsel, an approved IMC may be excused only with the express consent of the accused, or by a military judge upon application for withdrawal by the IMC for good cause shown. [See, RCM 506(c).]

3.H.4. Detail of Trial Counsel to Courts-Martial

3.H.4.a. General

The SJA for the OEGCMJ shall detail trial counsel for general and special courts-martial. Such an SJA, having a principal assistant law specialist on his staff, may delegate this authority to his or her principal assistant. At least one of the trial counsel detailed to a general court martial must be certified in accordance with Article 27(b), UCMJ. The detailing authorities may also detail assistant trial counsel to general and special courts-martial. Assistant trial counsel need not be certified in accordance with Article 27(b), UCMJ. Although not required by Article 27(c), UCMJ, at least one of the trial counsel detailed to a special court-martial should normally have the same qualifications under Article 27(c), UCMJ, as the detailed defense counsel.

3.H.4.b. Restriction

The SJA assigned to an OEGCMJ shall not be detailed as trial counsel to a court-martial convened by a unit within the geographical limits of the command to which he or she is assigned.

3.H.4.c. Trial Counsel Preparation

A procedural rights checklist found at enclosure (18i) may assist a trial counsel prepare for the court-martial process. The checklist addresses pretrial, trial, and post-trial procedures. An updated copy of the checklist will be maintained on the Office of Military Justice website.

3.H.5. Court Reporters, Interpreters, Bailiffs, and Court Security Personnel

3.H.5.a. Appointment

Appointment of reporters, interpreters, bailiffs, and court security personnel by the convening authority or authority directing the proceedings may be effected personally, or, at his or her discretion by any other person. Such appointment may be oral or in writing.

3.H.5.b. Disqualification

Reporters, interpreters, bailiffs, and court security personnel shall be disqualified as provided in RCM 502(e)(2).

3.H.5.c. Duties

The duties of reporters, interpreters, bailiffs, and court security personnel shall be as prescribed in RCM 502(e)(3), other applicable provisions of this Manual, and by the military judge or trial counsel.

3.H.5.d. Court Reporters

(1) Generally

In all special and general courts-martial, the convening authority shall detail a qualified court reporter. Court reporters detailed to those courts-martial shall record verbatim, by shorthand, mechanical, electronic or other means all the proceedings of the court. A reporter may also be detailed, by the appropriate official, to a summary court-martial, a deposition, and an investigation under Article 32, UCMJ [*see*, section 3.F above].

(2) Court Reporter Qualification and Duty

(a) The term “qualified court reporter” as used in this chapter means a professional civilian court reporter from a commercial court reporting service or a yeoman with the 02 or 08 Coast Guard qualification code [*see*, Enlisted Qualifications Manual, COMDTINST M1414.8 (series)], or any other person having equivalent qualifications. A yeoman’s eligibility for the 02-qualification code attained through an on-the-job or other recognized training program must be certified in writing by the individual’s district or staff legal officer.

(b) Detail of a reporter under this chapter is a full time duty until the record of the proceedings is complete. No other duties shall be assigned to the reporter that might interfere with his or her preparation of the record of trial or investigation in a timely fashion.

(c) Under the supervision and at the direction of the trial counsel of a general or special court-martial, the reporter shall prepare a record of trial [ROT], using Appendix 14, MCM as a guide [*see also*, section 5.A below]. The court reporter shall preserve the complete shorthand notes or mechanical record of the proceedings under the supervision of the trial counsel in accordance with section. Additional clerical assistants may be detailed when necessary.] Enclosure (16j) is a guide designed to assist civilian court reporters, who might not be familiar with courts-martial procedures and terminology, in carrying out their duties. [*See*, RCM 501(e).

3.H.5.e. Interpreters

In each court-martial case, Article 32, UCMJ investigation, or deposition the convening authority or the officer directing such proceeding shall appoint, when necessary, an interpreter for the proceeding. Interpreters shall be qualified as set forth in MRE 604.

3.H.5.f. Bailiffs and Court Security Personnel

The convening authority shall appoint a bailiff for every general and special court-martial. The bailiff shall be present at every court-martial session unless the military judge excuses his or her presence. The trial counsel shall brief the bailiff as to his or her duties well in advance of trial [*see*, Guide For Bailiffs, enclosure (16i)]. Trial counsel shall make an initial security risk assessment and determine whether to take special security precautions. Assistance may be obtained from CGIS. Trial counsel will notify the convening authority, military judge and defense counsel before trial of any special secu-

ity arrangements deemed necessary. The convening authority will appoint court security personnel as necessary. If special security arrangements are deemed necessary, the trial counsel should coordinate the arrangements with the convening authority, bailiff, court security personnel and CGIS.

3.H.5.g. Source and Expenses

The services of reporters or interpreters for duty to a general or special court-martial, an investigation under Article 32, UCMJ, or at the taking of a deposition may be procured locally. The expenses incidental to a court-martial or Article 32 investigation are normally the responsibility of the convening authority. *See*, 3.N.1 below.

3.H.6. Members

3.H.6.a. Changes in Membership Before Court has been Assembled

A general court-martial or special court-martial convening authority may delegate his or her authority to excuse members under RCM 505(c)(1) to a principal assistant or to the SJA.

3.H.6.b. Changes in Membership After Court has been Assembled

Article 29(a), UCMJ, and RCM 505(c)(2) provide that no member of a general or special court-martial may be absent or excused after a court-martial has been assembled except for physical disability, as a result of a challenge, or by order of the convening authority for good cause.

3.H.6.c. Court-Martial Member Questionnaire

RCM 912(a)(1) permits the use of a court-martial member questionnaire to facilitate *voir dire*. As a matter of policy and practice, absent good cause, trial counsel should use enclosure (16g) in every general and special court-martial. Court members should be requested by the SJA's staff to complete the questionnaire and return it to the SJA's office at least five days before the trial date.

3.I. ADMINISTRATIVE PRETRIAL MATTERS

3.I.1. Uniform for Trial

Except for the military judge, all military personnel required to be present at sessions of trial attended by members of the court shall wear the uniform prescribed by the military judge. The military judge shall wear a judicial robe.

3.I.2. Court Room and Trial Facilities

The military judge may refuse to commence trial if the site, facilities, and security provided are not suitable. Among the factors that should be taken into account in determining the appropriateness of the site and facilities of the courtroom are:

- a. Freedom from noise or other disturbing influences;
- b. Adequacy of the bench;
- c. Adequacy of seating for the members of the court;
- c. Adequacy of space for spectators;
- d. Adequacy of lighting and ventilation;
- e. Adequacy of counsel tables;
- f. Adequacy of recording equipment;
- g. Adequacy of space for the deliberation of court members;
- h. Adequacy of space for witnesses waiting to testify;
- i. Adequacy of establishing and maintaining security; and
- j. Any other factors that create or detract from an appropriate judicial forum.

3.J. PRETRIAL AGREEMENTS

3.J.1. General

The authority of Coast Guard convening authorities to enter into pretrial agreements shall be exercised in accordance with RCM 705 and the discussion thereunder, and the provisions of this section. Enclosure (16f), a sample agreement, must be modified as appropriate to include all of the agreements made between an accused and the convening authority. No matters “understood” between the parties should be omitted from the written agreement.

3.J.2. Pretrial Agreement Negotiations and Content

3.J.2.a. Consultation with Servicing Legal Office [SJA]

Pretrial agreements may be negotiated where the potential for a significant benefit to the government by entering a pretrial agreement can be articulated. Whether to accept or reject any proposed pretrial agreement is a matter within the discretion of the parties: the accused and the convening authority. Due to the complexity and legal effects of both negotiations and the final agreement, however, Coast Guard convening authorities must consult closely with their servicing legal office [SJA] prior to and throughout the pretrial agreement negotiation process. Direct negotiations of pretrial agreements are usually

conducted primarily between the trial counsel (subject to authority from the convening authority and SJA) and the defense counsel. A thorough legal review of any proposed pretrial agreement is critical to ensure that it reflects the intent of the parties and comports with the status of the law at the time of the agreement.

3.J.2.b. Involving Other Parties

Pretrial agreements shall not normally include provisions purporting to bind persons or officials other than the accused and the convening authority. A convening authority has no authority to bind other governmental officials by a pretrial agreement unless the affected official has explicitly agreed to be so bound.

3.J.2.c. Major Federal Offenses

Appropriate consultation with the Department of Justice will take place prior to approval of a pretrial agreement in cases of major federal offenses. [See, paragraph 3.B.7 above.]

3.J.2.d. Cases Involving Classified Information

Permission from the Chief Counsel will be obtained prior to approval of a pretrial agreement in cases involving classified information. [See, section 4.A below.]

3.J.2.e. Deferral or Waiver of Automatic Forfeitures

Automatic forfeiture under Article 58b, UCMJ is a congressionally required administrative (not a courts-martial sentencing) action applicable only if a prisoner is otherwise entitled to pay. There are circumstances in which a member is convicted and sentenced to confinement and is not entitled to, or loses entitlement to military pay. Notable is the loss of entitlement to pay when a prisoner's enlistment expires while in confinement (*e.g.*, a prior extension does not become effective if the member is confined and a prisoner is precluded from reenlisting). It is important to remember this issue during any pre-trial agreement negotiations to the extent they may address Article 58b, UCMJ deferment or waiver of automatic forfeitures. [See, subparagraph 5.D.5.b below.]

3.K. AUTHORITY TO GRANT IMMUNITY FROM PROSECUTION

3.K.1. General

In certain cases involving more than one participant, the interests of justice may make it advisable to grant immunity, either transactional or testimonial, to one or more of the participants in the offense in consideration for their testifying in the investigation and/or the trial of another offender. Transactional immunity, as that term is used in this section, shall mean immunity from criminal prosecution for any offense or offenses to which the compelled testimony relates. Testimonial immunity, as that term is used in this section, shall mean immunity from the use in aid of future criminal prosecution, of testimony or other information compelled under an order to testify. Ordinarily, testimonial immunity is

all that is required to protect the right against self-incrimination and compel a witness to testify. The authority to grant either transactional or testimonial immunity to a witness is reserved to the cognizant OEGCMJ. This authority may be exercised in any case whether or not formal charges have been preferred and whether or not the matter has been referred for trial. The approval of the Attorney General of the United States on certain orders to testify may be required, as outlined below.

3.K.2. Procedure

The procedures outlined herein are in amplification of RCM 704, and the “Discussion” under that rule. The written recommendation that a certain witness be granted either transactional or testimonial immunity in consideration for testimony deemed essential to the public interest shall be forwarded to the cognizant OEGCMJ by the trial counsel in cases referred for trial, the pretrial investigating officer conducting an investigation upon preferred charges, the counsel or recorder of any other fact finding body, or the investigator when no charges have been preferred. The recommendation shall state in detail why the testimony of the witness is deemed so essential or material that the interests of justice cannot be served without the grant of immunity. The OEGCMJ shall act upon such request after referring it to his or her legal office for consideration and advice.

3.K.3. Civilian Witness, or Military Witness Liable to Prosecution in Federal Court

If a military witness is liable to prosecution for civilian federal offenses, but is willing to testify under a grant of immunity from court-martial pursuant to RCM 704, the OEGCMJ should grant such immunity only after determining that the cognizant United States Attorney is not interested in pursuing the case. Pursuant to RCM 704, if the United States Attorney believes that authorization for immunity should be sought from the Attorney General, the grant of immunity should be treated under the requirements of 18 U.S. C. §§ 6002 and 6004. If a grant of immunity to a civilian witness, or to a military witness who is liable to prosecution for civilian federal offenses, is necessary in the public interest, the approval of the Attorney General of the United States or his or her designee should be obtained prior to granting immunity by the cognizant OEGCMJ. The OEGCMJ may obtain the approval of the Attorney General in such circumstances by directing a letter to Commandant (G-LMJ) requesting assistance in obtaining a grant of immunity for the witness, and enclosing the signed grant of immunity and order to testify to be approved. The grant of immunity and order to testify should be substantially in the form set forth in enclosures (13a) through (13c). Once approved through the Department of Justice, a grant of immunity signed by the OEGCMJ extends to all federal and state actions. Requests to grant immunity must be in writing, allowing at least 3 weeks for consideration, and must contain the following information:

- a. Name, citation, or other identifying information, of the proceeding in which the order is to be used.
- b. Name of the person for whom the immunity is requested.

- c. Name of employer, company or unit with which the witness is associated.
- d. Date and place of birth, if known, of the witness.
- e. FBI number or local police number, if any, and if known.
- f. Whether any State or Federal charges are pending against the prospective witness and the nature of the charges.
- g. Whether the witness is currently incarcerated, under what conditions, and for what length of time.
- h. A brief resume of the background of the investigation or proceeding before the agency or department.
- i. A concise statement of the reasons for the request, including:
 - (1) What testimony the prospective witness is expected to give;
 - (2) How this testimony will serve the public interest;
 - (3) Whether the witness:
 - (a) Has invoked the privilege against self-incrimination; or,
 - (b) Is likely to invoke the privilege (if so, based on what information).
- j. An estimate as to whether the witness is likely to testify in the event immunity is granted.

3.K.4. Post-Testimony Procedures for Civilian Witness, or Military Witness Liable to Prosecution in Federal Court

After the witness has testified, the following information, together with a verbatim transcript of the witness' testimony, authenticated by the military judge, shall be provided to Commandant (G-LMJ) for further transmittal to the United States Department of Justice, Criminal Division, Immunity Unit:

- a. Name, citation, or other identifying information, of the proceeding in which the order was requested;
- b. Date of the examination of the witness;
- c. Name and residence address of the witness;
- d. Whether the witness invoked the privilege;
- e. Whether the immunity order was used;
- f. Whether the witness testified pursuant to the order; and,
- g. If the witness refused to comply with the order, whether contempt proceedings were instituted, or are contemplated, and the result of the contempt proceeding, if concluded.

3.K.5. Form of Grant of Immunity — Order to Testify

In any case in which a military witness is granted transactional immunity, and is not liable to prosecution in a federal district court, the OEGCMJ should execute a written grant and order to testify substantially in the form of enclosure (13a) of this Manual. In any case in which a military witness is granted testimonial immunity, the OEGCMJ should execute a written grant and order to testify substantially in the form of enclosure (13b) of this Manual. In any case in which a civilian witness is granted testimonial immunity, the OEGCMJ should execute a written grant and order to testify substantially in the form of enclosure (13c) of this Manual. The language of the written grant determines the scope of this immunity. The forms set out in enclosures (13a) through (13c) should be tailored as necessary to incorporate the terms of the grant of immunity. For example, a grant conditioned on the act of testifying only becomes effective when the witness testifies. If the witness is to be granted immunity to give information during the investigation of a matter, this must be provided for in the grant of immunity.

3.L. ASSISTANCE TO DEFENSE COUNSEL

3.L.1. General

When military defense counsel is assigned to represent a person before a court-martial or a matter preliminary to a court-martial, counsel should be supplied with the means to function effectively. These means include, but are not limited to, a work area, a consultation area in which privacy can be maintained, clerical assistance, access to a working library, transportation, and supplies and services needed to prepare the defense or perfect an appeal. At locations removed from district offices or other major military installations, some of these means will not be readily available or will be impossible to provide. Whenever possible, however, reasonable requests by defense counsel should be accommodated.

3.L.2. Defense Investigative Assistance

3.L.2.a. General

(1) The provisions of 18 U.S.C. § 3006A(e) that provide for investigative assistance at the government's expense for the defense on behalf of an indigent defendant before United States district courts, do not apply to trials by court-martial. *U.S. v. Johnson*, 22 USCMA 424, 47 CMR 402 (1973). This paragraph, however, applies the policy behind those provisions to Coast Guard courts-martial if defense counsel establishes good cause and so long as assistance is reasonably available without unduly delaying trial.

(2) While preparing a case defense counsel may for good cause request investigative assistance if necessary to provide adequate assistance of counsel.

(3) While a request for investigative assistance is made to the convening authority, few convening authorities have trained investigators under their command. Therefore, when the convening authority determines that a request for investigative assistance should be granted and agrees that the assignment of a trained investigator to defense counsel is necessary for the defense of the case, the convening authority shall so recommend to the next senior in command who has trained investigators under his or her command or to the Coast Guard Investigative Service [CGIS]. Even when good cause is shown it is not always necessary that a CGIS agent trained in investigative duties be provided. Adequate assistance can often be provided by an officer or enlisted member who is not trained in investigative duties.

(4) An individual working for an attorney in the defense of a criminal case is considered an extension of the attorney. Such individual is subject to the same restrictions as an attorney on releasing information concerning the client or the case, is subject to the attorney/client privileged relationship, and any information he or she produces is considered to be part of the “attorney work product.” Therefore, unless the client and attorney consent, information obtained by an investigator assigned to the defense counsel cannot be released to the government. This restriction precludes submission of the normal investigative report to CGIS without the approval of the defense counsel. When investigative assistance is provided, the investigator’s immediate supervisor shall be the defense counsel to whom he or she is assigned.

(5) The trial judge may review the denial of a request for investigative assistance.

3.L.2.b. Request for assistance

(1) Defense counsel shall make all requests for investigative assistance to the convening authority in writing. The request should include:

- (a) Name, duty station, etc., of accused.
- (b) Specific charges and type of court-martial.
- (c) Type of investigative assistance requested, *e. g.*, Coast Guard special agent, commissioned officer, enlisted member, etc.
- (d) Period of time assistance desired, including any travel requirements.
- (e) General nature of assistance required, *e. g.*, interview of witnesses, obtaining records, research, etc., and noting with particularity any required special skills.
- (f) A detailed showing of good cause why investigative assistance is necessary for the defense of the case.

(2) If the convening authority determines investigative assistance is not necessary for the defense of the case, he or she will deny the request. Such determination is not subject to appeal, except as provided in subparagraph 3.L.2.a above).

(3) If the convening authority determines pursuant to the provisions of this section that investigative assistance should be provided, he or she shall select a suitable individual under his or her command if available (without unduly delaying trial) and make the individual available to defense counsel. The convening authority's determination as to the qualifications of the individual assigned shall not be subject to appeal, except as provided in subparagraph 3.L.2.a above.

(4) If the convening authority does not have a suitable individual under his or her command, he or she shall refer the matter, by endorsement of the defense counsel's request, to the next senior in command who would normally be expected to have a suitable individual under his or her command. That officer shall make an independent determination as to whether, pursuant to the provisions of this section, investigative assistance shall be provided. This determination as to whether investigative assistance shall be provided, and the determination as to the qualifications of the person provided, shall not be subject to appeal, except as provided in subparagraph 3.L.2.a above. If the officer determines that investigative assistance will not be provided, he or she will so advise the defense counsel via the convening authority.

3.L.2.c. Report Required

When a CGIS agent is assigned to assist defense counsel, upon completion of the assignment he or she shall submit a report to the Commandant (G-O-CGIS), via the chain of command, containing an account of the investigative assistance provided, including any travel performed and expense involved. This report shall be subject to any restrictions imposed by defense counsel, and shall be subject to the defense counsel's prior review and approval if he or she so desires.

3.M. VICTIM AND WITNESS PROTECTION

3.M.1. Concern for Victims and Witnesses

This section provides guidance for the treatment of victims and witnesses. Increased nationwide concern for the impact of the criminal justice system on victims and witnesses led to enactment of the Victim and Witness Protection Act of 1982 (Public Law 97-291), 18 U.S.C. §§ 1512-5, 3663-4. Under that Act the Attorney General of the United States was tasked with issuing guidelines for protection and improved treatment of victims and witnesses. The Department of Justice Guidelines for Victim and Witness Assistance were issued on 9 July 1983. The Victim-Witness Assistance Program [VWAP] Manual, once effective, will supplement this section and where inconsistent with this section, will control. The VWAP Manual should be consulted for the details of the Coast Guard's implementation of the Victim and Witness Protection Act.

3.M.2. Applicability and Scope

a. The procedures of this section apply to the victims and witnesses of offenses that may involve Coast Guard proceedings under the UCMJ. They also apply to the victims of crimes under the jurisdiction of state or other federal authorities during any portion of the investigation or trial conducted primarily by Coast Guard personnel.

b. This section provides only internal guidance to protect and assist crime victims and witnesses, and to enhance their roles in the criminal justice process without infringing on the constitutional rights of the accused. It is not intended to and does not create any rights, substantive or procedural, enforceable at law by any victim, witness, suspect, accused, or other person in any matter, civil or criminal. No limitations are hereby placed on the lawful prerogatives of the Coast Guard or its officials.

c. Humanitarian and practical concerns for victims of offenses under the UCMJ and for witnesses participating in criminal investigations or proceedings within the responsibility of the Coast Guard require consideration of the needs of these persons by authorities responsible for the effective functioning of the system. The physical, psychological and financial hardships suffered by victims of crimes should be mitigated within the means of available resources and in accordance with applicable law, and all reasonable efforts made to foster cooperation by victims and witnesses. When an investigation or prosecution is within the primary responsibility of another federal agency or military service, appropriate consultation with such agency shall be undertaken to ensure application of the provisions of this section.

3.M.3. Definitions

3.M.3.a. Victim

A victim is a person who suffers direct or threatened physical, emotional, or financial harm as the result of an offense. The term “victim” also includes the immediate family or guardian of a minor who is a victim and the immediate family of a homicide victim. No other person or entity is included within this term. The U.S. Government may not be classified as a victim under this definition. Nothing in this section precludes classification of the Coast Guard as a victim under applicable federal law or under the implementing rules of other federal agencies.

3.M.3.b. Witness

For the purposes of the VWAP program, a witness is a person who participates in a Coast Guard criminal investigation or proceeding for the purpose of providing information or evidence concerning an offense within the investigative jurisdiction of the Coast Guard. When the witness is a minor this term includes the minor’s parent, guardian, or any person having legal custody of the minor. The term “witness” does not include a person allegedly involved in an offense as a co-conspirator, accomplice, or other principal.

3.M.3.c. Serious Offense

A serious offense is an offense involving personal violence, or attempted or threatened personal violence, or for which a maximum period of confinement of 1 year or more would be authorized under the MCM. "Serious offense" also includes an offense involving the destruction or permanent loss of property of a value of more than \$500.

3.M.4. Keeping the Victim Informed

a. All victims, when circumstances dictate, should be informed promptly by a representative of the cognizant commanding officer of the availability of emergency medical and social services, and when necessary, should be provided appropriate assistance in securing such services.

b. All victims should be informed of:

- (1) Available crime victim compensation, if any;
- (2) Available community-based victim treatment programs;
- (3) The stages in the military criminal justice process of significance to the victim, and the role that the victim plays in the process [*see*, VWAP instruction and enclosure (14f)].
- (4) How the victim can obtain additional information about the process and the case.

c. A victim's property held for evidence should be safeguarded and returned as expeditiously as possible.

3.M.5. Treatment of Witnesses and Victims

a. A victim or witness should be informed concerning protection from intimidation or similar threats, when appropriate.

b. A victim or witness of a serious offense who so requests should, if he or she provides an appropriate official with a current address or telephone number, be notified by a representative of the convening authority in advance, if possible, of the following:

- (1) The apprehension of the accused.
- (2) The pretrial release of the accused.
- (3) The date of trial, entry of a guilty plea if any, findings, and completion of the sentencing proceeding.

[*see*, enclosure (14f)].

c. A representative of the convening authority should notify a victim or witness who has been scheduled to attend a proceeding promptly of scheduling changes affecting the proceeding.

d. At courts-martial and other proceedings, victims and witnesses should be afforded, to the extent practicable, the opportunity to wait in an area separate from the accused or other witnesses, to avoid embarrassment, coercion, or similar emotional distress.

e. Upon request of a victim or witness, reasonable steps should be taken to inform the employer of the victim or witness of the reasons for his or her absence from work. In addition, in appropriate cases, a victim or witness who is subjected to serious financial strain as a direct result of crime or of cooperation in the investigation or prosecution of an offense should be assisted by responsible officials in explaining to creditors the reason for such strain.

f. Victims and witnesses should be provided with appropriate assistance to obtain available services such as transportation, parking, childcare, lodging, and courtroom translators or interpreters.

g. The extent to which witnesses are provided services or information under this paragraph will be determined on a case-by-case basis. For example, ordinarily it will be unnecessary to provide some or all of these services to active duty military witnesses, or to expert or character witnesses. Doubt as to provision of information or services should be resolved in favor of providing them.

h. A victim or witness will be provided a copy of the appropriate VWAP instructional pamphlets [*see*, enclosure (14f)].

i. A victim or witness will be asked whether he or she wants to be informed of the accused's release from confinement and have his or her answer and contact information, if applicable, recorded on the appropriate form [*see*, enclosure (14f)] for submission to the confinement facility.

3.M.6. Consultation with the Victim(s) by the Convening Authority

The victim(s) of a serious offense ordinarily should be consulted by a representative of the convening authority to obtain the victim's views about a decision not to prefer charges; dismissal of charges; pretrial restraint; and negotiations for a pretrial agreement. Consultation may be limited when justified by the circumstances, such as to avoid endangering the safety of a victim or a witness, jeopardizing an ongoing investigation, disclosing classified or privileged information, or unduly delaying the disposition of an offense. Although the victim's views should be considered, nothing in this section limits the responsibility and authority of appropriate officials to take such action as they deem appropriate in the interest of good order and discipline and of preventing service-discrediting conduct.

3.N. WITNESSES FEES AND PAYMENT

3.N.1. Financial Responsibility

Financial responsibility for costs incurred as the result of witnesses called before courts-martial, including Article 32, UCMJ investigations, shall normally be borne by the convening authority. In cases involving excessive costs funding may be requested from higher authority in the chain of command.

3.N.2. Attendance of Witnesses

a. Trial counsel is required to take timely and appropriate action to ensure the presence of both prosecution and defense witnesses whose presence is required at trial. [See, RCMs 703, 801(c) and 1001(e).] The trial counsel shall inform the defense counsel of the trial date as soon as it is known. This may be accomplished orally or in writing.

b. Having ascertained the names of all required witnesses, the trial counsel may:

(1) Issue a subpoena to all civilian witnesses using DD Form-453, available on the standard workstation [see also, enclosure (14b)]. This will not only ensure their presence at trial, but will make the payment of witness fees easier [see, subparagraph 3.N.3.c below]; and

(2) Inform the convening authority of the required military witnesses. This may be accomplished in writing, using the format in enclosure (14a).

c. Military witnesses attached to local commands other than that of the convening authority shall be notified of the time and place of their required attendance by the trial counsel through their commanding officers. This may be done orally, but to ensure no miscommunication as to witnesses, uniforms, times, and locations, written notifications are recommended. Formal requests, usually by message, shall be made to commands of military witnesses not within commuting distance of the trial location. Included in the request shall be travel order numbers and accounting data. A command receiving a proper request for a military witness must provide that witness as requested or promptly notify the trial counsel that the witness will not be provided so the trial counsel can report the matter to the military judge. Failure to order a military witness to the trial can have severe consequences and may delay the trial.

d. A military judge may issue a Warrant of Attachment (DD-454) [see, enclosure (14e) for sample] to obtain production of witness or evidence after a proper subpoena was ignored or refused. [See, RCM 703(e)(2)(G).]

3.N.3. Fees, Per Diem, and Mileage for Civilian Witnesses

3.N.3.a. Civilian Witnesses not in Government Employ

Pursuant to 28 U.S.C. § 1821, a civilian not in government employ, who is compelled or required to testify as a witness before an Article 32, UCMJ investigation, a Coast Guard court-martial or at a place where a deposition is to be taken for use before such court-martial, shall receive the following:

(1) An attendance fee for each day's actual attendance and for the time necessarily occupied in going and returning from the place of attendance.

(2) A subsistence allowance (per diem or actual expense) in an amount not to exceed the maximum per diem allowance for official travel in the area of attendance by employees of the federal government when an overnight stay is required at the place of attendance because such a place is so far removed from the witness' residence as to prohibit return home from day to day.

(3) Travel Expenses:

(a) If travel is by common carrier, the witness (and necessary escort, in the case of a minor or older witness in need of an escort) shall be paid for the actual expenses of travel on the basis of the means of transportation reasonably utilized and the distance necessarily traveled from the place of residence to and from the place of attendance by the shortest practical route. The common carrier shall be utilized at the most economical rate reasonably available. A receipt or other evidence of actual cost shall be attached to the claim.

(b) If travel is by privately owned vehicle, the witness shall be paid a travel allowance equal to that prescribed for official travel of federal civilian employees.

(c) Toll charges for toll roads, bridges, tunnels, and ferries; taxicab fares between places of lodging and carrier terminals; and parking fees (upon presentation of valid parking receipts) shall be paid in full to a witness incurring such expenses.

(d) Nothing in this section shall be construed as authorizing the payment of attendance fees, mileage allowances, or subsistence fees to a witness for attendance or travel that is not performed as a direct result of being compelled or required to testify, or for travel that is performed prior to being duly summoned as a witness, or for travel returning to their place of residence if the travel from their place of residence does not qualify for payment under this section.

3.N.3.b. Civilian Witnesses in Government Employ

A civilian in the employ of the government, when summoned as a witness, shall be issued temporary additional duty orders by the convening authority, if necessary, and shall re-

ceive the current mileage and per diem allowances for temporary additional duty travel for civilian employees. If the tribunal is in session at or near the place where the civilian witness in the employ of the government is stationed, he or she shall receive local travel or no allowance as appropriate. Because TAD orders are usually issued in lieu of a subpoena, notification of the witness' superiors by letter is appropriate.

3.N.3.c. Procedures for Submitting Civilian Witness Travel Claims

The following documents are required to ensure a timely and accurate payment:

- (1) A copy of the subpoena (DD-453, if used) or certificate issued in lieu of subpoena directing the witness to the location of the trial or place of deposition;
- (2) The travel order (DD-453-1, if used) informing the witness of their entitlements; and,
- (3) A completed travel claim (SF-1157), showing the actual number of days in travel and attendance. All lodging receipts and receipts for any claimed items \$75 or over, are required. Include the witness' SSN and telephone number in block 1.

3.N.4. Expert Witnesses

a. The provisions of paragraph 3.N.3 above are applicable to expert witnesses. The expert witness fee prescribed by the convening authority, however, will be paid in lieu of the ordinary attendance fee only on those days the witness is required to attend the court.

b. An expert witness employed in accordance with this section may be paid compensation in advance at the rate authorized by the convening authority [*see*, 11 Comp. Gen. 504]. An expert witness' claim for fees and mileage, submitted in accordance with paragraph 3.N.6 below shall also contain a certified copy of the convening authority's authorization for the expert's employment. Absent such authorization, only the fees paid to an ordinary witness may be paid.

c. The convening authority may authorize the employment of an expert witness. Such authorization shall be in writing and shall fix the limit of compensation to be paid such expert on the basis of the normal compensation paid by United States attorneys for attendance of a witness of such standing in the United States courts in the area involved. Information concerning such normal compensation may be obtained from the servicing legal office. Convening authorities in the Fourteenth District will adhere to fees paid such witnesses in the Hawaiian area and may obtain information as to the limit of such fees from the Commander, Fourteenth Coast Guard District Legal Office. [*See*, paragraph 3.N.5 below for fees payable to foreign nationals.]

3.N.5. Payment of Witness Fees to Foreign Nationals

An OEGCMJ in areas other than a state of the United States shall establish rates of compensation for payment of foreign nationals who testify as witnesses, including expert witnesses, at courts-martial convened in such areas.

3.N.6. Authorization for Payment of Civilian Fees

a. The fees and mileage of a civilian witness shall be paid by the disbursing officer of the command of a convening authority or appointing authority or by the disbursing officer at or near the place where the tribunal sits or where a deposition is taken when such disbursing officer is presented a properly completed Claim for Fees and Mileage of Witnesses (SF-1157) [*see*, enclosure (14d) for sample], signed by the witness and approved by one of the following:

- (1) Trial counsel or assistant trial counsel of a court-martial;
- (2) Summary court;
- (3) Military or civil officer before whom a deposition is taken; or,
- (4) Article 32, UCMJ investigating officer.

b. The claim, prepared as shown in enclosure (14d), must be accompanied by the subpoena (DD-453), if used, or Certificate in Lieu of Subpoena, exhibited in enclosure (14c), and by a certified copy of the order appointing the court-martial or Article 32, UCMJ investigation. If, however, a deposition is taken before charges are referred for trial, the fees and mileage of the witness concerned shall be paid upon presentation of a claim, properly completed as previously described, and accompanied by an order from the officer who authorized the taking of the deposition and subscribed by him or her and directing the disbursing officer to pay the witness the fees and mileage supported by the claim. When the civilian witness testifies outside the United States, its territories or possessions, the claim must be accompanied by a certified copy of the order appointing the court-martial or investigation and by an order from the convening authority or appointing authority, subscribed by him or her and directing payment to the witness the fees and mileage supported by the claim.

3.N.7. Advance Tender or Payment

Any of the officers listed in subparagraph 3.N.6 above may tender to the witness advance fees. The person so receiving the fees in advance of submitting a travel claim shall furnish the officer concerned with a proper receipt. The means of obtaining the advance is not expressly provided for in the Coast Guard's financial regulations.

A preferred procedure to provide for advance fees is for the officer to receive travel, per diem, and witness fees as an advance on behalf of the witness in the form of travelers checks. Generally, the local travelers check issuing official should be willing to advance

travel, per diem, and witness fees in the form of traveler's checks upon presentation of a valid travel order (such as a subpoena) bearing an appropriate Standard Document Number (TONO) and an SF-1038 (Advance of Funds Application and Account), available on Jetform Filler. The trial counsel responsible for a witness's appearance should check with his or her local traveler's check issuing official well in advance of the court-martial for their specific requirements. The officer receiving such advances on behalf of the witness is authorized to issue some or all of the traveler's checks to the witness. Caution: the officer should ensure that a complete and accurate receipt is made for all traveler's checks subsequently transferred to a witness. The officer should annotate the original subpoena with the serial number, date of issue, and denomination of each traveler's check issued to a witness. The officer should have each such annotation initialed and dated by the witness. The officer should ensure that the advance travel allowances, advance per diem, and advance witness fees that are represented by the traveler's checks are reflected on the witness' travel claim as a deductible advance. Finally, it is recommended that the officer personally ensure that the witness' travel claim (SF-1157) and original subpoena are submitted to HRSIC for liquidation before the witness departs the court-martial location.

If the travelers check procedure is unavailable, an alternative means of obtaining advance fees (but not witness travel or per diem) is for the officer to use a government credit card to obtain an advance from an ATM machine. The officer obtaining the advance can then issue the advance to the witness and submit a SF-1164 to the Finance Center, using the witness's Standard Document Number (ensure document type 33 is used), for reimbursement.

3.N.8. Reimbursement of Witness Fees

If an officer charged with serving a subpoena pays from his or her personal funds the necessary fees to a witness, taking a receipt therefor, he or she is entitled to reimbursement upon submitting such receipt, together with a certificate from the appropriate person named in subparagraph 3.N.6 above demonstrating the payment was necessary. The officer tendering the fees in advance shall annotate the original subpoena that such an advance was made and shall ensure that the witness does not claim reimbursement for such fees on their travel claim (SF-1157). The officer shall request reimbursement using form SF-1164 or OF-1034 and shall attach a copy of the witness' subpoena and the original receipt for the advance fees. Follow current Finance Center SOP.

3.N.9. Certificate of Person Before Whom Deposition is Taken

The certificate of a person named in paragraph 3.N.6 above before whom the witness gave a deposition will be evidence of the fact and period of attendance of the witness and the place from which summoned.

3.N.10. Payment of Accrued Fees

The witness may be paid accrued fees at his or her request at any time during the period of attendance. Any of the officers listed in subparagraph 3.N.6 above may make such interim payment(s). If an officer charged with serving a subpoena pays from his or her personal funds the accrued fees to a witness, taking a receipt therefor, he or she is entitled to reimbursement upon submitting such receipt, together with a certificate from the appropriate person named in subparagraph 3.N.6 above demonstrating the payment was necessary. The officer tendering the accrued fees shall annotate the original subpoena that such a payment was made and shall ensure that the witness does not claim reimbursement for accrued fees on their travel claim (SF-1157). The officer shall request reimbursement using form SF-1164 or OF-1034 and shall attach a copy of the witness' subpoena and the original receipt for the accrued fees. Follow current Finance Center SOP.

3.N.11. Civilian Witnesses at Article 32, UCMJ Investigations

Payment of transportation expenses and per diem allowance to civilians requested to testify at Article 32 investigations is authorized, providing the investigating officer certifies that the witness is reasonably available [*see*, RCM 405(g)(3)] and that the witness appeared and testified. Fees shall be the same as if the witness testified at a court-martial [*see*, paragraph 3.N.3 above]. The investigating officer's certificate in the form of that shown in enclosure (14c) of this Manual, shall substitute for a subpoena in support of a claim. In the case of civilians in government employ, subparagraph 3.N.3.b above shall apply.