

nity to use such viewing equipment as is necessary to listen to or view and listen to the recording; or

(B) With the written consent of the accused, defer service of the record until a written record is prepared under subsection (4) of this rule.

**Rule 1104. Records of trial: Authentication; service; loss; correction; forwarding**

(a) *Authentication.*

(1) *In general.* A record is authenticated by the signature of a person specified in this rule who thereby declares that the record accurately reports the proceedings. No person may be required to authenticate a record of trial if that person is not satisfied that it accurately reports the proceedings.

(2) *General and special courts-martial.*

(A) *Authentication by the military judge.* In special courts-martial in which a bad-conduct discharge, confinement for more than six months, or forfeiture of pay for more than six months, has been adjudged and in general courts-martial, except as provided in subsection (a)(2)(B) of this rule, the military judge present at the end of the proceedings shall authenticate the record of trial, or that portion over which the military judge presided. If more than one military judge presided over the proceedings, each military judge shall authenticate the record of the proceedings over which that military judge presided, except as provided in subsection (a)(2)(B) of this rule. The record of trial of special courts-martial in which a bad-conduct discharge, confinement for more than six months, or forfeiture of pay for more than six months, was not adjudged shall be authenticated in accordance with regulations of the Secretary concerned.

(B) *Substitute authentication.* If the military judge cannot authenticate the record of trial because of the military judge's death, disability, or absence, the trial counsel present at the end of the proceedings shall authenticate the record of trial. If the trial counsel cannot authenticate the record of trial because of the trial counsel's death, disability, or absence, a member shall authenticate the record of trial. In a court-martial composed of a military judge alone, or as to sessions without members, the court reporter shall authenticate the record of trial when this duty would fall upon a member under this subsection. A person authorized to authenticate a record under this subsection may authenticate the record

only as to those proceedings at which that person was present.

## Discussion

*See* Appendix 13 or 14 for sample forms.

Substitute authentication is authorized only in emergencies. A brief, temporary absence of the military judge from the situs of the preparation of the record of trial does not justify a substitute authentication. Prolonged absence, including permanent change of station, ordinarily justifies substitute authentication.

The person who authenticates the record of trial instead of the military judge should attach to the record of trial an explanation for the substitute authentication. *See* R.C.M. 1103(b)(3)(E).

(3) *Summary courts-martial.* The summary court-martial shall authenticate the summary court-martial record of trial as prescribed in R.C.M. 1305(a).

(b) *Service.*

(1) *General and special courts-martial.*

(A) *Service of record of trial on accused.* In each general and special court-martial, except as provided in subsection (b)(1)(C) or (D) of this rule, the trial counsel shall cause a copy of the record of trial to be served on the accused as soon as the record of trial is authenticated.

(B) *Proof of service of record of trial on accused.* The trial counsel shall cause the accused's receipt for the copy of the record of trial to be attached to the original record of trial. If it is impracticable to secure a receipt from the accused before the original record of trial is forwarded to the convening authority, the trial counsel shall prepare a certificate indicating that a copy of the record of trial has been transmitted to the accused, including the means of transmission and the address, and cause the certificate to be attached to the original record of trial. In such a case the accused's receipt shall be forwarded to the convening authority as soon as it is obtained.

(C) *Substitute service.* If it is impracticable to serve the record of trial on the accused because of the transfer of the accused to a distant place, the unauthorized absence of the accused, or military exigency, or if the accused so requests on the record at the court-martial or in writing, the accused's copy of the record shall be forwarded to the accused's defense counsel, if any. Trial counsel shall attach a statement to the record explaining why the accused was not served personally. If the accused has more than one counsel, R.C.M. 1106(f)(2) shall apply. If

**R.C.M. 1104(b)(1)(C)**

the accused has no counsel and if the accused is absent without authority, the trial counsel shall prepare an explanation for the failure to serve the record. The explanation and the accused's copy of the record shall be forwarded with the original record. The accused shall be provided with a copy of the record as soon as practicable.

**Discussion**

See Appendix 13 or 14 for sample forms.

**(D) Classified information.**

(i) *Forwarding to convening authority.* If the copy of the record of trial prepared for the accused contains classified information, the trial counsel, unless directed otherwise by the convening authority, shall forward the accused's copy to the convening authority, before it is served on the accused.

(ii) *Responsibility of the convening authority.* The convening authority shall:

(a) cause any classified information to be deleted or withdrawn from the accused's copy of the record of trial;

(b) cause a certificate indicating that classified information has been deleted or withdrawn to be attached to the record of trial; and

(c) cause the expurgated copy of the record of trial and the attached certificate regarding classified information to be served on the accused as provided in subsections (b)(1)(A) and (B) of this rule except that the accused's receipt shall show that the accused has received an expurgated copy of the record of trial.

(iii) *Contents of certificate.* The certificate regarding deleted or withdrawn classified information shall indicate:

(a) that the original record of trial may be inspected in the Office of the Judge Advocate General concerned under such regulations as the Secretary concerned may prescribe;

(b) the pages of the record of trial from which matter has been deleted;

(c) the pages of the record of trial which have been entirely deleted; and

(d) the exhibits which have been withdrawn.

**Discussion**

See R.C.M. 1103(h) concerning classified information.

(2) *Summary courts-martial.* The summary court-martial record of trial shall be disposed of as provided in R.C.M. 1305(d). Subsection (b)(1)(D) of this rule shall apply if classified information is included in the record of trial of a summary court-martial.

(c) *Loss of record.* If the authenticated record of trial is lost or destroyed, the trial counsel shall, if practicable, cause another record of trial to be prepared for authentication. The new record of trial shall become the record of trial in the case if the requirements of R.C.M. 1103 and this rule are met.

(d) *Correction of record after authentication; certificate of correction.*

(1) *In general.* A record of trial found to be incomplete or defective after authentication may be corrected to make it accurate. A record of trial may be returned to the convening authority by superior competent authority for correction under this rule.

**Discussion**

The record of trial is corrected with a certificate of correction.

See Appendix 13 or 14 for a form for a certificate of correction. A certificate of correction may be used only to make the record of trial correspond to the actual proceedings. If the members were not sworn, for example, the error cannot be cured by a certificate of correction. If the members were sworn but the record did not so reflect, the record could be corrected.

(2) *Procedure.* An authenticated record of trial believed to be incomplete or defective may be returned to the military judge or summary court-martial for a certificate of correction. The military judge or summary court-martial shall give notice of the proposed correction to all parties and permit them to examine and respond to the proposed correction before authenticating the certificate of correction. All parties shall be given reasonable access to any original reporter's notes or tapes of the proceedings.

**Discussion**

The type of opportunity to respond depends on the nature and scope of the proposed correction. In many instances an adequate opportunity can be provided by allowing the respective parties to present affidavits and other documentary evidence to the person authenticating the certificate of correction or by a

conference telephone call among the authenticating person, the parties, and the reporter. In other instances, an evidentiary hearing with witnesses may be required. The accused need not be present at any hearing on a certificate of correction.

(3) *Authentication of certificate of correction; service on the accused.* The certificate of correction shall be authenticated as provided in subsection (a) of this rule and a copy served on the accused as provided in subsection (b) of this rule. The certificate of correction and the accused's receipt for the certificate of correction shall be attached to each copy of the record of trial required to be prepared under R.C.M. 1103(g).

(e) *Forwarding.* After every court-martial, including a rehearing and new and other trials, the authenticated record shall be forwarded to the convening authority for initial review and action, provided that in case of a special court-martial in which a bad-conduct discharge or confinement for one year was adjudged or a general court-martial, the convening authority shall refer the record to the staff judge advocate or legal officer for recommendation under R.C.M. 1106 before the convening authority takes action.

### **Rule 1105. Matters submitted by the accused**

(a) *In general.* After a sentence is adjudged in any court-martial, the accused may submit matters to the convening authority in accordance with this rule.

(b) *Matters which may be submitted.*

(1) The accused may submit to the convening authority any matters that may reasonably tend to affect the convening authority's decision whether to disapprove any findings of guilty or to approve the sentence. The convening authority is only required to consider written submissions.

(2) Submissions are not subject to the Military Rules of Evidence and may include:

(A) Allegations of errors affecting the legality of the findings or sentence;

(B) Portions or summaries of the record and copies of documentary evidence offered or introduced at trial;

(C) Matters in mitigation which were not available for consideration at the court-martial; and

### **Discussion**

For example, post-trial conduct of the accused, such as providing restitution to the victim or exemplary behavior, might be appropriate.

(D) Clemency recommendations by any member, the military judge, or any other person. The defense may ask any person for such a recommendation.

### **Discussion**

A clemency recommendation should state reasons for the recommendation and should specifically indicate the amount and character of the clemency recommended.

A clemency recommendation by a member should not disclose the vote or opinion of any member expressed in deliberations. Except as provided in R.C.M. 923 and 1008 and Mil. R. Evid. 606(b), a clemency recommendation does not impeach the findings or the sentence. If the sentencing authority makes a clemency recommendation in conjunction with the announced sentence, *see* R.C.M. 1106(d)(3)(B).

Although only written submissions must be considered, the convening authority may consider any submission by the accused, including, but not limited to, videotapes, photographs, and oral presentations.

(c) *Time periods.*

(1) *General and special courts-martial.* After a general or special court-martial, the accused may submit matters under this rule within the later of 10 days after a copy of the authenticated record of trial or, if applicable, the recommendation of the staff judge advocate or legal officer, or an addendum to the recommendation containing new matter is served on the accused. If, within the 10-day period, the accused shows that additional time is required for the accused to submit such matters, the convening authority or that authority's staff judge advocate may, for good cause, extend the 10-day period for not more than 20 additional days; however, only the convening authority may deny a request for such an extension.

(2) *Summary courts-martial.* After a summary court-martial, the accused may submit matters under this rule within 7 days after the sentence is announced. If the accused shows that additional time is required for the accused to submit such comments, the convening authority may, for good cause, extend the period in which comments may be submitted for up to 20 additional days.

(3) *Post-trial sessions.* A post-trial session under