

CHAPTER VII. PRETRIAL MATTERS

Rule 701. Discovery

(a) *Disclosure by the trial counsel.* Except as otherwise provided in subsections (f) and (g)(2) of this rule, the trial counsel shall provide the following information or matters to the defense—

(1) *Papers accompanying charges; convening orders; statements.* As soon as practicable after service of charges under R.C.M. 602, the trial counsel shall provide the defense with copies of, or, if extraordinary circumstances make it impracticable to provide copies, permit the defense to inspect:

(A) Any paper which accompanied the charges when they were referred to the court-martial, including papers sent with charges upon a rehearing or new trial;

(B) The convening order and any amending orders; and

(C) Any sworn or signed statement relating to an offense charged in the case which is in the possession of the trial counsel.

(2) *Documents, tangible objects, reports.* After service of charges, upon request of the defense, the Government shall permit the defense to inspect:

(A) Any books, papers, documents, photographs, tangible objects, buildings, or places, or copies of portions thereof, which are within the possession, custody, or control of military authorities, and which are material to the preparation of the defense or are intended for use by the trial counsel as evidence in the prosecution case-in-chief at trial, or were obtained from or belong to the accused; and

(B) Any results or reports of physical or mental examinations, and of scientific tests or experiments, or copies thereof, which are within the possession, custody, or control of military authorities, the existence of which is known or by the exercise of due diligence may become known to the trial counsel, and which are material to the preparation of the defense or are intended for use by the trial counsel as evidence in the prosecution case-in-chief at trial.

Discussion

For specific rules concerning certain mental examinations of

the accused or third party patients, *see* R.C.M. 701(f), R.C.M. 706, Mil. R. Evid. 302 and Mil. R. Evid. 513.

(3) *Witnesses.* Before the beginning of trial on the merits the trial counsel shall notify the defense of the names and addresses of the witnesses the trial counsel intends to call:

(A) In the prosecution case-in-chief; and

(B) To rebut a defense of alibi, innocent ingestion, or lack of mental responsibility, when trial counsel has received timely notice under subsection (b)(1) or (2) of this rule.

Discussion

Such notice should be in writing except when impracticable.

(4) *Prior convictions of accused offered on the merits.* Before arraignment the trial counsel shall notify the defense of any records of prior civilian or court-martial convictions of the accused of which the trial counsel is aware and which the trial counsel may offer on the merits for any purpose, including impeachment, and shall permit the defense to inspect such records when they are in the trial counsel's possession.

(5) *Information to be offered at sentencing.* Upon request of the defense the trial counsel shall:

(A) Permit the defense to inspect such written material as will be presented by the prosecution at the presentencing proceedings; and

(B) Notify the defense of the names and addresses of the witnesses the trial counsel intends to call at the presentencing proceedings under R.C.M. 1001(b).

(6) *Evidence favorable to the defense.* The trial counsel shall, as soon as practicable, disclose to the defense the existence of evidence known to the trial counsel which reasonably tends to:

(A) Negate the guilt of the accused of an offense charged;

(B) Reduce the degree of guilt of the accused of an offense charged; or

(C) Reduce the punishment.

Discussion

In addition to the matters required to be disclosed under subsection (a) of this rule, the Government is required to notify the defense of or provide to the defense certain information under other rules. Mil. R. Evid. 506 covers the disclosure of unclassified information which is under the control of the Government. Mil. R. Evid. 505 covers disclosure of classified information.

Other R.C.M. and Mil. R. Evid. concern disclosure of other specific matters. *See* R.C.M. 308 (identification of accuser), 405 (report of Article 32 investigation), 706(c)(3)(B) (mental examination of accused), 914 (production of certain statements), and 1004(b)(1) (aggravating circumstances in capital cases); Mil. R. Evid. 301(c)(2) (notice of immunity or leniency to witnesses), 302 (mental examination of accused), 304(d)(1) (statements by accused), 311(d)(1) (evidence seized from accused), 321(c)(1) (evidence based on lineups), 507 (identity of informants), 612 (memoranda used to refresh recollection), and 613(a) (prior inconsistent statements).

Requirements for notice of intent to use certain evidence are found in: Mil. R. Evid. 201A(b) (judicial notice of foreign law), 301(c)(2) (immunized witnesses), 304(d)(2) (notice of intent to use undisclosed confessions), 304(f) (testimony of accused for limited purpose on confession), 311(d)(2)(B) (notice of intent to use undisclosed evidence seized), 311(f) (testimony of accused for limited purpose on seizures), 321(c)(2)(B) (notice of intent to use undisclosed line-up evidence), 321(e) (testimony of accused for limited purpose of line-ups), 412(c)(1) and (2) (intent of defense to use evidence of sexual misconduct by a victim); 505(h) (intent to disclose classified information), 506(h) (intent to disclose privilege government information), and 609(b) (intent to impeach with conviction over 10 years old).

(b) *Disclosure by the defense.* Except as otherwise provided in subsections (f) and (g)(2) of this rule, the defense shall provide the following information to the trial counsel—

(1) *Names of witnesses and statements.*

(A) Before the beginning of trial on the merits, the defense shall notify the trial counsel of the names and addresses of all witnesses, other than the accused, whom the defense intends to call during the defense case in chief, and provide all sworn or signed statements known by the defense to have been made by such witnesses in connection with the case.

(B) Upon request of the trial counsel, the defense shall also

(i) Provide the trial counsel with the names and addresses of any witnesses whom the defense intends to call at the presentencing proceedings under R.C.M. 1001(c); and

(ii) Permit the trial counsel to inspect any

written material that will be presented by the defense at the presentencing proceeding.

Discussion

Such notice shall be in writing except when impracticable. *See* R.C.M. 701(f) for statements that would not be subject to disclosure.

(2) *Notice of certain defenses.* The defense shall notify the trial counsel before the beginning of trial on the merits of its intent to offer the defense of alibi, innocent ingestion, or lack of mental responsibility, or its intent to introduce expert testimony as to the accused's mental condition. Such notice by the defense shall disclose, in the case of an alibi defense, the place or places at which the defense claims the accused to have been at the time of the alleged offense, and, in the case of an innocent ingestion defense, the place or places where, and the circumstances under which the defense claims the accused innocently ingested the substance in question, and the names and addresses of the witnesses upon whom the accused intends to rely to establish any such defenses.

Discussion

Such notice should be in writing except when impracticable. *See* R.C.M. 916(k) concerning the defense of lack of mental responsibility. *See* R.C.M. 706 concerning inquiries into the mental responsibility of the accused. *See* Mil. R. Evid. 302 concerning statements by the accused during such inquiries. If the defense needs more detail as to the time, date, or place of the offense to comply with this rule, it should request a bill of particulars. *See* R.C.M. 906(b)(6).

(3) *Documents and tangible objects.* If the defense requests disclosure under subsection (a)(2)(A) of this rule, upon compliance with such request by the Government, the defense, on request of the trial counsel, shall permit the trial counsel to inspect books, papers, documents, photographs, tangible objects, or copies or portions thereof, which are within the possession, custody, or control of the defense and which the defense intends to introduce as evidence in the defense case-in-chief at trial.

(4) *Reports of examination and tests.* If the defense requests disclosure under subsection (a)(2)(B) of this rule, upon compliance with such request by the Government, the defense, on request of trial

counsel, shall (except as provided in R.C.M. 706, Mil. R. Evid. 302, and Mil. R. Evid. 513) permit the trial counsel to inspect any results or reports of physical or mental examinations and of scientific tests or experiments made in connection with the particular case, or copies thereof, that are within the possession, custody, or control of the defense that the defense intends to introduce as evidence in the defense case-in-chief at trial or that were prepared by a witness whom the defense intends to call at trial when the results or reports relate to that witness' testimony.

(5) *Inadmissibility of withdrawn defense.* If an intention to rely upon a defense under subsection (b)(2) of this rule is withdrawn, evidence of such intention and disclosures by the accused or defense counsel made in connection with such intention is not, in any court-martial, admissible against the accused who gave notice of the intention.

Discussion

In addition to the matters covered in subsection (b) of this rule, defense counsel is required to give notice or disclose evidence under certain Military Rules of Evidence: Mil. R. Evid. 201A(b) (judicial notice of foreign law), 304(f) (testimony by the accused for a limited purpose in relation to a confession), 311(b) (same, search), 321(e) (same, lineup), 412(c)(1) and (2) (intent to offer evidence of sexual misconduct by a victim), 505(h) (intent to disclose classified information), 506(h) (intent to disclose privileged government information), 609(b) (intent to impeach a witness with a conviction older than 10 years), 612(2) (writing used to refresh recollection), and 613(a) (prior inconsistent statements).

(c) *Failure to call witness.* The fact that a witness' name is on a list of expected or intended witnesses provided to an opposing party, whether required by this rule or not, shall not be ground for comment upon a failure to call the witness.

(d) *Continuing duty to disclose.* If, before or during the court-martial, a party discovers additional evidence or material previously requested or required to be produced, which is subject to discovery or inspection under this rule, that party shall promptly notify the other party or the military judge of the existence of the additional evidence or material.

(e) *Access to witnesses and evidence.* Each party shall have adequate opportunity to prepare its case and equal opportunity to interview witnesses and inspect evidence. No party may unreasonably im-

pede the access of another party to a witness or evidence.

Discussion

Convening authorities, commanders and members of their immediate staffs should make no statement, oral or written, and take no action which could reasonably be understood to discourage or prevent witnesses from testifying truthfully before a court-martial, or as a threat of retribution for such testimony.

(f) *Information not subject to disclosure.* Nothing in this rule shall be construed to require the disclosure of information protected from disclosure by the Military Rules of Evidence. Nothing in this rule shall require the disclosure or production of notes, memoranda, or similar working papers prepared by counsel and counsel's assistants and representatives.

(g) *Regulation of discovery.*

(1) *Time, place, and manner.* The military judge may, consistent with this rule, specify the time, place, and manner of making discovery and may prescribe such terms and conditions as are just.

(2) *Protective and modifying orders.* Upon a sufficient showing the military judge may at any time order that the discovery or inspection be denied, restricted, or deferred, or make such other order as is appropriate. Upon motion by a party, the military judge may permit the party to make such showing, in whole or in part, in writing to be inspected only by the military judge. If the military judge grants relief after such an ex parte showing, the entire text of the party's statement shall be sealed and attached to the record of trial as an appellate exhibit. Such material may be examined by reviewing authorities in closed proceedings for the purpose of reviewing the determination of the military judge.

(3) *Failure to comply.* If at any time during the court-martial it is brought to the attention of the military judge that a party has failed to comply with this rule, the military judge may take one or more of the following actions:

(A) Order the party to permit discovery;

(B) Grant a continuance;

(C) Prohibit the party from introducing evidence, calling a witness, or raising a defense not disclosed; and

(D) Enter such other order as is just under the

R.C.M. 701(g)(3)(D)

circumstances. This rule shall not limit the right of the accused to testify in the accused's behalf.

Discussion

Factors to be considered in determining whether to grant an exception to exclusion under subsection (3)(C) include: the extent of disadvantage that resulted from a failure to disclose; the reason for the failure to disclose; the extent to which later events mitigated the disadvantage caused by the failure to disclose; and any other relevant factors.

The sanction of excluding the testimony of a defense witness should be used only upon finding that the defense counsel's failure to comply with this rule was willful and motivated by a desire to obtain a tactical advantage or to conceal a plan to present fabricated testimony. Moreover, the sanction of excluding the testimony of a defense witness should only be used if alternative sanctions could not have minimized the prejudice to the Government. Before imposing this sanction, the military judge must weigh the defendant's right to compulsory process against the countervailing public interests, including (1) the integrity of the adversary process; (2) the interest in the fair and efficient administration of military justice; and (3) the potential prejudice to the truth-determining function of the trial process.

Procedures governing refusal to disclose classified information are in Mil. R. Evid. 505. Procedures governing refusal to disclose other government information are in Mil. R. Evid. 506. Procedures governing refusal to disclose an informant's identity are in Mil. R. Evid. 507.

(h) *Inspect*. As used in this rule "inspect" includes the right to photograph and copy.

Rule 702. Depositions

(a) *In general*. A deposition may be ordered whenever, after preferral of charges, due to exceptional circumstances of the case it is in the interest of justice that the testimony of a prospective witness be taken and preserved for use at an investigation under Article 32 or a court-martial.

Discussion

A deposition is the out-of-court testimony of a witness under oath in response to questions by the parties, which is reduced to writing or recorded on videotape or audiotape or similar material. A deposition taken on oral examination is an oral deposition, and a deposition taken on written interrogatories is a written deposition. Written interrogatories are questions, prepared by the prosecution, defense, or both, which are reduced to writing before submission to a witness whose testimony is to be taken by deposition. The answers, reduced to writing and properly sworn to, constitute the deposition testimony of the witness.

Note that under subsection (i) of this rule a deposition may

be taken by agreement of the parties without necessity of an order.

A deposition may be taken to preserve the testimony of a witness who is likely to be unavailable at the investigation under Article 32 (*see* R.C.M. 405(g)) or at the time of trial (*see* R.C.M. 703(b)). Part of all of a deposition, so far as otherwise admissible under the Military Rules of Evidence, may be used on the merits or on an interlocutory question as substantive evidence if the witness is unavailable under Mil. R. Evid. 804(a) except that a deposition may be admitted in a capital case only upon offer by the defense. *See* Mil. R. Evid. 804(b)(1). In any case, a deposition may be used by any party for the purpose of contradicting or impeaching the testimony of the deponent as a witness. *See* Mil. R. Evid. 613. If only a part of a deposition is offered in evidence by a party, an adverse party may require the proponent to offer all which is relevant to the part offered, and any party may offer other parts. *See* Mil. R. Evid. 106.

A deposition which is transcribed is ordinarily read to the court-martial by the party offering it. *See also* subsection (g)(3) of this rule. The transcript of a deposition may not be inspected by the members. Objections may be made to testimony in a written deposition in the same way that they would be if the testimony were offered through the personal appearance of a witness.

Part or all of a deposition so far as otherwise admissible under the Military Rules of Evidence may be used in presentencing proceedings as substantive evidence as provided in R.C.M. 1001.

DD Form 456 (Interrogatories and Deposition) may be used in conjunction with this rule.

(b) *Who may order*. A convening authority who has the charges for disposition or, after referral, the convening authority or the military judge may order that a deposition be taken on request of a party.

(c) *Request to take deposition*.

(1) *Submission of request*. At any time after charges have been preferred, any party may request in writing that a deposition be taken.

Discussion

A copy of the request and any accompanying papers ordinarily should be served on the other parties when the request is submitted.

(2) *Contents of request*. A request for a deposition shall include:

(A) The name and address of the person whose deposition is requested, or, if the name of the person is unknown, a description of the office or position of the person;

(B) A statement of the matters on which the person is to be examined;

(C) A statement of the reasons for taking the deposition; and

(D) Whether an oral or written deposition is requested.

(3) *Action on request.*

(A) *In general.* A request for a deposition may be denied only for good cause.

Discussion

Good cause for denial includes: failure to state a proper ground for taking a deposition; failure to show the probable relevance of the witness' testimony, or that the witness' testimony would be unnecessary. The fact that the witness is or will be available for trial is good cause for denial in the absence of unusual circumstances, such as improper denial of a witness request at an Article 32 hearing, unavailability of an essential witness at an Article 32 hearing, or when the Government has improperly impeded defense access to a witness.

(B) *Written deposition.* A request for a written deposition may not be approved without the consent of the opposing party except when the deposition is ordered solely in lieu of producing a witness for sentencing under R.C.M. 1001 and the authority ordering the deposition determines that the interests of the parties and the court-martial can be adequately served by a written deposition.

Discussion

A request for an oral deposition may be approved without the consent of the opposing party.

(C) *Notification of decision.* The authority who acts on the request shall promptly inform the requesting party of the action on the request and, if the request is denied, the reasons for denial.

(D) *Waiver.* Failure to review before the military judge a request for a deposition denied by a convening authority waives further consideration of the request.

(d) *Action when request is approved.*

(1) *Detail of deposition officer.* When a request for a deposition is approved, the convening authority shall detail an officer to serve as deposition officer or request an appropriate civil officer to serve as deposition officer.

Discussion

See Article 49(c).

When a deposition will be at a point distant from the command, an appropriate authority may be requested to make available an officer to serve as deposition officer.

(2) *Assignment of counsel.* If charges have not yet been referred to a court-martial when a request to take a deposition is approved, the convening authority who directed the taking of the deposition shall ensure that counsel qualified as required under R.C.M. 502(d) are assigned to represent each party.

Discussion

The counsel who represents the accused at a deposition ordinarily will form an attorney-client relationship with the accused which will continue through a later court-martial. *See R.C.M. 506.*

If the accused has formed an attorney-client relationship with military counsel concerning the charges in question, ordinarily that counsel should be appointed to represent the accused.

(3) *Instructions.* The convening authority may give instructions not inconsistent with this rule to the deposition officer.

Discussion

Such instruction may include the time and place for taking the deposition.

(e) *Notice.* The party at whose request a deposition is to be taken shall give to every other party reasonable written notice of the time and place for taking the deposition and the name and address of each person to be examined. On motion of a party upon whom the notice is served the deposition officer may for cause shown extend or shorten the time or change the place for taking the deposition, consistent with any instructions from the convening authority.

(f) *Duties of the deposition officer.* In accordance with this rule, and subject to any instructions under subsection (d)(3) of this rule, the deposition officer shall:

(1) Arrange a time and place for taking the deposition and, in the case of an oral deposition, notify the party who requested the deposition accordingly;

(2) Arrange for the presence of any witness whose deposition is to be taken in accordance with

R.C.M. 702(f)(2)

the procedures for production of witnesses and evidence under R.C.M. 703(e);

(3) Maintain order during the deposition and protect the parties and witnesses from annoyance, embarrassment, or oppression;

(4) Administer the oath to each witness, the reporter, and interpreter, if any;

(5) In the case of a written deposition, ask the questions submitted by counsel to the witness;

(6) Cause the proceedings to be recorded so that a verbatim record is made or may be prepared;

(7) Record, but not rule upon, objections or motions and the testimony to which they relate;

(8) Authenticate the record of the deposition and forward it to the authority who ordered the deposition; and

(9) Report to the convening authority any substantial irregularity in the proceeding.

Discussion

When any unusual problem, such as improper conduct by counsel or a witness, prevents an orderly and fair proceeding, the deposition officer should adjourn the proceedings and inform the convening authority.

The authority who ordered the deposition should forward copies to the parties.

(g) *Procedure.*

(1) *Oral depositions.*

(A) *Rights of accused.* At an oral deposition, the accused shall have the rights to:

(i) Be present except when: (a) the accused, absent good cause shown, fails to appear after notice of time and place of the deposition; (b) the accused is disruptive within the meaning of R.C.M. 804(b)(2); or (c) the deposition is ordered in lieu of production of a witness on sentencing under R.C.M. 1001 and the authority ordering the deposition determines that the interests of the parties and the court-martial can be served adequately by an oral deposition without the presence of the accused; and

(ii) Be represented by counsel as provided in R.C.M. 506.

(B) *Examination of witnesses.* Each witness giving an oral deposition shall be examined under oath. The scope and manner of examination and cross-examination shall be such as would be allowed

in the trial itself. The Government shall make available to each accused for examination and use at the taking of the deposition any statement of the witness which is in the possession of the United States and to which the accused would be entitled at the trial.

Discussion

As to objections, *see* subsections (f)(7) and (h) of this rule. As to production of prior statements of witnesses, *see* R.C.M. 914; Mil. R. Evid. 612, 613.

A sample oath for a deposition follows.

“You (swear) (affirm) that the evidence you give shall be the truth, the whole truth, and nothing but the truth (so help you God)?”

(2) *Written depositions.*

(A) *Rights of accused.* The accused shall have the right to be represented by counsel as provided in R.C.M. 506 for the purpose of taking a written deposition, except when the deposition is taken for use at a summary court-martial.

(B) *Presence of parties.* No party has a right to be present at a written deposition.

(C) *Submission of interrogatories to opponent.* The party requesting a written deposition shall submit to opposing counsel a list of written questions to be asked of the witness. Opposing counsel may examine the questions and shall be allowed a reasonable time to prepare cross-interrogatories and objections, if any.

Discussion

The interrogatories and cross-interrogatories should be sent to the deposition officer by the party who requested the deposition. *See* subsection (h)(3) of this rule concerning objections.

(D) *Examination of witnesses.* The deposition officer shall swear the witness, read each question presented by the parties to the witness, and record each response. The testimony of the witness shall be recorded on videotape, audiotape, or similar material or shall be transcribed. When the testimony is transcribed, the deposition shall, except when impracticable, be submitted to the witness for examination. The deposition officer may enter additional matters then stated by the witness under oath. The deposition shall be signed by the witness if the witness is available. If the deposition is not signed by the wit-

ness, the deposition officer shall record the reason. The certificate of authentication shall then be executed.

(3) *How recorded.* In the discretion of the authority who ordered the deposition, a deposition may be recorded by a reporter or by other means including videotape, audiotape, or sound film. In the discretion of the military judge, depositions recorded by videotape, audiotape, or sound film may be played for the court-martial or may be transcribed and read to the court-martial.

Discussion

A deposition read in evidence or one that is played during a court-martial, is recorded and transcribed by the reporter in the same way as any other testimony. The deposition need not be included in the record of trial.

(h) *Objections.*

(1) *In general.* A failure to object prior to the deposition to the taking of the deposition on grounds which may be corrected if the objection is made prior to the deposition waives such objection.

(2) *Oral depositions.* Objections to questions, testimony, or evidence at an oral deposition and the grounds for such objection shall be stated at the time of taking such deposition. If an objection relates to a matter which could have been corrected if the objection had been made during the deposition, the objection is waived if not made at the deposition.

Discussion

A party may show that an objection was made during the deposition but not recorded, but, in the absence of such evidence, the transcript of the deposition governs.

(3) *Written depositions.* Objections to any question in written interrogatories shall be served on the party who proposed the question before the interrogatories are sent to the deposition officer or the objection is waived. Objections to answers in a written deposition may be made at trial.

(i) *Deposition by agreement not precluded.*

(1) *Taking deposition.* Nothing in this rule shall preclude the taking of a deposition without cost to the United States, orally or upon written questions, by agreement of the parties.

(2) *Use of deposition.* Subject to Article 49, nothing in this rule shall preclude the use of a deposition at the court-martial by agreement of the parties unless the military judge forbids its use for good cause.

Rule 703. Production of witnesses and evidence

(a) *In general.* The prosecution and defense and the court-martial shall have equal opportunity to obtain witnesses and evidence, including the benefit of compulsory process.

Discussion

See also R.C.M. 801(c) concerning the opportunity of the court-martial to obtain witnesses and evidence.

(b) *Right to witnesses.*

(1) *On the merits or on interlocutory questions.* Each party is entitled to the production of any witness whose testimony on a matter in issue on the merits or on an interlocutory question would be relevant and necessary.

Discussion

See Mil. R. Evid. 401 concerning relevance.

Relevant testimony is necessary when it is not cumulative and when it would contribute to a party's presentation of the case in some positive way on a matter in issue. A matter is not in issue when it is stipulated as a fact.

(2) *On sentencing.* Each party is entitled to the production of a witness whose testimony on sentencing is required under R.C.M. 1001(e).

(3) *Unavailable witness.* Notwithstanding subsections (b)(1) and (2) of this rule, a party is not entitled to the presence of a witness who is unavailable within the meaning of Mil. R. Evid. 804(a). However, if the testimony of a witness who is unavailable is of such central importance to an issue that it is essential to a fair trial, and if there is no adequate substitute for such testimony, the military judge shall grant a continuance or other relief in order to attempt to secure the witness' presence or shall abate the proceedings, unless the unavailability of the witness is the fault of or could have been prevented by the requesting party.

(c) *Determining which witness will be produced.*

R.C.M. 703(c)(1)

(1) *Witnesses for the prosecution.* The trial counsel shall obtain the presence of witnesses whose testimony the trial counsel considers relevant and necessary for the prosecution.

(2) *Witnesses for the defense.*

(A) *Request.* The defense shall submit to the trial counsel a written list of witnesses whose production by the Government the defense requests.

(B) *Contents of request.*

(i) *Witnesses on merits or interlocutory questions.* A list of witnesses whose testimony the defense considers relevant and necessary on the merits or on an interlocutory question shall include the name, telephone number, if known, and address or location of the witness such that the witness can be found upon the exercise of due diligence and a synopsis of the expected testimony sufficient to show its relevance and necessity.

(ii) *Witnesses on sentencing.* A list of witnesses wanted for presentencing proceedings shall include the name, telephone number, if known, and address or location of the witness such that the witness can be found upon the exercise of due diligence, a synopsis of the testimony that it is expected the witness will give, and the reasons why the witness' personal appearance will be necessary under the standards set forth in R.C.M. 1001(e).

(C) *Time of request.* A list of witnesses under this subsection shall be submitted in time reasonably to allow production of each witness on the date when the witness' presence will be necessary. The military judge may set a specific date by which such lists must be submitted. Failure to submit the name of a witness in a timely manner shall permit denial of a motion for production of the witness, but relief from such denial may be granted for good cause shown.

(D) *Determination.* The trial counsel shall arrange for the presence of any witness listed by the defense unless the trial counsel contends that the witness' production is not required under this rule. If the trial counsel contends that the witness' production is not required by this rule, the matter may be submitted to the military judge. If the military judge grants a motion for a witness, the trial counsel shall produce the witness or the proceedings shall be abated.

Discussion

When significant or unusual costs would be involved in producing witnesses, the trial counsel should inform the convening authority, as the convening authority may elect to dispose of the matter by means other than a court-martial. *See* R.C.M. 906(b)(7). *See also* R.C.M. 905(j).

(d) *Employment of expert witnesses.* When the employment at Government expense of an expert is considered necessary by a party, the party shall, in advance of employment of the expert, and with notice to the opposing party, submit a request to the convening authority to authorize the employment and to fix the compensation for the expert. The request shall include a complete statement of reasons why employment of the expert is necessary and the estimated cost of employment. A request denied by the convening authority may be renewed before the military judge who shall determine whether the testimony of the expert is relevant and necessary, and, if so, whether the Government has provided or will provide an adequate substitute. If the military judge grants a motion for employment of an expert or finds that the Government is required to provide a substitute, the proceedings shall be abated if the Government fails to comply with the ruling. In the absence of advance authorization, an expert witness may not be paid fees other than those to which entitled under subsection (e)(2)(D) of this rule.

Discussion

See Mil. R. Evid. 702, 706.

(e) *Procedures for production of witnesses.*

(1) *Military witnesses.* The attendance of a military witness may be obtained by notifying the commander of the witness of the time, place, and date the witness' presence is required and requesting the commander to issue any necessary orders to the witness.

Discussion

When military witnesses are located near the court-martial, their presence can usually be obtained through informal coordination with them and their commander. If the witness is not near the court-martial and attendance would involve travel at government expense, or if informal coordination is inadequate, the appropriate superior should be requested to issue the necessary order.

If practicable, a request for the attendance of a military

witness should be made so that the witness will have at least 48 hours notice before starting to travel to attend the court-martial.

The attendance of persons not on active duty should be obtained in the manner prescribed in subsection (e)(2) of this rule.

(2) *Civilian witnesses—subpoena.*

(A) *In general.* The presence of witnesses not on active duty may be obtained by subpoena.

Discussion

A subpoena is not necessary if the witness appears voluntarily at no expense to the United States.

Civilian employees of the Department of Defense may be directed by appropriate authorities to appear as witnesses in courts-martial as an incident of their employment. Appropriate travel orders may be issued for this purpose.

A subpoena may not be used to compel a civilian to travel outside the United States and its territories.

A witness must be subject to United States jurisdiction to be subject to a subpoena. Foreign nationals in a foreign country are not subject to subpoena. Their presence may be obtained through cooperation of the host nation.

(B) *Contents.* A subpoena shall state the command by which the proceeding is directed, and the title, if any, of the proceeding. A subpoena shall command each person to whom it is directed to attend and give testimony at the time and place specified therein. A subpoena may also command the person to whom it is directed to produce books, papers, documents or other objects designated therein at the proceeding or at an earlier time for inspection by the parties.

Discussion

A subpoena may not be used to compel a witness to appear at an examination or interview before trial, but a subpoena may be used to obtain witnesses for a deposition or a court of inquiry.

A subpoena normally is prepared, signed, and issued in duplicate on the official forms. See Appendix 7 for an example of a Subpoena with certificate of service (DD Form 453) and a Travel Order (DD Form 453-1).

(C) *Who may issue.* A subpoena may be issued by the summary court-martial or trial counsel of a special or general court-martial to secure witnesses or evidence for that court-martial. A subpoena may also be issued by the president of a court of inquiry or by an officer detailed to take a deposition to

secure witnesses or evidence for those proceedings respectively.

(D) *Service.* A subpoena may be served by the person authorized by this rule to issue it, a United States marshal, or any other person who is not less than 18 years of age. Service shall be made by delivering a copy of the subpoena to the person named and by tendering to the person named travel orders and fees as may be prescribed by the Secretary concerned.

Discussion

See Department of Defense Pay and Entitlements Manual.

If practicable, a subpoena should be issued in time to permit service at least 24 hours before the time the witness will have to travel to comply with the subpoena.

Informal service. Unless formal service is advisable, the person who issued the subpoena may mail it to the witness in duplicate, enclosing a postage-paid envelope bearing a return address, with the request that the witness sign the acceptance of service on the copy and return it in the envelope provided. The return envelope should be addressed to the person who issued the subpoena. The person who issued the subpoena should include with it a statement to the effect that the rights of the witness to fees and mileage will not be impaired by voluntary compliance with the request and that a voucher for fees and mileage will be delivered to the witness promptly on being discharged from attendance.

Formal service. Formal service is advisable whenever it is anticipated that the witness will not comply voluntarily with the subpoena. Appropriate fees and mileage must be paid or tendered. See Article 47. If formal service is advisable, the person who issued the subpoena must assure timely and economical service. That person may do so by serving the subpoena personally when the witness is in the vicinity. When the witness is not in the vicinity, the subpoena may be sent in duplicate to the commander of a military installation near the witness. Such commanders should give prompt and effective assistance, issuing travel orders for their personnel to serve the subpoena when necessary.

Service should ordinarily be made by a person subject to the code. The duplicate copy of the subpoena must have entered upon it proof of service as indicated on the form and must be promptly returned to the person who issued the subpoena. If service cannot be made, the person who issued the subpoena must be informed promptly. A stamped, addressed envelope should be provided for these purposes.

(E) *Place of service.*

(i) *In general.* A subpoena requiring the attendance of a witness at a deposition, court-martial, or court of inquiry may be served at any place within the United States, its Territories, Commonwealths, or possessions.

(ii) *Foreign territory.* In foreign territory, the

attendance of civilian witnesses may be obtained in accordance with existing agreements or, in the absence of agreements, with principles of international law.

(iii) *Occupied territory.* In occupied enemy territory, the appropriate commander may compel the attendance of civilian witnesses located within the occupied territory.

(F) *Relief.* If a person subpoenaed requests relief on grounds that compliance is unreasonable or oppressive, the convening authority or, after referral, the military judge may direct that the subpoena be modified or withdrawn if appropriate.

(G) *Neglect or refusal to appear.*

(i) *Issuance of warrant of attachment.* The military judge or, if there is no military judge, the convening authority may, in accordance with this rule, issue a warrant of attachment to compel the attendance of a witness or production of documents.

Discussion

A warrant of attachment (DD Form 454) may be used when necessary to compel a witness to appear or produce evidence under this rule. A warrant of attachment is a legal order addressed to an official directing that official to have the person named in the order brought before a court.

Subpoenas issued under R.C.M. 703 are Federal process and a person not subject to the code may be prosecuted in a Federal civilian court under Article 47 for failure to comply with a subpoena issued in compliance with this rule and formally served.

Failing to comply with such a subpoena is a felony offense, and may result in a fine or imprisonment, or both, at the discretion of the district court. The different purposes of the warrant of attachment and criminal complaint under Article 47 should be borne in mind. The warrant of attachment, available without the intervention of civilian judicial proceedings, has as its purpose the obtaining of the witness' presence, testimony, or documents. The criminal complaint, prosecuted through the civilian Federal courts, has as its purpose punishment for failing to comply with process issued by military authority. It serves to vindicate the military interest in obtaining compliance with its lawful process.

(ii) *Requirements.* A warrant of attachment may be issued only upon probable cause to believe that the witness was duly served with a subpoena, that the subpoena was issued in accordance with these rules, that appropriate fees and mileage were tendered to the witness, that the witness is material, that the witness refused or willfully neglected to appear at the time and place specified on the sub-

poena, and that no valid excuse reasonably appears for the witness' failure to appear.

(iii) *Form.* A warrant of attachment shall be written. All documents in support of the warrant of attachment shall be attached to the warrant, together with the charge sheet and convening orders.

(iv) *Execution.* A warrant of attachment may be executed by a United States marshal or such other person who is not less than 18 years of age as the authority issuing the warrant may direct. Only such nondeadly force as may be necessary to bring the witness before the court-martial or other proceeding may be used to execute the warrant. A witness attached under this rule shall be brought before the court-martial or proceeding without delay and shall testify as soon as practicable and be released.

Discussion

In executing a warrant of attachment, no more force than necessary to bring the witness to the court-martial, deposition, or court of inquiry may be used.

(v) *Definition.* For purposes of subsection (e)(2)(G) of this rule "military judge" does not include a summary court-martial or the president of a special court-martial without a military judge.

(f) *Right to evidence.*

(1) *In general.* Each party is entitled to the production of evidence which is relevant and necessary.

Discussion

See Mil. R. Evid. 401 concerning relevance.

Relevant evidence is necessary when it is not cumulative and when it would contribute to a party's presentation of the case in some positive way on a matter in issue. A matter is not in issue when it is stipulated as a fact.

As to the discovery and introduction of classified or other government information, *see* Mil. R. Evid. 505 and 506.

(2) *Unavailable evidence.* Notwithstanding subsection (f)(1) of this rule, a party is not entitled to the production of evidence which is destroyed, lost, or otherwise not subject to compulsory process. However, if such evidence is of such central importance to an issue that it is essential to a fair trial, and if there is no adequate substitute for such evidence, the military judge shall grant a continuance or other

relief in order to attempt to produce the evidence or shall abate the proceedings, unless the unavailability of the evidence is the fault of or could have been prevented by the requesting party.

(3) *Determining what evidence will be produced.* The procedures in subsection (c) of this rule shall apply to a determination of what evidence will be produced, except that any defense request for the production of evidence shall list the items of evidence to be produced and shall include a description of each item sufficient to show its relevance and necessity, a statement where it can be obtained, and, if known, the name, address, and telephone number of the custodian of the evidence.

(4) *Procedures for production of evidence.*

(A) *Evidence under the control of the Government.* Evidence under the control of the Government may be obtained by notifying the custodian of the evidence of the time, place, and date the evidence is required and requesting the custodian to send or deliver the evidence.

(B) *Evidence not under the control of the Government.* Evidence not under the control of the Government may be obtained by subpoena issued in accordance with subsection (e)(2) of this rule.

(C) *Relief.* If the person having custody of evidence requests relief on grounds that compliance with the subpoena or order of production is unreasonable or oppressive, the convening authority or, after referral, the military judge may direct that the subpoena or order of production be withdrawn or modified. Subject to Mil. R. Evid. 505 and 506, the military judge may direct that the evidence be submitted to the military judge for an in camera inspection in order to determine whether such relief should be granted.

Rule 704. Immunity

(a) *Types of immunity.* Two types of immunity may be granted under this rule.

(1) *Transactional immunity.* A person may be granted transactional immunity from trial by court-martial for one or more offenses under the code.

(2) *Testimonial immunity.* A person may be granted immunity from the use of testimony, statements, and any information directly or indirectly derived from such testimony or statements by that person in a later court-martial.

Discussion

“Testimonial” immunity is also called “use” immunity.

Immunity ordinarily should be granted only when testimony or other information from the person is necessary to the public interest, including the needs of good order and discipline, and when the person has refused or is likely to refuse to testify or provide other information on the basis of the privilege against self-incrimination.

Testimonial immunity is preferred because it does not bar prosecution of the person for the offenses about which testimony or information is given under the grant of immunity.

In any trial of a person granted testimonial immunity after the testimony or information is given, the Government must meet a heavy burden to show that it has not used in any way for the prosecution of that person the person’s statements, testimony, or information derived from them. In many cases this burden makes difficult a later prosecution of such a person for any offense that was the subject of that person’s testimony or statements. Therefore, if it is intended to prosecute a person to whom testimonial immunity has been or will be granted for offenses about which that person may testify or make statements, it may be necessary to try that person before the testimony or statements are given.

(b) *Scope.* Nothing in this rule bars:

(1) A later court-martial for perjury, false swearing, making a false official statement, or failure to comply with an order to testify; or

(2) Use in a court-martial under subsection (b)(1) of this rule of testimony or statements derived from such testimony or statements.

(c) *Authority to grant immunity.* Only a general court-martial convening authority may grant immunity, and may do so only in accordance with this rule.

Discussion

Only general court-martial convening authorities are authorized to grant immunity. However, in some circumstances, when a person testifies or makes statements pursuant to a promise of immunity, or a similar promise, by a person with apparent authority to make it, such testimony or statements and evidence derived from them may be inadmissible in a later trial. Under some circumstances a promise of immunity by someone other than a general court-martial convening authority may bar prosecution altogether. Persons not authorized to grant immunity should exercise care when dealing with accused or suspects to avoid inadvertently causing statements to be inadmissible or prosecution to be barred.

A convening authority who grants immunity to a prosecution witness in a court-martial may be disqualified from taking post-trial action in the case under some circumstances.

R.C.M. 704(c)(1)

(1) *Persons subject to the code.* A general court-martial convening authority may grant immunity to any person subject to the code. However, a general court-martial convening authority may grant immunity to a person subject to the code extending to a prosecution in a United States District Court only when specifically authorized to do so by the Attorney General of the United States or other authority designated under 18 U.S.C. § 6004.

Discussion

When testimony or a statement for which a person subject to the code may be granted immunity may relate to an offense for which that person could be prosecuted in a United States District Court, immunity should not be granted without prior coordination with the Department of Justice. Ordinarily coordination with the local United States Attorney is appropriate. Unless the Department of Justice indicates it has no interest in the case, authorization for the grant of immunity should be sought from the Attorney General. A request for such authorization should be forwarded through the office of the Judge Advocate General concerned. Service regulations may provide additional guidance. Even if the Department of Justice expresses no interest in the case, authorization by the Attorney General for the grant of immunity may be necessary to compel the person to testify or make a statement if such testimony or statement would make the person liable for a Federal civilian offense.

(2) *Persons not subject to the code.* A general court-martial convening authority may grant immunity to persons not subject to the code only when specifically authorized to do so by the Attorney General of the United States or other authority designated under 18 U.S.C. § 6004.

Discussion

See the discussion under subsection (c)(1) of this rule concerning forwarding a request for authorization to grant immunity to the Attorney General.

(3) *Other limitations.* The authority to grant immunity under this rule may not be delegated. The authority to grant immunity may be limited by superior authority.

Discussion

Department of Defense Directive 1355.1 (21 July 1981) provides: "A proposed grant of immunity in a case involving espionage, subversion, aiding the enemy, sabotage, spying, or violation of rules or statutes concerning classified information or

the foreign relations of the United States, shall be forwarded to the General Counsel of the Department of Defense for the purpose of consultation with the Department of Justice. The General Counsel shall obtain the view of other appropriate elements of the Department of defense in furtherance of such consultation."

(d) *Procedure.* A grant of immunity shall be written and signed by the convening authority who issues it. The grant shall include a statement of the authority under which it is made and shall identify the matters to which it extends.

Discussion

A person who has received a valid grant of immunity from a proper authority may be ordered to testify. In addition, a servicemember who has received a valid grant of immunity may be ordered to answer questions by investigators or counsel pursuant to that grant. See Mil. R. Evid. 301(c). A person who refuses to testify despite a valid grant of immunity may be prosecuted for such refusal. Persons subject to the code may be charged under Article 134. See paragraph 108, Part IV. A grant of immunity removes the right to refuse to testify or make a statement on self-incrimination grounds. It does not, however, remove other privileges against disclosure of information. See Mil. R. Evid., Section V.

An immunity order or grant must not specify the contents of the testimony it is expected the witness will give.

When immunity is granted to a prosecution witness, the accused must be notified in accordance with Mil. R. Evid. 301(c)(2).

(e) *Decision to grant immunity.* Unless limited by superior competent authority, the decision to grant immunity is a matter within the sole discretion of the appropriate general court-martial convening authority. However, if a defense request to immunize a witness has been denied, the military judge may, upon motion by the defense, grant appropriate relief directing that either an appropriate convening authority grant testimonial immunity to a defense witness or, as to the affected charges and specifications, the proceedings against the accused be abated, upon findings that:

(1) The witness intends to invoke the right against self-incrimination to the extent permitted by law if called to testify; and

(2) The Government has engaged in discriminatory use of immunity to obtain a tactical advantage, or the Government, through its own overreaching,

has forced the witness to invoke the privilege against self-incrimination; and

(3) The witness' testimony is material, clearly exculpatory, not cumulative, not obtainable from any other source and does more than merely affect the credibility of other witnesses.

Rule 705. Pretrial agreements

(a) *In general.* Subject to such limitations as the Secretary concerned may prescribe, an accused and the convening authority may enter into a pretrial agreement in accordance with this rule.

Discussion

The authority of convening authorities to refer cases to trial and approve pretrial agreements extends only to trials by court-martial. To ensure that such actions do not preclude appropriate action by Federal civilian authorities in cases likely to be prosecuted in the United States district courts, convening authorities shall ensure that appropriate consultation under the "Memorandum of Understanding Between the Departments of Justice and Defense Relating to the Investigation and Prosecution of Crimes Over Which the Two Departments Have Concurrent Jurisdiction" has taken place prior to trial by court-martial or approval of a pretrial agreement in cases where such consultation is required. See Appendix 3.

(b) *Nature of agreement.* A pretrial agreement may include:

(1) A promise by the accused to plead guilty to, or to enter a confessional stipulation as to one or more charges and specifications, and to fulfill such additional terms or conditions which may be included in the agreement and which are not prohibited under this rule; and

(2) A promise by the convening authority to do one or more of the following:

- (A) Refer the charges to a certain type of court-martial;
- (B) Refer a capital offense as noncapital;
- (C) Withdraw one or more charges or specifications from the court-martial;

Discussion

A convening authority may withdraw certain specifications and/or charges from a court-martial and dismiss them if the accused fulfills the accused's promises in the agreement. Except when jeopardy has attached (*see* R.C.M. 907(b)(2)(C)), such withdrawal and dismissal does not bar later reinstatement of the charges by the same or a different convening authority. A judicial

determination that the accused breached the pretrial agreement is not required prior to reinstatement of withdrawn or dismissed specifications and/or charges. If the defense moves to dismiss the reinstated specifications and/or charges on the grounds that the government remains bound by the terms of the pretrial agreement, the government will be required to prove, by a preponderance of the evidence, that the accused has breached the terms of the pretrial agreement. If the agreement is intended to grant immunity to an accused, *see* R.C.M. 704.

(D) Have the trial counsel present no evidence as to one or more specifications or portions thereof; and

(E) Take specified action on the sentence adjudged by the court-martial.

Discussion

For example, the convening authority may agree to approve no sentence in excess of a specified maximum, to suspend all or part of a sentence, to defer confinement, or to mitigate certain forms of punishment into less severe forms.

(c) *Terms and conditions.*

(1) *Prohibited terms or conditions.*

(A) *Not voluntary.* A term or condition in a pretrial agreement shall not be enforced if the accused did not freely and voluntarily agree to it.

(B) *Deprivation of certain rights.* A term or condition in a pretrial agreement shall not be enforced if it deprives the accused of: the right to counsel; the right to due process; the right to challenge the jurisdiction of the court-martial; the right to a speedy trial; the right to complete sentencing proceedings; the complete and effective exercise of post-trial and appellate rights.

Discussion

A pretrial agreement provision which prohibits the accused from making certain pretrial motions (*see* R.C.M. 905-907) may be improper.

(2) *Permissible terms or conditions.* Subject to subsection (c)(1)(A) of this rule, subsection (c)(1)(B) of this rule does not prohibit either party from proposing the following additional conditions:

(A) A promise to enter into a stipulation of fact

R.C.M. 705(c)(2)(A)

concerning offenses to which a plea of guilty or as to which a confessional stipulation will be entered;

(B) A promise to testify as a witness in the trial of another person;

Discussion

See R.C.M. 704(a)(2) concerning testimonial immunity. Only a general court-martial convening authority may grant immunity.

(C) A promise to provide restitution;

(D) A promise to conform the accused's conduct to certain conditions of probation before action by the convening authority as well as during any period of suspension of the sentence, provided that the requirements of R.C.M. 1109 must be complied with before an alleged violation of such terms may relieve the convening authority of the obligation to fulfill the agreement; and

(E) A promise to waive procedural requirements such as the Article 32 investigation, the right to trial by court-martial composed of members or the right to request trial by military judge alone, or the opportunity to obtain the personal appearance of witnesses at sentencing proceedings.

(d) *Procedure.*

(1) *Negotiation.* Pretrial agreement negotiations may be initiated by the accused, defense counsel, trial counsel, the staff judge advocate, convening authority, or their duly authorized representatives. Either the defense or the government may propose any term or condition not prohibited by law or public policy. Government representatives shall negotiate with defense counsel unless the accused has waived the right to counsel.

(2) *Formal submission.* After negotiation, if any, under subsection (d)(1) of this rule, if the accused elects to propose a pretrial agreement, the defense shall submit a written offer. All terms, conditions, and promises between the parties shall be written. The proposed agreement shall be signed by the accused and defense counsel, if any. If the agreement contains any specified action on the adjudged sentence, such action shall be set forth on a page separate from the other portions of the agreement.

Discussion

The first part of the agreement ordinarily contains an offer to

plead guilty and a description of the offenses to which the offer extends. It must also contain a complete and accurate statement of any other agreed terms or conditions. For example, if the convening authority agrees to withdraw certain specifications, or if the accused agrees to waive the right to an Article 32 investigation, this should be stated. The written agreement should contain a statement by the accused that the accused enters it freely and voluntarily and may contain a statement that the accused has been advised of certain rights in connection with the agreement.

(3) *Acceptance.* The convening authority may either accept or reject an offer of the accused to enter into a pretrial agreement or may propose by counteroffer any terms or conditions not prohibited by law or public policy. The decision whether to accept or reject an offer is within the sole discretion of the convening authority. When the convening authority has accepted a pretrial agreement, the agreement shall be signed by the convening authority or by a person, such as the staff judge advocate or trial counsel, who has been authorized by the convening authority to sign.

Discussion

The convening authority should consult with the staff judge advocate or trial counsel before acting on an offer to enter into a pretrial agreement.

(4) *Withdrawal.*

(A) *By accused.* The accused may withdraw from a pretrial agreement at any time; however, the accused may withdraw a plea of guilty or a confessional stipulation entered pursuant to a pretrial agreement only as provided in R.C.M. 910(h) or 811(d), respectively.

(B) *By convening authority.* The convening authority may withdraw from a pretrial agreement at any time before the accused begins performance of promises contained in the agreement, upon the failure by the accused to fulfill any material promise or condition in the agreement, when inquiry by the military judge discloses a disagreement as to a material term in the agreement, or if findings are set aside because a plea of guilty entered pursuant to the agreement is held improvident on appellate review.

(e) *Nondisclosure of existence of agreement.* Except in a special court-martial without a military judge, no member of a court-martial shall be informed of the existence of a pretrial agreement. In addition,

except as provided in Mil. R. Evid. 410, the fact that an accused offered to enter into a pretrial agreement, and any statements made by an accused in connection therewith, whether during negotiations or during a providence inquiry, shall not be otherwise disclosed to the members.

Discussion

See also R.C.M. 910(f) (plea agreement inquiry).

Rule 706. Inquiry into the mental capacity or mental responsibility of the accused

(a) *Initial action.* If it appears to any commander who considers the disposition of charges, or to any investigating officer, trial counsel, defense counsel, military judge, or member that there is reason to believe that the accused lacked mental responsibility for any offense charged or lacks capacity to stand trial, that fact and the basis of the belief or observation shall be transmitted through appropriate channels to the officer authorized to order an inquiry into the mental condition of the accused. The submission may be accompanied by an application for a mental examination under this rule.

Discussion

See R.C.M. 909 concerning the capacity of the accused to stand trial and R.C.M. 916(k) concerning mental responsibility of the accused.

(b) *Ordering an inquiry.*

(1) *Before referral.* Before referral of charges, an inquiry into the mental capacity or mental responsibility of the accused may be ordered by the convening authority before whom the charges are pending for disposition.

(2) *After referral.* After referral of charges, an inquiry into the mental capacity or mental responsibility of the accused may be ordered by the military judge. The convening authority may order such an inquiry after referral of charges but before beginning of the first session of the court-martial (including any Article 39(a) session) when the military judge is not reasonably available. The military judge may order a mental examination of the accused regardless of any earlier determination by the convening authority.

(c) *Inquiry.*

(1) *By whom conducted.* When a mental examination is ordered under subsection (b) of this rule, the matter shall be referred to a board consisting of one or more persons. Each member of the board shall be either a physician or a clinical psychologist. Normally, at least one member of the board shall be either a psychiatrist or a clinical psychologist. The board shall report as to the mental capacity or mental responsibility or both of the accused.

(2) *Matters in inquiry.* When a mental examination is ordered under this rule, the order shall contain the reasons for doubting the mental capacity or mental responsibility, or both, of the accused, or other reasons for requesting the examination. In addition to other requirements, the order shall require the board to make separate and distinct findings as to each of the following questions:

(A) At the time of the alleged criminal conduct, did the accused have a severe mental disease or defect? (The term “severe mental disease or defect” does not include an abnormality manifested only by repeated criminal or otherwise antisocial conduct, or minor disorders such as nonpsychotic behavior disorders and personality defects.)

(B) What is the clinical psychiatric diagnosis?

(C) Was the accused, at the time of the alleged criminal conduct and as a result of such severe mental disease or defect, unable to appreciate the nature and quality or wrongfulness of his or her conduct?

(D) Is the accused presently suffering from a mental disease or defect rendering the accused unable to understand the nature of the proceedings against the accused or to conduct or cooperate intelligently in the defense?

Other appropriate questions may also be included.

(3) *Directions to board.* In addition to the requirements specified in subsection (c)(2) of this rule, the order to the board shall specify:

(A) That upon completion of the board’s investigation, a statement consisting only of the board’s ultimate conclusions as to all questions specified in the order shall be submitted to the officer ordering the examination, the accused’s commanding officer, the investigating officer, if any, appointed pursuant to Article 32 and to all counsel in the case, the convening authority, and, after referral, to the military judge;

R.C.M. 706(c)(3)(B)

(B) That the full report of the board may be released by the board or other medical personnel only to other medical personnel for medical purposes, unless otherwise authorized by the convening authority or, after referral of charges, by the military judge, except that a copy of the full report shall be furnished to the defense and, upon request, to the commanding officer of the accused; and

(C) That neither the contents of the full report nor any matter considered by the board during its investigation shall be released by the board or other medical personnel to any person not authorized to receive the full report, except pursuant to an order by the military judge.

Discussion

Based on the report, further action in the case may be suspended, the charges may be dismissed by the convening authority, administrative action may be taken to discharge the accused from the service or, subject to Mil. R. Evid. 302, the charges may be tried by court-martial.

(4) *Additional examinations.* Additional examinations may be directed under this rule at any stage of the proceedings as circumstances may require.

(5) *Disclosure to trial counsel.* No person, other than the defense counsel, accused, or, after referral of charges, the military judge may disclose to the trial counsel any statement made by the accused to the board or any evidence derived from such statement.

Discussion

See Mil. R. Evid. 302.

Rule 707. Speedy trial

(a) *In general.* The accused shall be brought to trial within 120 days after the earlier of:

- (1) Preferral of charges;

Discussion

Delay from the time of an offense to preferral of charges or the imposition of pretrial restraint is not considered for speedy trial purposes. See also Article 43 (statute of limitations). In some circumstances such delay may prejudice the accused and may result in dismissal of the charges or other relief. Offenses ordinarily should be disposed of promptly to serve the interests of good

order and discipline. Priority shall be given to persons in arrest or confinement.

(2) The imposition of restraint under R.C.M. 304(a)(2)–(4); or

(3) Entry on active duty under R.C.M. 204.

(b) *Accountability.*

(1) *In general.* The date of preferral of charges, the date on which pretrial restraint under R.C.M. 304 (a)(2)–(4) is imposed, or the date of entry on active duty under R.C.M. 204 shall not count for purpose of computing time under subsection (a) of this rule. The date on which the accused is brought to trial shall count. The accused is brought to trial within the meaning of this rule at the time of arraignment under R.C.M. 904.

(2) *Multiple Charges.* When charges are preferred at different times, accountability for each charge shall be determined from the appropriate date under subsection (a) of this rule for that charge.

(3) *Events which affect time periods.*

(A) *Dismissal or mistrial.* If charges are dismissed, or if a mistrial is granted, a new 120-day time period under this rule shall begin on the date of dismissal or mistrial for cases in which there is no repreferal and cases in which the accused is in pretrial restraint. In all other cases, a new 120-day time period under the rule shall begin on the earlier of

- (i) the date of repreferal;
- (ii) the date of imposition of restraint under R.C.M. 304(a)(2)–(4).

(B) *Release from restraint.* If the accused is released from pretrial restraint for a significant period, the 120-day time period under this rule shall begin on the earlier of

- (i) the date of preferral of charges;
- (ii) the date on which restraint under R.C.M. 304(a) (2)–(4) is reimposed; or
- (iii) the date of entry on active duty under R.C.M. 204.

(C) *Government appeals.* If notice of appeal under R.C.M. 908 is filed, a new 120-day time period under this rule shall begin, for all charges neither proceeded on nor severed under R.C.M. 908(b)(4), on the date of notice to the parties under R.C.M. 908(b)(8) or 908(c)(3), unless it is deter-