

R.C.M. 1105(c)(3)

R.C.M. 1102 shall have no effect on the running of any time period in this rule, except when such session results in the announcement of a new sentence, in which case the period shall run from that announcement.

(4) *Good cause.* For purposes of this rule, good cause for an extension ordinarily does not include the need for securing matters which could reasonably have been presented at the court-martial.

(d) *Waiver.*

(1) *Failure to submit matters.* Failure to submit matters within the time prescribed by this rule shall be deemed a waiver of the right to submit such matters.

(2) *Submission of matters.* Submission of any matters under this rule shall be deemed a waiver of the right to submit additional matters unless the right to submit additional matters within the prescribed time limits is expressly reserved in writing.

(3) *Written waiver.* The accused may expressly waive, in writing, the right to submit matters under this rule. Once filed, such waiver may not be revoked.

(4) *Absence of accused.* If, as a result of the unauthorized absence of the accused, the record cannot be served on the accused in accordance with R.C.M. 1104(b)(1) and if the accused has no counsel to receive the record, the accused shall be deemed to have waived the right to submit matters under this rule within the time limit which begins upon service on the accused of the record of trial.

Discussion

The accused is not required to raise objections to the trial proceedings in order to preserve them for later review.

Rule 1106. Recommendation of the staff judge advocate or legal officer

(a) *In general.* Before the convening authority takes action under R.C.M. 1107 on a record of trial by general court-martial or a record of trial by special court-martial that includes a sentence to a bad-conduct discharge or confinement for one year, that convening authority's staff judge advocate or legal officer shall, except as provided in subsection (c) of this rule, forward to the convening authority a recommendation under this rule.

(b) *Disqualification.* No person who has acted as member, military judge, trial counsel, assistant trial counsel, defense counsel, associate or assistant defense counsel, or investigating officer in any case may later act as a staff judge advocate or legal officer to any reviewing or convening authority in the same case.

Discussion

The staff judge advocate or legal officer may also be ineligible when, for example, the staff judge advocate or legal officer; served as the defense counsel in a companion case; testified as to a contested matter (unless the testimony is clearly uncontroverted); has other than an official interest in the same case; or must review that officer's own pretrial action (such as the pretrial advice under Article 34; see R.C.M. 406) when the sufficiency or correctness of the earlier action has been placed in issue.

(c) *When the convening authority has no staff judge advocate.*

(1) *When the convening authority does not have a staff judge advocate or legal officer or that person is disqualified.* If the convening authority does not have a staff judge advocate or legal officer, or if the person serving in that capacity is disqualified under subsection (b) of this rule or otherwise, the convening authority shall:

(A) Request the assignment of another staff judge advocate or legal officer to prepare a recommendation under this rule; or

(B) Forward the record for action to any officer exercising general court-martial jurisdiction as provided in R.C.M. 1107(a).

(2) *When the convening authority has a legal officer but wants the recommendation of a staff judge advocate.* If the convening authority has a legal officer but no staff judge advocate, the convening authority may, as a matter of discretion, request designation of a staff judge advocate to prepare the recommendation.

(d) *Form and content of recommendation.*

(1) The purpose of the recommendation of the staff judge advocate or legal officer is to assist the convening authority to decide what action to take on the sentence in the exercise of command prerogative. The staff judge advocate or legal officer shall use the record of trial in the preparation of the recommendation.

(2) *Form.* The recommendation of the staff judge

advocate or legal officer shall be a concise written communication.

(3) *Required contents.* Except as provided in subsection (e) of this rule, the recommendation of the staff judge advocate or legal officer shall include concise information as to:

(A) The findings and sentence adjudged by the court-martial;

(B) A recommendation for clemency by the sentencing authority, made in conjunction with the announced sentence;

Discussion

The recommendation required by this rule need not include information regarding other recommendations for clemency. See R.C.M. 1105(b)(4), which pertains to clemency recommendations that may be submitted by the accused to the convening authority.

(C) A summary of the accused's service record, to include length and character of service, awards and decorations received, and any records of non-judicial punishment and previous convictions;

(D) A statement of the nature and duration of any pretrial restraint;

(E) If there is a pretrial agreement, a statement of any action the convening authority is obligated to take under the agreement or a statement of the reasons why the convening authority is not obligated to take specific action under the agreement; and

(F) A specific recommendation as to the action to be taken by the convening authority on the sentence.

(4) *Legal errors.* The staff judge advocate or legal officer is not required to examine the record for legal errors. However, when the recommendation is prepared by a staff judge advocate, the staff judge advocate shall state whether, in the staff judge advocate's opinion, corrective action on the findings or sentence should be taken when an allegation of legal error is raised in matters submitted under R.C.M. 1105 or when otherwise deemed appropriate by the staff judge advocate. The response may consist of a statement of agreement or disagreement with the matter raised by the accused. An analysis or rationale for the staff judge advocate's statement, if any, concerning legal errors is not required.

(5) *Optional matters.* The recommendation of the staff judge advocate or legal officer may include, in addition to matters included under subsections (d)(3)

and (4) of this rule, any additional matters deemed appropriate by the staff judge advocate or legal officer. Such matter may include matters outside the record.

Discussion

See R.C.M. 1107(b)(3)(B)(iii) if matters adverse to the accused from outside the record are included.

(6) *Effect of error.* In case of error in the recommendation not otherwise waived under subsection (f)(6) of this rule, appropriate corrective action shall be taken by appellate authorities without returning the case for further action by a convening authority.

(e) *No findings of guilty; findings of not guilty only by reason of lack of mental responsibility.* If the proceedings resulted in an acquittal or in a finding of not guilty only by reason of lack of mental responsibility of all charges and specifications, or if, after the trial began, the proceedings were terminated without findings and no further action is contemplated, a recommendation under this rule is not required.

(f) *Service of recommendation on defense counsel and accused; defense response.*

(1) *Service of recommendation on defense counsel and accused.* Before forwarding the recommendation and the record of trial to the convening authority for action under R.C.M. 1107, the staff judge advocate or legal officer shall cause a copy of the recommendation to be served on counsel for the accused. A separate copy will be served on the accused. If it is impracticable to serve the recommendation on the accused for reasons including but not limited to 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 shall be forwarded to the accused's defense counsel. A statement shall be attached to the record explaining why the accused was not served personally.

Discussion

The method of service and the form of the proof of service are not prescribed and may be by any appropriate means. See R.C.M. 1103(b)(3)(G). For example, a certificate of service, at

R.C.M. 1106(f)(1)

tached to the record of trial, would be appropriate when the accused is served personally.

(2) *Counsel for the accused.* The accused may, at trial or in writing to the staff judge advocate or legal officer before the recommendation has been served under this rule, designate which counsel (detailed, individual military, or civilian) will be served with the recommendation. In the absence of such designation, the staff judge advocate or legal officer shall cause the recommendation to be served in the following order of precedence, as applicable, on: (1) civilian counsel; (2) individual military counsel; or (3) detailed defense counsel. If the accused has not retained civilian counsel and the detailed defense counsel and individual military counsel, if any, have been relieved or are not reasonably available to represent the accused, substitute military counsel to represent the accused shall be detailed by an appropriate authority. Substitute counsel shall enter into an attorney-client relationship with the accused before examining the recommendation and preparing any response.

Discussion

When the accused is represented by more than one counsel, the military judge should inquire of the accused and counsel before the end of the court-martial as to who will act for the accused under this rule.

(3) *Record of trial.* The staff judge advocate or legal officer shall, upon request of counsel for the accused served with the recommendation, provide that counsel with a copy of the record of trial for use while preparing the response to the recommendation.

(4) *Response.* Counsel for the accused may submit, in writing, corrections or rebuttal to any matter in the recommendation believed to be erroneous, inadequate, or misleading, and may comment on any other matter.

Discussion

See also R.C.M. 1105.

(5) *Time period.* Counsel for the accused shall be given 10 days from service of the record of trial under R.C.M. 1104(b) or receipt of the recommendation, whichever is later, in which to submit com-

ments on the recommendation. The convening authority may, for good cause, extend the period in which comments may be submitted for up to 20 additional days.

(6) *Waiver.* Failure of counsel for the accused to comment on any matter in the recommendation or matters attached to the recommendation in a timely manner shall waive later claim of error with regard to such matter in the absence of plain error.

Discussion

The accused is not required to raise objections to the trial proceedings in order to preserve them for later review.

(7) *New matter in addendum to recommendation.* The staff judge advocate or legal officer may supplement the recommendation after the accused and counsel for the accused have been served with the recommendation and given an opportunity to comment. When new matter is introduced after the accused and counsel for the accused have examined the recommendation, however, the accused and counsel for the accused must be served with the new matter and given 10 days from service of the addendum in which to submit comments. Substitute service of the accused's copy of the addendum upon counsel for the accused is permitted in accordance with the procedures outlined in subparagraph (f)(1) of this rule.

Discussion

"New matter" includes discussion of the effect of new decisions on issues in the case, matter from outside the record of trial, and issues not previously discussed. "New matter" does not ordinarily include any discussion by the staff judge advocate or legal officer of the correctness of the initial defense comments on the recommendation. The method of service and the form of the proof of service are not prescribed and may be by any appropriate means. See R.C.M. 1103(b)(3)(G). For example, a certificate of service, attached to the record of trial, would be appropriate when the accused is served personally.

Rule 1107. Action by convening authority

(a) *Who may take action.* The convening authority shall take action on the sentence and, in the discretion of the convening authority, the findings, unless it is impracticable. If it is impracticable for the convening authority to act, the convening authority shall, in accordance with such regulations as the