

UNITED STATES NAVY-MARINE CORPS TRIAL JUDICIARY
NORTHERN JUDICIAL CIRCUIT
(GENERAL)(SPECIAL) COURT MARTIAL

UNITED STATES)
) CIVILIAN DEFENSE COUNSEL
) NOTICE OF APPEARANCE
 V.)
)
 ACCUSED)
) DATE:

1. Pursuant to Rule 5.1 of the Uniform Rules of Practice Before Navy-Marine Corps Courts-Martial (Uniform Rules) and the Northern Judicial Circuit Rules of Practice (Circuit Rules), I, {ATTORNEY'S FULL NAME}, hereby provide notice to the Circuit Military Judge of my appearance on behalf of {CLIENT'S RANK, FULL NAME}. My office address, phone numbers, and e-mail address are: ADDRESS, PHONE NUMBER (office and fax) & E-MAIL ADDRESS. I am an active member in good standing licensed to practice in the following jurisdictions: {LIST BAR ADMISSIONS}.

2. I understand that practice in the Northern Judicial Circuit requires me to be familiar with the Uniform and Circuit rules. Additionally, I am aware of the standards of professional conduct required of counsel practicing in Navy-Marine Corps courts-martial as contained in JAG Instruction 5803.1C. I certify that I am not now, nor have I ever been, de-certified or suspended from practice in Navy-Marine Corps courts-martial by the Judge Advocate General of the Navy.

COUNSEL NAME
Attorney At Law

Certificate of Service

I hereby attest that a copy of the foregoing notice of appearance was served on the court and opposing counsel personally and/or by facsimile and/or e-mail on _____, 20xx.

Counsel Name



UNITED STATES MARINE CORPS
 OFFICE OF THE STAFF JUDGE ADVOCATE
 MARINE CORPS BASE
 QUANTICO, VIRGINIA 22134

5800
 B0521
 1 Aug 12

From: Senior Trial Counsel, RLSO MIDLANT Det Groton
 To: Docketing Judge
 Via: Clerk of Court

Subj: DOCKETING MEMORANDUM FOR THE WEEK OF 6 - 10 AUGUST 2012

1. DOCKET REQUEST FOR 6 - 10 AUGUST 2012

NAME	TIME	MJ/TC/DC	UNIT	CHARGES	PURPOSE	CTRM	DUR
Monday, 6 August 2012							
Smith	0800	ABC/DE/FG	NSB	80,81,134	MOT	Groton	3 HRS
Tuesday, 7 August 2012							
Johnson	0900	ABC/DE/FG	NSB	91,92,121	ARRN-VTC	Groton	15 MIN
Wednesday, 8 August 2012							
Thursday, 9 August 2012							
Friday, 10 August 2012							

2. The long range docket accurately reflects the following cases:

U.S. v. Smith: Wednesday 22 - 24 August, Trial.
 U.S. v. Johnson: Monday 27 August, Motions.

3. The following cases need to be added to the docket.

U.S. v. Sailor: Wednesday 15 August, Motions.
 U.S. v. Corpsman: Friday 31 August, Motions.
 U.S. v. Marine: Monday 24 September, Motions.

4. The following cases need to be removed from the docket.

U.S. v. Smith: Tuesday 4 September, Motions.
 U.S. v. Smith: Monday 10 - 13 September, Trial.

I. M. COUNSEL
 Lieutenant,
 U.S. Navy

UNITED STATES NAVY-MARINE CORPS TRIAL JUDICIARY
NORTHERN JUDICIAL CIRCUIT
(GENERAL)(SPECIAL) COURT MARTIAL

UNITED STATES)
) MOTION FOR DOCKETING
 V.)
 ACCUSED)

From: _____, Trial Counsel
To: _____, Defense Counsel

1. The government requests _____ for arraignment/trial in the above captioned case to be tried at _____.
2. THE ATTACHED PRETRIAL ORDER (PTO) IS PROPOSED [notice must be given if any change is made to the standard PTO included as Attachment 8 to the local rules].

TRIAL COUNSEL

Dated: _____

From: _____, Defense Counsel
To: _____, Trial Counsel

1. () The above arr/trial date and proposed PTO is acceptable.
() The above arr/trial date and proposed PTO is not acceptable, and the date of _____/ATTACHED PTO is proposed. [notice must be given if any change is made to the standard PTO included as Attachment 8 to the local rules].
(if approved by the military judge, delay is normally excludable under R.C.M. 707 absent a showing to the contrary).
2. Anticipated Forum: () Members; () Military Judge Alone.
3. Anticipated Motions:
4. Anticipated Pleas:
5. Additional Comments:

DEFENSE COUNSEL

Dated: _____

From: _____, Trial Counsel
To: Circuit/Docketing Military Judge or detailed military judge as appropriate

1. () The arr/trial date of _____ AND PTO is **mutually agreeable** to the trial and defense counsel.
() The trial and defense counsel were not able to reach a mutually agreeable date and PTO – both the government’s as well as the defense’s proposed PTOs are attached.

TRIAL COUNSEL

Counsel are advised that if they do not receive a court signed copy of the PTO soon after submitting this MFD, that they have an affirmative duty to acquire a copy of the PTO for this case.

PRETRIAL INFORMATION REPORT

From: _____, (Trial)(Defense) Counsel
To: _____, Clerk of Court
Via: _____, (Defense)(Trial) Counsel

Subj: (GCM) (SPCM) ICO U.S. v. _____

Ref: (a) Uniform Rules of Practice Before Navy-Marine Corps Courts-Martial

- Encl: (1) Copy of Charge Sheet ___ enclosed ___ not enclosed
- (2) Copy of Convening Order ___ enclosed ___ not enclosed
- (3) Pretrial Agreement (Part one) ___ enclosed ___ not enclosed
- (4) Page 43 matters ___ enclosed ___ not enclosed
- (5) Anticipated Pleas/Forum ___ enclosed ___ not enclosed
- (6) Motion for Docketing ___ enclosed ___ not enclosed
- (7) Stipulation of Fact ___ enclosed ___ not enclosed
- (8) Applicable Orders/Regulations ___ enclosed ___ not enclosed
- (9) Prop elements (if Assimil.) ___ enclosed ___ not enclosed

1. Pursuant to Rules 6 and 7 of reference (a), the following information is provided:

- a. Date charges preferred: _____; Day 120: _____
calculated from date of pretrial confinement
- b. Date charges referred: _____.
- c. Proposed trial site: _____.
- d. Expected duration of trial: _____ (hours)(days).
- e. Prior Sessions: ___ Yes ___ No
- f. Names of Related case(s)(if any): _____.
- g. Additional Counsel (not listed above):
_____.
- h. Pretrial Agreement: ___ Yes ___ No
- i. Article 39(a) session requested by ___ TC ___ DC to resolve:

2. Special requests (e.g. explain missing signature(s), specific times):

Trial Counsel / date

Defense Counsel / date

**NORTHERN JUDICIAL CIRCUIT
TRIAL DEADLINES
IN THE CASE OF
UNITED STATES
VERSUS**

Date of Arraignment _____
 Trial Counsel _____
 Defense Counsel _____
 Court Reporter _____
 Military Judge _____

Misc Notices _____ *Normally same date as motions filed*
 RCM 701(a)(1), 701(a)(3), 701(a)(4), 701(a)(6), & MRE 301(c)(2),
 304(d)(1), 311(d)(1), 321(c)(1), 404B, 412, 413(b), 414(b), 513,
 807, Certain Defenses

Witness Requests _____ *Normally about a month prior to trial*
 Witness Responses _____ *Normally a week after the request*
 Witness 802 _____ *As soon as it is ripe*

Motions Filed _____ *Normally 2 weeks prior to Motion hearing*
 Motions Answered _____ *Normally 1 week prior to Motion hearing*

Forum Selection _____ *At least 10 days prior to trial*
 Members Finalized _____ *At least 1 day prior to Plea 39a*

39(a) Pleas/Motions _____ *At least 1 week prior to trial*

Pre-Trial Matters _____ *Normally a week prior to trial includes
questionnaires and witness lists*

39(a) Admin _____ *Normally 1 day prior to trial*

Trial Dates _____

 Trial Counsel Signature

 Defense Counsel Signature

The above deadlines are hereby ordered.

 Military Judge (Date)

AE _____

UNITED STATES NAVY-MARINE CORPS TRIAL JUDICIARY
NORTHERN JUDICIAL CIRCUIT
(GENERAL)(SPECIAL) COURT MARTIAL

UNITED STATES

V.

ACCUSED

)
)
) ACCUSED'S NOTICE OF
) ANTICIPATED PLEAS AND
) FORUM ELECTION
)
) DATE:

1. **Forum Election.** Pursuant to Rule for Courts-Martial 903(b), I, ACCUSED NAME, elect to be tried by a court-martial composed of members / members with enlisted representation / military judge alone.

2. **Entry of Pleas.** Pursuant to Rule for Courts-Martial 910, I, ACCUSED NAME, enter the following pleas:

Charge	Plea
Charge (I)	
Specification:	

I. M. ACCUSED
RANK, U.S. Marine Corps / Navy

I. M. DEFENDER
RANK, U.S. Marine Corps/Navy
Defense Counsel

Certificate of Service

I hereby attest that a copy of the foregoing was served on the court and opposing counsel on (DATE).

I. M. DEFENDER

UNITED STATES NAVY-MARINE CORPS TRIAL JUDICIARY
NORTHERN JUDICIAL CIRCUIT
(GENERAL)(SPECIAL) COURT MARTIAL

UNITED STATES) CERTIFICATE OF WITHDRAWAL
) OF REFERRED CHARGES
 V.)
 ACCUSED)
) DATE:

Pursuant to Northern Circuit Rule 6.2.10, notice of withdrawal of referred charges in the above-captioned case is hereby filed with the court. The charges were withdrawn by (convening authority) on (date), and (dismissed)(referred to summary court-martial)(other appropriate action).

COUNSEL NAME
RANK, U.S. Marine Corps/Navy
Trial Counsel

Certificate of Filing

I hereby attest that a copy of the foregoing was filed with the court personally / by facsimile on (DATE).

COUNSEL NAME

UNITED STATES NAVY-MARINE CORPS TRIAL JUDICIARY
NORTHERN JUDICIAL CIRCUIT
(GENERAL)(SPECIAL) COURT-MARTIAL

UNITED STATES)
) (DEFENSE)(GOVERNMENT) MOTION
V.) FOR (GROUNDS FOR MOTION)
)
ACCUSED)
) DATE:

1. **Nature of Motion.** Pursuant to (cite applicable RCM and/or MRE), the defense / government moves the court to (describe nature of motion) based upon (cite primary legal basis for motion).

2. **Summary of Facts.**

a. Set forth the pertinent facts for the motion. If you attach documents to the motion, label them as “Attachment” with a number and specifically reference them at the appropriate spot in your factual summary.

b. The preferred format in the Northern Judicial Circuit for all motions is double line spacing, 12-point font of the style of Courier New or Times New Roman.

3. **Discussion.**

a. Number or letter all subparagraphs in a particular section.

b. Identify the applicable law; then apply the facts to the law in support of the motion.

4. **Evidence and Burden of Proof.** List or describe the testimony and evidence that will be presented in support of the facts alleged in the motion. Also indicate the standard for the burden of proof and assignment of the burden of persuasion applicable to the motion. For motions with dual or shifting burdens, set out what the burdens are and how they should be applied by the court.

Additionally, if you are requesting production of a witness for an Article 39(a) motion session, include a discussion along with the all supporting authority.

5. **Relief Requested.** List the specific relief sought.
6. **Argument.** Indicate whether or not you desire oral argument on the issue presented in the motion.

Counsel Name
Rank, USMC/USN
Trial / Defense Counsel

Certificate of Service

I hereby attest that a copy of the foregoing motion was served on the court and opposing counsel personally / by facsimile / by e-mail on (DATE).

COUNSEL NAME
Counsel Rank, USMC/USN
Detailed Defense/Trial Counsel
Individual Military Counsel
Civilian Defense Counsel

THE BAILIFF'S HANDBOOK

The military court-martial is a visible procedure dedicated to the proposition of equal justice under the law. A court-martial should be conducted to command the respect and assure all that the law is functioning and order will be preserved. Anything that distracts from respect for the law and the authority of the court is to be avoided.

The court-martial should not be disturbed by small administrative matters. Every party to the court-martial should know what is expected of them. The military judge and trial counsel receive the assistance of a bailiff who has been instructed as to his or her responsibilities. The bailiff should be senior to the accused. A bailiff is disqualified if he or she is, or has been, in the same case, the accuser, a witness, an investigating officer, counsel, or has previously served as a member of the accused's court-martial.

The bailiff should receive specific instructions as to his or her duties from the trial counsel before and after each session of court. While the court is in session, the bailiff is under the supervision of the military judge and will assist the military judge and counsel in the conduct of an orderly trial. The bailiff should be familiar with the location of the principle offices and facilities within the law complex.

DUTIES OF THE BAILIFF

Prior to Court-Martial

1. The bailiff will report in the uniform designated by the military judge to trial counsel at least 30 minutes before the beginning of each day's proceedings. Thereafter, the bailiff will report to the military judge 15 minutes before the reconvening of each of the day's proceedings.
2. The bailiff ensures that the courtroom spectator area and deliberation room for court members are neat and orderly. He or she will place the furniture in the proper arrangement as directed by the trial counsel or the court reporter.
3. The bailiff, with assistance of trial counsel or the court reporter will ensure that the military judge has the desired desk supplies and that the court members have pencils and pads of papers in their deliberation room.

ENTRY AND DEPARTURE OF MILITARY JUDGE

4. When counsel for both sides, the accused, the reporter, and if applicable, court members, are present in the courtroom, the bailiff will notify the military judge and escort the judge to the courtroom. When the bailiff enters the courtroom with the military judge, he or she will announce: "All rise." When the military judge announces a recess or adjournment the bailiff will announce: "All rise." If need be, the bailiff will instruct the spectators to stand fast until the military judge has departed the courtroom. The military judge will advise the bailiff of any departure from this procedure.

ENTRY OF COURT MEMBERS

5. When the court members enter the courtroom and when the court members stand to be sworn, the bailiff will announce: "All rise" in a voice that can be heard by all, unless advised of different procedure by the military judge.

SPECTATORS AND MEMBERS OF THE NEWS MEDIA

6. Military trials are usually open to the public. Spectators and members of the news media are welcome in the courtroom to observe the trial proceedings, unless otherwise instructed by the military judge. The bailiff should see that they enter the courtroom, be seated, and leave quietly while the court is in session.

7. As the law does not permit picture taking or any type of broadcasting in or from the courtroom. The bailiff will not permit broadcasting-capable equipment to be taken into the courtroom. Any problems concerning this matter should be brought to the attention of the trial counsel without delay.

8. Courtroom rules do not permit spectators to eat, sleep, smoke, chew gum, or engage in conversation while the court is in session. The bailiff should quietly and diplomatically inform offenders of these rules.

9. Anyone talking or making distracting noises in the areas outside of or adjacent to the courtroom while court is in session will be informed by the bailiff that a court is in session and they can be heard in the courtroom.

10. Rowdiness and violence are not unknown in the courtroom. The bailiff must be alert and prepared to take immediate steps to suppress unruly behavior.

COURT MEMBERS – IN CLOSED SESSION

11. When the court members are in closed session, they are the only ones permitted in the deliberation room. Therefore, the bailiff will not enter that room or permit anyone else to enter during the closed session.

12. The bailiff is the only contact between the court members and the parties to the trial during the periods the court members are deliberating. The bailiff will be available to the court members outside their deliberation room and immediately notify counsel and the military judge when the court members are ready for the court to be reopened.

13. If the bailiff is instructed to deliver any item or message to the court members in closed session, he must first inform the military judge and obtain his or her approval.

MISCELLANEOUS DUTIES DURING TRIAL

14. The bailiff will be prepared to furnish the following services:

a. Summon the court members to the courtroom at the beginning of each session of court when directed to do so by the military judge or trial counsel.

b. While the court is in session, collect written questions from the court members upon the military judge's request and hand them to the court reporter, the military judge, and counsel as instructed.

c. Summon witnesses to the courtroom when requested by counsel.

d. While the court is in session, deliver findings and sentence worksheets to the president of the court when instructed to do so.

e. Deliver items of evidence to the deliberation room, if instructed to do so by the military judge, when the members retire to the deliberation room.

f. Perform administrative errands during the trial as requested by the military judge or counsel.

THE BAILIFF'S RELATION TO THE ISSUES AND PARTIES OF THE TRIAL

The bailiff must remain neutral during the trial of a case. In other words, the bailiff should not take the side of prosecution or defense. **The bailiff must never participate in any discussion of the merits of the case and should never attempt to predict the outcome of the trial.** The bailiff must not make any comments on the performance of counsel or on the testimony of a witness. **The bailiff shall not reveal to members the matters discussed during sessions of the trial held outside the presence of the members.**

**NORTHERN JUDICIAL CIRCUIT
COURT-MARTIAL MEMBER QUESTIONNAIRE**

Please complete the following questionnaire and provide to the appropriate authority. Because of the sensitive personal information requested, no copy will be retained on file outside of the Legal Office. However, counsel and the military judge will use the questionnaire to prepare for trial and a copy will be attached to the record of trial.

1. Name _____ Grade _____ Date of Rank _____ Service _____

2. Active Duty Base Date _____ Date Current Tour Began _____ Years of Service _____

3. Military Awards / Decorations: _____

4. Current Duty Position: _____ Work Phone: _____

5. Unit (down to **Company Level**): _____

6. Date of Birth _____ Gender _____ Race or Ethnic Origin _____ Marital Status _____

7. Age and gender of any children _____

8. Age and occupation of spouse if married _____

9. Civilian Education: College / Vocational / Civilian Professional School / Civilian Post-Graduate:

Date graduated or dates attended (and number of years), school, location, degree/major: _____

10. Military Education: Dates attended, school/course title. _____

11. Duty Assignments: Last **four** assignments, units, and dates of assignments. _____

12. Have you ever sat as a court-martial member or juror in any other case? _____ If so, how many special courts-martial _____; general courts-martial _____. What was the general nature of the charges for these cases (rape, murder, theft, etc.) _____

PRIVACY ACT WARNING: This document contains personal information concerning an individual. Use and disclosure thereof is governed by SECNAVINST 5211.5 (series). Unauthorized disclosure of personal information from this document could subject the discloser to criminal penalties.

**NORTHERN JUDICIAL CIRCUIT
COURT-MARTIAL MEMBER QUESTIONNAIRE**

13. Have you ever conducted an Article 15 or Summary Court-Martial? ____ If so, how many times? ____
For what type of offense(s)? _____

Did any of these cases resulted in a finding of Not Guilty? _____

14. Have you ever sat as a member for a Board of Inquiry and/or Administrative Discharge Board? ____
If so, how many times? _____.

15. Have you or a close relative or friend ever been the victim of any crime? Explain. _____

16. Have you or a close relative or friend ever been the witness to any crime? Explain. _____

17. Have you or a close relative or friend ever testified in any legal proceeding? Explain. _____

18. Have you or a close relative or friend ever been arrested for, accused of, or investigated for committing
any crime? Explain. _____

19. Have you ever dealt with any military or civilian law enforcement agency (CID, NCIS, local police,
etc)? _____ If so, was/were your experience(s) positive or negative? Explain. _____

20. Have you ever visited a military brig for any reason? _____

21. What is your opinion of the military's criminal justice system? _____

22. Do you believe that anything about your religious beliefs would make it difficult for you to sit in
judgment of another person? Explain. _____

23. Do you have any specialized training in criminal justice, law, medicine, science, psychology, or
biology? Explain. _____

24. Do you believe you may be disqualified to sit as a court member for any reason? Explain. _____

25. If you were the accused at a court-martial, would you be willing to be judged, and if found guilty,
sentenced by a person who has provided information similar to your responses and who has your personal
temperament, views and morals? _____

Signature of Member: _____ Date: _____

PRIVACY ACT WARNING: This document contains personal information concerning an individual. Use and disclosure thereof is governed by SECNAVINST 5211.5 (series). Unauthorized disclosure of personal information from this document could subject the discloser to criminal penalties.

TECHNOLOGY SUPPLEMENT
NORTHERN JUDICIAL CIRCUIT RULES OF COURT
USE OF ELECTRONIC MEDIA

These rules supplement the Rules of Court, Northern Judicial Circuit, to address the use of electronic media in courts-martial.

1. Introduction. “Electronic media” is any form of graphic or other data display, any image, picture, moving image or picture, sound, or any combination of these media, which is presented to a court-martial through an electronic device, such as an image projector, a speaker, a “speaker-phone” telephone, or a video monitor combined with a computer, VCR, DVD or other electronic media player, and includes video-teleconference transmissions and computers employing similar software.

a. Properly used, electronic media can substantially enhance the ability of the prosecution to fairly represent the interests of the government and the defense to zealously represent anyone accused of a crime. Appropriate use facilitates both the quality of representation and the efficiency of courts-martial. As a result, the use of electronic media in the Northern Circuit is encouraged. At the same time, however, electronic media must be acknowledged as a powerful tool, the use of which must be subject to procedural rules that encourage superlative advocacy through technology while ensuring the dignity, efficiency, and fairness of courts-martial.

b. For example, if used during opening statements, material displayed must satisfy R.C.M. 913 (i.e., referencing only evidence counsel expect to be offered, and in good faith believe to be admissible, and a brief statement of the issues anticipated in the case). *See* R.C.M. 913 (Discussion). During trial, any material to be introduced into evidence and published by electronic means must first be properly admitted under the Military Rules of Evidence. If used during closing arguments, any matter displayed electronically should either have been admitted into evidence, or be a fair comment on the evidence admitted, such as an accurate summary of data or other similar demonstrative aid. Ultimately, use of electronic media will be subject to the objections of opposing counsel and will be within the discretion of the judge to admit or exclude consistent with applicable authority.

This supplement to the Northern Circuit Rules of Court is to be construed consistently with the Rules for Courts-Martial, the Military Rules of Evidence, applicable case law, the Navy-Marine Corps Trial Judiciary Rules, and the other Northern Circuit Rules of Court.

2. Pre-Trial Requirements. This rule is a rule of notice and, if required by the judge in the interests of justice, of disclosure. It is not a rule of discovery and it does not provide any substantive rights to either the prosecution or to the defense to obtain the content of any electronic media not otherwise subject to the rules governing discovery.

a. Notice.

(1) Prior to Docketing. To ensure facilities (i.e. a properly equipped courtroom) and equipment are available (e.g., where portable equipment is needed), counsel shall provide notice of the intent to use electronic media via [docketing] memo at the time counsel request a trial date. The [docketing] memo shall be addressed to the opposing counsel, [and] the judge, [and the Court Clerk,] and it shall describe generally the technology and purpose desired for use (e.g., electronic media to display evidence, the presentation of remote live testimony, or otherwise to bring matters before the court-martial). No further elaboration is necessary in the [docketing] memo.

(2) After Docketing. If a case has already been docketed for trial when counsel determine use of electronic media is necessary or desired, [notice] [an amended docketing memo] must immediately be filed with opposing counsel and the court [including the Clerk]. Counsel are cautioned that delay in submitting notice to the court could result in facilities or equipment, including remote access to witnesses, being unavailable.

b. Judge Alone Cases.

(1) In guilty plea cases before a military judge alone, use of electronic media shall be discussed with the judge at a conference under R.C.M. 802 sufficiently in advance of trial to resolve logistics and other issues related to the use of electronic media, such as whether it consists of classified or contraband material.

(2) In cases contested before a military judge alone, in mixed plea cases where the electronic media relates to a plea of not guilty, in conditional guilty plea cases, or in the disposition of guilty pleas (military judge or members for sentencing) with the permission of the judge, counsel should follow the procedures for notice and disclosure in a contested members case.

c. Contested Members Cases.

(1) Notice. Unless previously provided by the (docketing) memo, notice of intent to use electronic media must be provided to opposing counsel and to the presiding military judge at arraignment. Notice shall describe generally the technology and purpose desired for use of electronic media (such as ExhibitONE® or similar technology to display evidence, the presentation of remote live testimony, or otherwise to bring facts before the court-martial) and the notice shall indicate whether any exhibit is classified or of a contraband nature, such as pornography. No further elaboration is necessary at arraignment. Failure to provide notice at arraignment risks unavailability of needed facilities, equipment, or access to remote witnesses. Pretrial notice is not required for the use of electronic media for impeachment or in rebuttal;

however, if notice of such an intention is not provided, counsel risk unavailability of necessary facilities, equipment, or access to remote witnesses unless already approved.

(2) Disclosure.

A. Where either party has provided notice of an intent to use electronic media, counsel should discuss the proposed use with the judge at a conference under R.C.M. 802. The judge shall, by entry of a Case Management/Pretrial Order (CMO/PTO) or otherwise, set the date on which disclosure, if any, of electronic media to the court or to opposing counsel is required. The judge may provide different disclosure dates in the CMO/PTO for different uses of electronic media and may direct descriptions or summaries of electronic media be disclosed in lieu of a copy in order to protect the value of the presentation. For example, the nature and origin of material to be introduced into evidence and published via electronic media may be required to be disclosed, if necessary, sufficiently in advance of trial to dispose of any objections or to provide any needed safeguards, such as for the use of contraband or classified information.

B. Where electronic media are intended for use in opening statement or closing argument, proponent counsel shall discuss such use with the judge at an R.C.M. 802 conference. Counsel are cautioned that such use of electronic media must comply with the Rules for Courts-Martial, Military Rules of Evidence, and case law applicable to opening statements and closing arguments. Counsel are highly encouraged to disclose the content of such electronic media to opposing counsel. In addition, counsel should submit any media intended for use in opening statement or closing argument to their supervisory counsel for review prior to use. Disclosing the contents to supervisory counsel and to opposing counsel will help ensure such use of electronic media is properly within the governing rules and will minimize the potential for objections that would interrupt the presentation of counsel and require an Article 39(a), UCMJ, session at a critical point in the presentation of the proponent's case. As a precondition to using electronic media in opening statements or closing arguments, the judge may require disclosure of the nature of the presentation, or the contents thereof, to the judge and opposing counsel, if necessary in the interests of justice. Ordering disclosure of contents should ordinarily occur only so far in advance as is necessary to resolve any issue, giving the utmost consideration to protecting the value of the presentation from premature disclosure.

d. Motions. The content of electronic media proposed for use by either side during their respective cases in chief may be made the subject of a pretrial motion *in limine* by either counsel. Such a motion should be disposed of in accordance with the terms of the CMO setting the date for submission and hearing of pre-trial motions. Objections to electronic media that are not readily susceptible of resolution as a pre-trial matter, such as an objection to opening statements, refreshed recollection, impeachment, rebuttal, or closing argument, may be disposed of in the discretion of the judge.

e. Remote live testimony.

(1) Remote live testimony includes, but is not limited to, testimony by video-

teleconference, closed circuit television, telephone, or other similar technology. To use remote live testimony, counsel must provide notice to opposing counsel and to the judge, using the docket or other notice procedures set forth in paragraph 2.a., b. or c. above.

(2) In a contested case, counsel requesting the use of remote live testimony during their case-in-chief must submit a written motion, at the time required by the applicable CMO, requesting such remote live testimony and setting out the justification therefor, pursuant to the governing case law and Rules for Court-Martial. See R.C.M. 914A (and 914B, when implemented). If opposed, counsel may submit briefs in support of their respective positions and request the matter be heard at an Article 39(a), UCMJ, session in accordance with the CMO. Counsel should carefully consider methods for ensuring the integrity of remote testimony. Such measures may include the appointment of an officer to be present at the site of the remote witness to administer the oath, and to ensure the integrity of the testimony from intrusion by other personnel or reference material not otherwise permitted.

(3) Counsel requesting remote live testimony shall annotate their witness list to indicate which witnesses are expected to testify remotely.

3. Trial Procedure.

a. Admission and Publishing of Exhibits.

(1) Loading Media.

A. Counsel are encouraged to reserve and use courtroom facilities and electronic equipment for training, familiarization, moot courts, and other similar exercises. However, counsel should not pre-load any media into electronic devices in the courtroom for a trial until they have requested and received permission to do so from the judge. Permission to preload any evidence into courtroom electronic devices, and to connect laptops to electronic display media, should be requested pre-trial at an R.C.M. 802 conference.

B. Classified information or exhibits of a contraband nature may ONLY be loaded and displayed on electronic devices previously cleared to contain and exhibit such items. Permission to use such devices must be obtained from the judge at a pretrial conference under R.C.M. 802.

(2) Offering/Admitting Evidence Electronically.

The procedures for the use of electronic media in a members trial should be the subject of discussion with the judge at a conference under R.C.M. 802. The preferred method of admitting evidence electronically will ordinarily be to pre-admit the evidence, and the electronic media display thereof, at an Article 39(a), UCMJ, session.

(3) Publishing Pre-Admitted Evidence.

Counsel may not operate the electronic media control panel to activate the monitors of the court-martial members without the permission of the judge. When electronic exhibits have been admitted into evidence at an Article 39(a) session, counsel will ordinarily be given permission to publish/display those exhibits at counsel's discretion. Under these circumstances, once the court-martial is called to order, counsel should request permission to activate the members' monitors and publish/display the enumerated item of previously admitted evidence. Once authorized by the judge to do so, counsel may activate the members' monitors. If a series of exhibits are being published, counsel may request and be permitted to publish/display the series without seeking permission for each item individually.

(4) Evidence Not Pre-Admitted.

A. Counsel may not operate the electronic media control panel to activate the monitors of the court-martial members without the permission of the judge.

B. When electronic exhibits have not been previously admitted into evidence outside the members' presence, such as when used to refresh recollection or to impeach, counsel shall use standard evidentiary procedures to use or offer that evidence at trial. Counsel should initially request to activate only the monitors of the witness and may do so only upon a grant of permission by the judge. If an exhibit is not admitted into evidence when use of the exhibit is completed, counsel shall turn off the monitors of the witness, orally informing the record.

C. If an electronic exhibit used to refresh or impeach is admitted into evidence, counsel should request to activate the members' monitors and to publish the item or items of evidence to the members.

(5) Electronic Imaging.

A. Counsel may publish documentary and other items of admitted evidence by use of visual presentation equipment (e.g., ELMO), after requesting and receiving permission from the judge.

B. In switching between items of evidence on the visual presentation equipment, counsel shall ensure the image being used is "frozen" on the monitors or that the members' monitors are turned off prior to removing a published item. Members' monitors should remain off, or the image of the last item of evidence published should remain frozen on their monitors, until the next item of admitted evidence is in place to be published electronically. This practice will result in a smooth transition from one item of evidence to the next and will minimize the potential for error in publishing the next item. As in the case of other electronic items of evidence, counsel may request and be granted permission to publish a series of admitted items without seeking permission for each item individually.

(6) Witness Monitors. Counsel may activate the monitor of a witness at the

appropriate time in their questioning, after first requesting and being granted permission of the judge. Members' monitors may not be activated until the proponent counsel has requested and been granted permission by the judge to publish an item of evidence by electronic means.

b. Remote Live Testimony. Before beginning any remote live testimony, proponent counsel shall request an Article 39(a), UCMJ, session during which the remote witness will be properly placed before the remote camera or telephone and a sound check completed. The receiving monitor will then be turned off or the telephone placed on "hold." Once the members are present, proponent counsel should request to call the witness for remote live testimony. Upon receiving permission, proponent counsel may activate the receiving monitor or telephone and the remote witness will be sworn and testify.

c. If technical problems are encountered, such as loss of the phone connection or other transmission signal, proponent counsel should request a recess in order to resolve the problem.

4. Preservation of Evidence for the Record

a. Electronic Media Not Admitted as Evidence.

When electronic media are used at trial but are not admitted into evidence, such as a PowerPoint opening statement or closing argument, or an item used to refresh recollection, or otherwise, the media should be printed, labeled as an Appellate Exhibit, and included in the record of trial.

b. Real Evidence. When items of real evidence are published to the court by use of visual presentation equipment (e.g., ELMO), proponent counsel shall prepare an accurate color photograph of such exhibit and move to substitute that photograph for the original exhibit in the record of trial.

c. Annotations to an Exhibit.

(1) Oral Descriptions. All annotations made to an exhibit by a witness made to an exhibit by a witness using the touch-screen monitor should be clearly described for the record by the witness or counsel. If a witness uses multiple colors, print fonts, symbols, or the like to annotate a document, an oral description of each convention used shall be provided by the witness or by counsel.

(2) Annotated Exhibits.

A. Whenever a witness uses the touch-screen monitor to make annotations on an exhibit that was previously admitted into evidence, the annotations shall be preserved for the record separately from the original exhibit, which shall remain unaltered. There is no need, however, to separately preserve an unmodified exhibit that is neither intended nor offered as evidence until the witness modifies it.

B. At the conclusion of a witness annotating an exhibit, the proponent counsel will request admission into evidence of the annotated exhibit as a separate prosecution or defense exhibit marked next in order as an appendix to the original exhibit. For example, if a map is admitted and marked as “PE-1,” the annotated version should be marked as “PE-1(a) for ID.” A subsequent annotation of the same exhibit should be marked “PE-1(b) for ID” (if it is intended to be a separate exhibit, such as when a later annotation would obliterate a previous one). The opposing counsel should use a similar marking convention. For example, if the defense counsel modifies PE-1(a) during cross examination, the modified version should be marked DE-1 for ID. A second modification altering DE-1 for ID should be marked DE-1(a) for ID. Counsel need not mark and capture for the record each mark made on an exhibit as a new exhibit. However, counsel must take care that exhibits are separately captured and saved for the record each time a new mark would alter or obliterate a preceding marking and when control of the exhibit changes for purposes of moving the item into evidence (i.e., from prosecution [PE] to defense [DE] or the reverse).

C. Upon admission into evidence by the judge, the proponent counsel shall request that the electronic media exhibit be “saved” as annotated, marked as the appropriate exhibit number, and that a printed copy be substituted in the record of trial.

D. If the offered exhibit is not admitted into evidence, the court reporter shall save the exhibit electronically and print a copy to be appended to the record, marked as the exhibit numbered “for ID.”

(3) Corrections. If a witness needs to make a correction to an annotation, counsel shall first request permission of the judge to make the necessary correction.

(4) “Clear All” Function. When counsel has completed questioning a witness using ExhibitONE or similar electronic media, counsel must request permission to verify with the court reporter that all witness annotations on the touch-screen have been preserved for the record. Upon such confirmation by the court reporter, counsel must then request permission from the judge to activate the “clear all” function. Only the judge may authorize counsel to hit the “clear all” button to remove markings from the touch-screen monitor.

d. Audio-Video and Remote Live Testimony.

Evidence published in an audio or audio-video medium, or remote live testimony, shall be recorded during its presentation in court and transcribed verbatim, subject to the requirements of R.C.M 1103 regarding verbatim transcripts. Proponent counsel will provide the court reporter any electronic file used, which shall be saved in the court reporter’s electronic file of the case and forwarded with the printed record of trial. If cassettes (audio or video) or CDs are admitted into evidence, these must be labeled with the caption of the matter, the date, the prosecution or defense exhibit number, and shall be forwarded as part of the original record of trial.

5. Use of Electronic Media in Deliberations.

a. When the court members retire to deliberate, a printed copy of all previously admitted and published exhibits will ordinarily be provided to the senior member to take into the deliberation room. If an original exhibit was admitted electronically, the printed copy shall be an exact duplicate of the original, including color.

b. If members of the court request to see or hear evidence admitted in an audio or audio-video medium, the judge will assemble the members in open court and replay the desired audio or audio-video evidence, if determined to be appropriate. Ordinarily, remote live testimony should be treated as any other witness testimony and, if replayed, only the audio track should be used. If testimony has been provided using a videotaped deposition, any replay of that testimony shall only be of the audio track, just as if the witness had testified personally in court. Any replay of audio or audio-video media is a matter subject to objection by either the government or the defense and it remains in the discretion of the judge.

6. Effective Date. This supplement are effective on the date Circuit rules are published.

C.M. GLASER-ALLEN
CDR, JAGC, USN
Circuit Military Judge

INTRODUCTION

The intent of this document is to serve as a primer to all persons directly and indirectly involved in military justice in the Navy and Marine Corps. Although primarily intended for the courts-martial practitioner, this text provides insight for staff judge advocates and convening authorities into court-martial processing. The focus of this document is directed at locales where military judges are not permanently assigned. However, the significance of the standards and procedures detailed within provide a worthwhile outlook of military justice practice servicewide.

The mission statement of the Navy-Marine Corps Trial Judiciary states that the judiciary,

“provide(s) crucial support to commanders in ensuring the maintenance of good order and discipline within our operating forces, while always guaranteeing due process and fundamental fairness for every court-martial accused.”

The trial judiciary is absolutely committed to this proposition. Judges throughout the circuits are also dedicated to fulfilling courts-martial requirements throughout their areas of responsibilities.

Each counsel and command should realize this fact: **NO** case will wait for lack of a military judge. Regardless of venue, a military judge will be available for motions, Article 39(a) sessions or trial. Accordingly, every court-martial in every circuit is a priority. No trial counsel or defense counsel or their chains of command should ever say, “can’t go to trial; there is no judge available.”

The procedures and management tools discussed in the following pages are general guidelines. Procedures for ensuring judicial coverage in one circuit may not mirror what is necessary for another circuit. The overarching goal and objective is effective and efficient management of court sessions as well as ensuring prompt, fair administration of justice regardless of the location or frequency needed.

Case Management

In 2005, the Trial Judiciary undertook a *Seapower 21* study of the geographic military justice case loads throughout the Navy and Marine Corps. The study found that the number of courts-martial cases at some locations no longer amounted to a “full-time” case load for the resident judge. As the result of the *Seapower 21* study, several military judge billets were transferred or eliminated by the Judge Advocate General. To increase overall efficiency, several trial judicial circuits were also consolidated. Eliminating some of the high-grade billets within the trial judicial circuits resulted in significant savings, a portion of which was set aside to fund increased travel requirements.

To fill the need at these locations in which there was no longer a resident military judge, a management device referred to as “Terms of Court” was then adopted. “Terms of Court” were considered to be regularly scheduled predictable sessions of courts-

martial in those locations. This management tool was intended from the outset to be pre-planned sessions of court where a military judge would travel to a designated location and would remain “in residence” as long as necessary to address any matter requiring the attention of a judge.

For example, a term of court might be set at Great Lakes Naval Station for the second week of each month. The regularity of posting a military judge at predictable intervals permits counsel and convening authorities to prepare and schedule matters for this pre-planned period of time. These pre-planned sessions also would allow a military judge to manage cases that have been referred for trial by hearing motions and resolving other necessary pre-trial matters. Overall, this general concept delivered a case management process that more effectively and efficiently allocated cases to the trial judiciary for disposition while at the same instance provided a time certain for resolution of military justice matters.

This brief paper provides additional background about Terms of Court and how to manage them. It is not intended to be an academic article. Rather, these comments provide clarification for managing cases in practical terms. The intended audience is for those directly and indirectly involved in the administration of military justice. The objective here is to provide general guidance for counsel, convening authorities, and RLSO/NLSO supervisors and commanding officers.

1. Regular Terms of Court. These pre-planned periods are those deemed required by the servicing Circuit Military Judge. The frequency and duration of these pre-planned periods may be adjusted to meet local demand or spikes in military justice requirements. For example, while a particular site may ordinarily be fully serviced by a Term of Court one week per month, certain local conditions, such as the return of a deployed unit or battalion or squadron may require adjustment. Consultation with the Circuit Military Judge by local RLSO/NLSO/LSSS would then be necessary to alter or adjust the planned cycle. Proper planning and anticipation of increased needs would enhance the efficiency required for alteration of planned schedules.

Regular Terms of Court should ordinarily be used for matters that are not time-sensitive and can be deferred for a time certain during a regular term when these matters can be completed. Examples include judicial training, R.C.M. 802 sessions, Article 39(a) sessions (arraignments, motions practice, docketing sessions, etc.) or even judge alone guilty pleas¹. It should be stressed here that recent changes to the Rules for Courts-Martial provide alternative remote means to conduct Article 39(a) sessions. Such sessions on the record may include resolution of pre-trial motions or even arraignments².

One necessary component and requirement for successful management of these pre-planned sessions of court is that all parties must remain vigilant and in frequent contact with opposing counsel as well as the assigned military judge or Circuit

¹ This is not an exhaustive list. Contested members cases may be tried during a Regular pre-planned session of judge availability as well as a members sentencing case. The point is, a good portion of military justice practice can be adjudicated at pre-planned sessions. The goal of the trial judiciary is to provide professional judicial services when and where needed – not to interfere with military justice processing based a rigid time-based formula.

² It is recognized that not all trial sites have video-teleconferencing technology available.

Military Judge. It is imperative that all parties ensure that matters are reliably scheduled or, in the event no matters are docketed, that the Regular Term of Court be cancelled. While most circuits use a written docket request form to schedule matters, experience has shown that the military judge with cognizance over a Term of Court must also discuss pending matters with counsel via frequent teleconferences with all concerned counsel (R.C.M. 802). The key to efficient management of cases is for all parties to ask a lot of questions of each other regarding scheduling, and then to document the case status, either with a written docket request endorsement, a memorandum from the court, email (see ¶ 8 below on use of e-mail in complex cases), or an Art. 39(a) session. Occasionally, a military judge must grant or deny a continuance under difficult circumstances, and, sometime, make both parties unhappy with the schedule. All should remember that continuances are only granted for reasonable cause shown; a military judge's decision for granting a continuance will only be overturned for an abuse of discretion. Counsel should ensure that a factual record is well-developed to support any contested decisions on scheduling.

2. Special Terms: Experience has shown that after balancing all necessary considerations (further discussed at ¶ 4 below), the practical result is that contested cases (and some guilty pleas-judge alone or with members) will require docketing during a "Special Term". A Special Term is simply a time period granted by a military judge which falls outside the periodic pre-planned Term of Court in any given location. Usually, Special Terms are scheduled to meet the specific demands of obtaining witnesses, evidence or other trial necessities in any particular case. In other words, contested cases should proceed when the witnesses and evidence from both sides are ready for presentation to a trier of fact. Should this time fall outside a pre-planned session, counsel should seek a Special Term.
 - Note: When a Special Term is used, consideration may be given to cancelling the preceding or subsequent regular term and moving routine matters to the Special Term. This correctly accommodates the needs of litigation, while preserving the general efficiencies of pre-planned terms. I stress that litigation requirements are the driving force, not a pre-planned session.
3. Combined Terms: Occasionally, if a geographic location generates a significant number of cases, both Regular and Special Terms could be needed for a brief period. For example, where a Regular Term might be scheduled for the second week of a month, an additional Special Term could be scheduled to try a contested case the week immediately following a Regular Term, resulting in a two-week Combined Term, which may be sufficient to dispose of routine matters as well as the contested case.
4. Scheduling Considerations: Contested trials (this may also include guilty plea cases) generally need to be scheduled when counsel are logistically able to marshal their witnesses and other evidence and can present their cases without holding the court open between terms of court, once members are seated. Contested courts-martial

should be docketed by agreement of counsel, if possible, as long as the agreed upon date is consistent with judicious processing of the case. If counsel are not able to agree, then each should submit alternative dates to the military judge who should schedule the trial based on the needs of the parties and other scheduling considerations, including the following (this is a representative list **not** an exhaustive one):

- **Commitments of counsel in other cases.** This is most often encountered when civilian defense counsel are retained, but it can also pose a challenge for individual military counsel (IMC), and even detailed counsel in some circuits, particularly where counsel must travel to the trial venue.
- **Commitment of counsel generally.** Trial practitioners as well as their clients, commands and convening authorities should realize that military judges generally view military justice as having priority over leave, legal assistance, training opportunities, temporary additional duty or other collateral duties. While military judges make all efforts to accommodate the inherent tension of conflicting schedules, the fair, expeditious and just administration of justice will always be the military judge's default position, particularly when an accused is in pre-trial restraint.
- **Priority among cases.** Military judges understand that cases have a status priority. These priorities may by their very nature resolve scheduling conflicts of counsel. For example, general courts-martial usually take priority over special courts-martial. Federal criminal cases generally take priority over federal civil cases; federal cases have priority over state cases; and within a state, criminal cases take priority over civil matters. Military judges are also cognizant that courts-martial duties have priority over other collateral duties including leave or temporary duty for training. While these priorities are generally recognized, military judges do not use them inflexibly.
- **Expert witnesses.** Expert witnesses typically have narrow windows in which to attend trial and need significant preparation time, including development of forensic or other technical evidence.
- **Remote witnesses.** Remote witnesses must often be scheduled significantly in advance to accommodate travel, including international travel; deployed witnesses might have narrow time windows in which to participate in trial proceedings, so as to limit critical operational impacts. Permanent change of station or release from active duty of witnesses may also be a concern. For all types of witnesses the question surrounding the government's obligation to produce them for trial is often a contested issue. All parties should be cognizant of other acceptable and legal avenues of placing evidence in front of the trier of fact. These options may include depositions, affidavits and video-teleconferencing among other options. [See ¶ 8 below regarding case management orders which anticipates resolving witness requests in sufficient time as to not impact the orderly conduct of a trial.]

- **The status of the accused.** The accused might be under pretrial restraint, have demanded speedy trial, or have some other special need, such as medical care.
 - **Logistical requirements, holidays, travel issues, security issues or needs of the Convening Authority**
 - **Conflicting needs of other cases/venues.** Within each judicial circuit, the Circuit Military Judge is charged with the responsibility to ensure responsive judicial support to each location within that circuit. When needed, judicial resources external to the circuit may be provided to accommodate surges or spikes of activity – advanced planning is critical in these situations to allow sufficient time to coordinate support.
5. Resolving Schedule Conflicts (R.C.M. 802 sessions). Generally speaking, military judges will insist, to the maximum extent possible, that counsel resolve their own scheduling conflicts and agree on dates for pretrial and trial sessions. This obviously eliminates issues for resolution by the trial judge. If counsel are not able to agree on trial milestones or trial dates or if a military judge suspects dilatory trial tactics or excessive delay issues, a R.C.M. 802 session with the military judge can often result in highlighting the reason for a conflict and lead to an agreement or resolution of the matter. The role of the military judge at an R.C.M. 802 session is one of a mediator and facilitator. Care must be exercised by all parties not to inadvertently conduct a “chambers hearing” that should only be conducted on the record. That said, a great deal can ordinarily be communicated between counsel and the military judge to resolve pretrial scheduling matters, reserving those that cannot be resolved by consent for resolution by written order, or at an Article 39(a). Counsel should be cognizant that matters to be resolved at an Article 39(a) session may be answered via video-teleconference [see R.C.M. 805 (c)].
6. Role of the Convening Authority and Counsel. Regular Terms of Court are most efficient when they are anticipated and planned for by the convening authority and counsel. However, it should be stressed that pre-planned Terms of Court may not be “one size fits all”. As previously discussed, Special Terms of Court may be arranged with the cognizant Circuit Military Judge or assigned trial judge when deemed warranted.
- Convening Authority (CA): CAs can reduce the cost and frequency of Special Terms of Court through negotiation with the defense and include, as a material term of a Pretrial Agreement, the adherence to a scheduled Term of Court. Generally, this would be in the case of a guilty plea, or a guilty plea with members sentencing.
 - Defense Counsel (DC): DCs might negotiate for a specific Term of Court, in a Pretrial Agreement, as consideration for sentence relief, or for other considerations (e.g., to accommodate additional development of sentencing evidence, attendance of certain witnesses with or without government funding,

or other matters), provided the client is in a position to plead guilty at the specified Term of Court.

7. Role of Commanding Officers³ and Supervising Attorneys: Close control of courts-martial docketing procedure by military judges alone will never be an adequate substitute for leadership within the other organizations providing military justice services. Docket management is largely a function of case control. While the judiciary obviously has certain essential tools to control the flow of a case, the convening authority, and to an even greater extent, the litigants and their supervising attorneys are in the best, first position to determine when a case goes to trial. These same officials are also in the best position to ensure that all appropriate measures have been taken by each side to ensure that the case is diligently progressing in an expeditious manner. Leadership by commanding officers and supervising attorneys should include clear training on case management as well as personal oversight of all cases assigned to their area of responsibility. Trial and Defense Counsel must be trained (and strictly monitored) to take the initiative to file motions and requests when appropriate. Generally, counsel prosecuting and defending courts-martial have little to no experience in proper case management and often times demonstrate no urgency in their approach to case management. Where counsel wait and or assume action, they run the inherent risk of being surprised by opposing counsel or the military judge. Commanding officers and supervising attorneys share the responsibility for the problems in docketing and case management and case preparation. Prudent counsel who desire ownership of a litigation timeline should not wait for filings from the other side, with or without a case management order. Commanding Officers and supervising attorneys must take personal responsibility for training and strictly monitoring their counsel to proactively and zealously pursue the respective interests of their clients. Use of Terms of Court, whether Regular, Special or Combined is the critical and most necessary facet of the case management equation.
8. Complex Cases. Litigating complex, contested cases presents unique challenges to the effective management of such cases in the context of Terms of Court. All counsel should understand that the military judge has a number of tools that, when used in combination, can result in the fair and efficient disposition of such cases.
 - R.C.M. 802 sessions. These conferences should be used early and often in complex cases to keep the military judge informed of developments in the case. An “802” should be held immediately upon referral to discuss pretrial motions and other pretrial events. This information should then be used as the basis for the military judge issuing a Case Management Order. When the

³ The phrase and term of “Commanding Officer and Supervising Attorneys” is used for brevity purposes only. It should be interpreted in the broadest sense to include all personnel directly involved in military justice litigation. The phrase, as used here, is not intended to specifically refer to Convening Authorities but rather judge advocate chains of command. The phrase should be interpreted as including, but not limited to, Staff Judge Advocates, Officers in Charge, Military Justice Officers, Chief and Regional Defense Counsel, Senior Trial and Senior Defense Counsel.

military judge and counsel are remotely located, an efficient and effective method for summarizing the conference for the record, without need of a court session, is for the military judge to use e-mail (see below).

- Telephone/Video-Teleconferences. There is no requirement in R.C.M 802 that counsel be physically present with the military judge or co-located with each other. Phone conferences are particularly efficient when multiple counsel are detailed or retained and are in different locations. R.C.M. 802 specifically references R.C.M. 914B and permits use of remote technology in conducting a conference. The military judge will be vigilant not to entertain argument on motions or make rulings on contested issues during an 802 conference. Counsel should not confuse an “802” conference with an Article 39(a) hearing.
- E-mail. R.C.M. 802 requires a summary be placed in the record of those matters agreed upon at a conference. This need not be done in open court, though that is typical. An alternative is for the military judge (or either counsel) to draft an e-mail contemporaneously with the conference and route it to the other trial participants for comment. E-mail has been likened to as “evidence-mail”. Once all parties have endorsed the e-mail outlining the substance of an R.C.M. 802 conference, that e-mail may then be printed and entered into the record as an appellate exhibit. This method reduces the risk of inaccuracy or forgotten matters which should be on the record.
 - In complex cases that are likely to generate a significant number of e-mail conferences or communications, a good technique is to open an early appellate exhibit (e.g., A.E. III – Electronic Mail) and designate it an “open” exhibit in which all e-mail summaries of conferences and other communications with counsel are deposited as “line items” throughout the course of pretrial and during trial. At the end of trial, the exhibit is closed and a listing of line items is appended as the cover sheet, much like a table of contents, for ease of reference during post-trial reviews.
 - If using e-mail as a trial communications tool, all parties should take care to ensure e-mail “discipline”; that is, the original author of an e-mail must select a subject line that is unique (e.g., DISCLOSURE CLASSIFIED MANUAL). Subsequent “via” addressees who comment and return, or forward the e-mail, may not change the subject and may not discuss topics other than that designated in the subject line. A new topic must begin a new e-mail chain and when that topic is completed, the email chain must be closed, printed, and added to the open appellate exhibit as the next line item. If this protocol is not maintained, email will become

unworkable, with multiple topics discussed in numerous emails, eliminating the possibility of finding a specific reference or response.

- An example of an “open” exhibit:

Appellate Exhibit III: Electronic Mail Correspondence

- Line item 1: 2 Jan 08 SUBJ: US V GROTZEL: DISCLOSURE OF CLASSIFIED MANUAL
- Line item 2: 10 Jan 08 SUBJ: US V GROTZEL: ARRAIGNMENT DATE
- Line item 3: 15 Jan 08 SUBJ: US V GROTZEL: TRIAL DATE
- Appellate Exhibit III - CLOSED 16 JAN 08

➤ Case Management Orders (CMO). A carefully developed and thorough CMO is the key to an orderly pretrial phase and is equally important to ensure trial is not interrupted because of incomplete pretrial practice. The best practice employed by most military judges is to have counsel confer and agree on as many required filing deadlines and hearing dates as they are able. However, before accepting the proffered dates from counsel, military judges ensure that the dates agreed upon by counsel are realistic/feasible (e.g., motions to compel cannot be set to be filed before answers to requests) and properly expeditious (e.g., counsel would not be permitted to unnecessarily “delay” a case by agreement if earlier processing is appropriate in the judge’s experience). Those matters that are not agreed upon should be submitted to the military judge in writing with options by each counsel, and a justification for each option. After thorough discussion with counsel at a pretrial conference (and, if contentious, based on additional documentation – remember that R.C.M. 802 conferences are not the proper forum for disposing of contested issues), the military judge will issue a comprehensive CMO. The CMO should anticipate all of the logistical and other needs of bringing a complex and/or contested case to trial.

- A good CMO should clearly identify pretrial motions, required filing deadlines, and Article 39(a) sessions for arraignment and motions (as needed), pretrial tasks, such as pre-admission of evidence, vetting of voir dire questions, and trial dates and locations. Where rulings require actions by counsel or others, for example, where the military judge orders an inquiry pursuant to R.C.M. 706, the order will direct compliance by a date certain, with notice to opposing counsel and the military judge, to ensure forward progress of the case is maintained.
 - Many motions can be resolved by consent of the parties in an R.C.M. 802 session (e.g., discovery issues, witness attendance). Other motions, which raise legal questions, but do not require the taking of testimony, should be resolved in writing (e.g., jurisdiction,

multiplicious charges). Counsel should understand that all pre-trial motions do not require an Article 39(a) session. [See R.C.M. 905(h)]

- Those motions that appear to require an evidentiary hearing should be carefully reviewed to ensure that in-court testimony is essential to a counsel's presentation of facts. If other methods of evidence gathering (e.g., affidavits, stipulations, business records) are sufficient to dispose of the motion, no hearing would be needed (e.g., if not agreed upon, discovery issues or witness attendance might be resolved with written submissions). If testimony from a remote location is necessary, consider alternatives to the "live" appearance of the witness at the Article 39(a) session. See options below (Remote Article 39(a) Sessions; and Remote Live Testimony).
 - Those motions that require testimony should be scheduled for hearing at the time most conducive to orderly pretrial and trial phases. Counsel should anticipate the impact of a favorable/unfavorable ruling on the development and preparation of their case on the merits. Some issues might require time in which the parties can adjust to meet the requirements of the ruling (e.g., a request for an R.C.M. 706 board or an expert consultant or witness, if granted, will require time in which to engage and prepare the expert). The CMO must logically group and schedule motions to facilitate and expedite trial.
 - For example, resolution of witness requests must be scheduled in the CMO soon enough for both parties to marshal their evidence during the trial term assigned. Contested witness requests do not always need a hearing to resolve. Many are ultimately resolved by consent, or by written motion and written ruling. However, if a witness request requires a hearing, that Article 39(a) session might effectively be scheduled during a Regular Term of Court, sufficiently in advance of the actual trial term to allow the parties to respond to the ruling. Once the duty to produce is determined, the prudent trial practitioner will ensure witnesses will be available at trial.
- Depositions. Unlike civil cases, depositions in a criminal case are not discovery tools. They are authorized to preserve testimony. The taking of depositions should be considered in any case in which there is a chance one or more witnesses will be unavailable to testify at trial.
- Importantly, when authorized by the convening authority during the pre-referral stage, or the military judge in the post-referral stage, the

designated deposition officer has “subpoena power” and can compel⁴ the attendance of witnesses to the deposition.

- Depositions can be by written interrogatories, oral deposition recorded by a court reporter or video-taped testimony. Counsel requesting a deposition should consider which mechanism best addresses their needs, keeping in mind that, if the witness ultimately is unavailable to testify, the deposition may be admitted into evidence.
 - The convening authority and counsel should consider whether an Article 32 investigating officer should also be designated a deposition officer. In this latter capacity, the Art. 32 Investigating Officer would be empowered to issue a subpoena and compel attendance of witnesses at risk of unavailability. Unavailability can include operational necessity. Compare R.C.M. 702 and Art. 49, UCMJ.
- Remote Art. 39(a) Sessions. Recent revisions to R.C.M. 804 permit “remote” sessions of court for purposes of Art. 39(a). It generally allows the military judge to conduct video-teleconferencing of Art. 39(a) sessions, provided the accused and his counsel are co-located. This rule does provide a new and very useful tool to help manage courts-martial, but the law on this specific topic is not yet fully developed. The request or need for remote Art. 39(a) sessions should be contemplated early in pretrial planning, discussed at pretrial conferences, litigated, if needed, and scheduled in the CMO.
- Remote Live Testimony. Revised R.C.M. 703(b)(1) authorizes the military judge to permit witnesses to testify via remote means on the merits or on a motion, with the consent of both parties. If the practical difficulties of producing the witness outweigh the significance of the witness’ personal appearance, the military judge may authorize the witness to testify remotely on an interlocutory question, even over an objection. The definition and procedures for receiving testimony via remote means are in new R.C.M. 904B. As with remote Art. 39(a) sessions, the use of remote live testimony should be contemplated as early as possible and discussed with the military judge. Effective use of both remote testimony and remote sessions can greatly facilitate the expeditious and efficient courts-martial practice.
9. Sentencing. Historically, approximately 90% of courts-martial are resolved by plea or plea agreement. Accordingly, at a minimum, 90% of courts-martial will include a sentencing proceeding. Inexperienced counsel often times focus too intently on the merits or pursuit of plea agreements, and devote less time anticipating the needs – evidentiary and logistical - of a sentencing hearing. The first pretrial conference is *not* too early to begin to plan what will be needed during a sentencing proceeding, should one be required.

⁴ See R.C.M 702. There are limitations to taking a deposition.

- All of the tools discussed above apply to sentencing. However, the tension between the defense's desire to have a robust sentencing case and the Government's need to conserve resources can often be more readily resolved by video-taped or remote live testimony than during trial on the merits. The needs of the parties should be thoroughly vetted well in advance of trial, agreed to or litigated, and, in either event, incorporated into the CMO, as appropriate to meet the needs of the case.

CLOSING COMMENTS

This discussion has not been designed or intended to be a cookbook or formula on how to properly or effectively manage pre-planned trial sessions in those areas not serviced by a resident military judge. This text was not intended to be an all-inclusive primer on trial advocacy or trial tactics. The sole intent of this writing is to provide military justice practitioners a clear view of what is available from the trial judiciary and to offer some helpful insight into the general use of pre-planned sessions of court.

The basic tenet all should take away from this discussion is that the Navy-Marine Corps Trial Judiciary is designed and focused to provide service to the Fleet by supplying professional judicial services for courts-martial. The efficiency goal of the Trial Judiciary is to maximize the professional services of highly trained military judges, **not** to limit the effectiveness or efficiency of those commands charged with providing litigation services to the Fleet.

Regular Terms of Court are **not** carved in stone nor intended to limit or regulate any commander's obligation to ensure good order and discipline. These pre-planned sessions are designed exclusively to adjudicate those cases and pre-trial necessities which are routine in nature. Regular Terms of Court may be adjusted as necessary; Special Terms of Court may be ordered as needed; and, Combined Terms of Court directed when required. Regular Terms of Court will be able to address many if not most local litigation requirements. However, these scheduled sessions cannot and will not fit all the varying needs of operational units, the complexities of litigation or the logistical dictates of a modern world.

Efficiency and effectiveness of military justice litigation depends upon a competitive yet professional interplay between competing interests in the due process arena with the military judge as the final arbiter. Effective communication between counsel consistent with professional representation is essential. Personal involvement in the overall courts-martial process and mentoring by Commanding Officers and supervising attorneys is absolutely critical. In the end, interaction and consultation with the cognizant Circuit Military Judge or myself will undoubtedly satisfy any perceived judicial availability issue.

/s/

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