

Executive Summary of Proposed Amendments to the Manual for Courts-Martial

Generally

The proposed amendments to the Manual for Courts-Martial would change military justice practice by implementing recommendations made by the Response Systems to Adult Sexual Assault Crimes Panel (RSP), incorporating recent amendments to the Federal Rules of Evidence into the Military Rules of Evidence, and modifying the Rules for Courts-Martial, the Military Rules of Evidence, and the Punitive Articles explanation to reflect recent statutory amendments and developments in case law.

The summary below is intended to assist in review of the proposed amendments and is not intended to capture the totality of the substance contained in the amendments. A public meeting to solicit comments concerning the current annual review of the Manual for Courts-Martial will be held on 5 November 2015 at 1000 at the Court of Appeals for the Armed Forces.

Specific Rule Amendments

R.C.M. 103(22) is inserted to clarify that the definition of “signature” includes a digital or electronic signature.

R.C.M. 104(b) is amended to prohibit special victims’ counsel from receiving a less favorable rating or evaluation because of the zeal with which such counsel represents any client.

R.C.M. 305(i)(2)(A)(v) is inserted to provide that a victim of an alleged offense committed by a prisoner has the right to be reasonably protected from that prisoner.

Discussion for R.C.M. 305(b)(2)(B) is added to clarify that any preference expressed by the victim is not binding upon the convening authority.

R.C.M. 306(b)(2) is inserted to provide that victims of a sex-related offense shall be provided an opportunity to express views on whether the offense should be prosecuted by court-martial or civilian court. The commander shall consider the victim’s views before making an initial disposition. If a victim expresses a desire for prosecution in civilian court, the convening authority shall ensure the appropriate civilian authority is notified and that the victim is informed of any subsequent decision of the civilian authority. This change implements Section 534(b) of the FY15 NDAA.

Discussion for R.C.M. 307(c)(3) is amended to reflect the option of using a victim’s initials, instead of his or her full name, on a charge sheet. It also notes the necessity to provide additional notice of the victim’s identity where the charge sheet contains only the victim’s initials.

Discussion for R.C.M. 401(c) is added to clarify that a named victim should, whenever practicable, be provided with an opportunity to express views regarding disposition of charges and the commander should consider such views throughout the case until final disposition. This implements recommendation 55 of the RSP while providing the Secretaries of the Military Departments (or, in the case of the Coast Guard, the Secretary of Homeland Security) with

discretion concerning the recommendation's implementation within their respective Departments.

R.C.M. 405(i)(2)(A) is amended to include the right of a victim to be reasonably protected from the accused during a preliminary hearing.

Discussion for R.C.M. 604(a) is amended to clarify that a victim of an alleged offense should be, whenever practicable, provided an opportunity to express views on the withdrawal of any charges or specifications in which the victim is named. The convening authority should consider any such views prior to withdrawing any charge or specification and continue to consider those views until final disposition of the case.

Discussion for R.C.M. 705(c)(2)(C) is added to clarify that a promise to provide restitution includes restitution to a victim of an alleged offense committed by the accused in accordance with Article 6b(6).

R.C.M. 705(d)(3) is added to require victim consultation on the terms and conditions of a pretrial agreement whenever practicable prior to acceptance of the agreement by the convening authority. This adopts recommendation 54 of the RSP.

R.C.M. 806(b)(2) and **(6)** are added to provide for the right of a victim to reasonable, accurate, and timely notification of court-martial proceedings and reasonable protection from the accused.

R.C.M. 907(b) is amended to list dismissal for failure to state an offense as a waivable ground for dismissal consistent with *United States v. Humphries*, 71 M.J. 209 (C.A.A.F. 2012).

Discussion for 907(b)(1)(B) is removed in accordance with the amendment of R.C.M. 907(b).

R.C.M. 910(f)(4)(C) is added to provide that a military judge shall inquire into whether the victim was provided an opportunity to express views as to the terms and conditions of a plea agreement prior to acceptance.

Discussion for 910(f)(4) is amended to clarify that the victim is not a party to the plea agreement.

R.C.M. 1002 is amended to clarify the military's unitary sentencing concept.

R.C.M. 1103(b)(2)(B)(i) is amended to require a verbatim transcript in a general court-martial only when the adjudged sentence exceeds 12 months' confinement or a forfeiture of pay for more than 12 months. Previously a verbatim transcript was required upon an adjudged sentence exceeding six months' confinement or a forfeiture of pay for more than six months even though those portions of a sentence did not require that the record be filed with the applicable Court of Criminal Appeals for review under Article 66 of the Uniform Code of Military Justice.

Discussion for R.C.M. 1105(b)(2) is amended to clarify that post-trial conduct of an accused, such as providing restitution to the victim of the accused's offense in accordance with Article 6b, may be appropriate for submission to the convening authority.

R.C.M. 1107 is amended throughout to improve the clarity with which Article 60 is implemented. Changes were made to the Note to clarify that the FY14 National Defense Authorization Act's amendments of Article 60, with the exception of a mandatory punitive discharge for an applicable offense that occurred on or after 24 June 2014, do not apply to any case where at least one offense resulting in a finding of guilty occurred prior to 24 June 2014. Subsections (c), (d), and (e) were amended to increase ease of implementation for the field and to make clear that rehearings are not authorized for any case where the sentence includes a punitive discharge or confinement for more than six months.

Discussion for R.C.M. 1107(b)(1) is amended to emphasize that in taking action, convening authorities may act only to the extent they are empowered by Article 60.

Discussion for R.C.M. 1107(c)(2) is added to explain that in deciding what actions are available for court-martial findings, due to the military's unitary sentencing policy, the sentenced adjudged for the entire case, and not per offense, controls what actions are available.

Discussion for R.C.M. 1107(e)(1)(C)(ii) is added to explain that rehearings are not authorized where a court-martial's adjudged sentence includes a punitive discharge or confinement for more than six months because Article 60(c)(4)(A) prohibits disapproval of the sentence where the court-martial's adjudged sentence includes a punitive discharge or confinement for more than six months, and Article 60(f)(3) requires disapproval of the sentence to order a rehearing.

Discussion for R.C.M. 1107(e)(1)(B)(iii) is deleted.

Discussion for the new R.C.M. 1107(e)(2)(B)(iii) is added, incorporating the Discussion that was deleted after R.C.M. 1107(e)(1)(B)(iii) and adding a sentence to the end to clarify that "superior competent authority" does not include convening authorities.

Discussion for R.C.M. 1108(b) is amended to clarify that the limitations on suspension of the execution of any sentence or part thereof contained in Article 60 do not apply to individuals acting under a different authority, such as Article 74.

R.C.M. 1109 is amended in light of the FY14 National Defense Authorization Act's amendments to Article 32 and the resulting changes to R.C.M. 405 made by Executive Order 13696; as a result of these changes, it was necessary to draft new procedures for vacation hearings. R.C.M. 1109 is further revised to clarify throughout the rule that the purpose of a vacation hearing is to determine whether there is probable cause to find that the probationer violated any condition of the probationer's suspension.

Discussion for the new R.C.M. 1109(h)(4) is added to provide guidance for hearing officers taking testimony during vacation hearings.

Mil. R. Evid. 304(c) is amended to require that, in order to consider a confession or admission against the accused, independent evidence be admitted that would tend to establish the trustworthiness of the admission or confession. This change, which will reduce the quantum of corroboration required in some cases, brings military practice in line with Federal practice. *See Oppen v. United States*, 348 U.S. 84 (1954); *Smith v. United States*, 348 U.S. 147 (1954).

Mil. R. Evid. 311 is amended to provide that exclusion of evidence obtained as a result of an unlawful search and seizure is appropriate only when the exclusion of such evidence would help deter further Fourth Amendment violations by the government and requires that the benefits of such deterrence outweigh the costs to the justice system. In addition, the rule is amended to provide that suppression of evidence obtained unlawfully may still be admissible if the official seeking the evidence acted in reasonable reliance on a statute which was valid at the time of the search. This change incorporates the balancing test in *Herring v. United States*, 555 U.S. 135 (2009), as well as the expansion of the good faith exception in *Illinois v. Krull*, 480 U.S. 340 (1987).

Discussion Mil. R. Evid. 311 is amended to explain the change to Mil. R. Evid. 311(a)(3) incorporates the balancing test from *Herring v. United States*, 555 U.S. 135 (2009).

Mil. R. Evid. 414 is amended to reflect the enactment of Article 120b by the FY12 National Defense Authorization Act.

Mil. R. Evid. 504 is amended to be inclusive of all marital relationships. In addition, the rule is restructured to clarify that the joint spousal participation exception applies only to assertions of the confidential communications portion of the privilege and not as an exception to the spousal incapacity portion of the privilege.

Mil. R. Evid. 801(d)(1)(B) is amended to provided that a declarant's previous statement is not hearsay if the declarant testifies, subject to cross examination, and the previous statement is used to rehabilitate the declarant's credibility after attack on another ground.

Mil R. Evid. 803(6) is amended to clarify that once a party has established the requirements to admit a record of a regularly conducted activity under the Rule, the burden is on the opposing party to show a lack of trustworthiness.

Mil. R. Evid. 803(7) is amended to clarify that once a party has established the requirements to admit evidence that a matter is not included in records kept in accordance with a regularly conducted activity under the Rule, the burden is on the opposing party to show a lack of trustworthiness.

Mil R. Evid. 803(8) is amended to clarify that once a party has established the requirements to admit a public record under the Rule, the burden is on the opposing party to show a lack of trustworthiness.

Mil. R. Evid. 803(10) is amended to require that a party who moves to admit a self-authenticating certification of absence of a public record provide notice to the opposing counsel at least 14 days before trial. The opposing counsel may then file any objection within seven days of receiving notice to allow the parties or the court to determine if production of a live witness on the matter will be necessary prior to trial. Despite the outlined timeframe, the military judge will retain discretion to modify any notice and response requirements as deemed appropriate.

¶ **110(c), Article 134, Threat, communicating** is amended to provide that a communication is wrongful if the accused transmitted the communication for the purpose of issuing a threat, with knowledge that the communication would be viewed as a threat, or acting recklessly with regard

to whether the communication would be viewed as a threat. It would not be necessary to prove that the accused intended to commit the injury threatened. This change is consistent with the recent decision of *Elonis v. United States*, 135 S. Ct. 2001 (2015).