



MILITARY COMMISSIONS

TRIAL JUDICIARY

RULES OF COURT

8 December 2011



**MILITARY COMMISSIONS
TRIAL JUDICIARY**

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From: Chief Judge of the Military Commissions Trial Judiciary

Subject: Military Commissions Rules of Court

Reference: (a) Military Commissions Act of 2009, 10 U.S.C. §§948a, *et seq.*, (M.C.A.)
(b) Manual for Military Commissions, 2010, (M.M.C.)
(c) DoD Regulation for Trial by Military Commission

1. **Purpose:** To prescribe Rules of Court for the Military Commissions consistent with the references.
2. **Background:** These Rules of Court are specifically promulgated within the authority of Rule for Military Commissions (R.M.C.) 108. The references authorize, and the sound administration of justice for Military Commissions requires, Rules of Court for the conduct of Military Commission proceedings. The enclosed rules are intended to facilitate the smooth and orderly trial of Military Commission cases and insure the utmost in public access while adhering to requirements of national security. To the extent that inconsistencies are perceived, the rules contained within references (a) and (b) shall control.
3. **Action:**
 - a. The judges of the Military Commissions Trial Judiciary shall ensure enforcement of these Rules of Court.
 - b. All counsel practicing before Military Commissions shall become familiar with these Rules and shall comply with them.
4. **Effective Date:** These rules are effective upon publication and shall remain in effect until cancelled, superseded, or modified.

A handwritten signature in black ink, appearing to read "James L. Pohl".

James L. Pohl
Colonel, U.S. Army
Chief Judge, Military Commissions Trial Judiciary

Military Commissions Trial Judiciary

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Military Commissions Rules of Court

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Military Commissions Rules of Court

RULE 1: INTERPRETATION, SHORT FORM, CITATIONS, MODIFICATION

- 1.** These Rules of Court (RC) are established pursuant to Manual for Military Commissions (M.M.C.) 2010 and the Rules for Military Commissions (R.M.C.) 108 and 801(b) (1). They shall apply to all cases referred to trial by Military Commission.
- 2.** Rules of Court shall be interpreted to be consistent with the Military Commissions Act (M.C.A.) and the M.M.C. In the event of any conflict between the M.C.A. or M.M.C. and the Rules of Court, the former two shall prevail.
- 3.** Rules of Court may be cited as RC followed by the Arabic numeral of the Section and then the Arabic paragraph number, and if applicable, subparagraph letters. For example, this Rule and paragraph may be cited as RC 1.3.
- 4.** The Rules of Court will be added to or modified on an as-required basis. Counsel and all other interested parties will be furnished any additions or modifications as soon as they are made.
- 5.** A Military Judge may modify, change, or determine that a certain Rule of Court or any portion thereof is not applicable to a given trial by Military Commission. Before taking such action, the Military Judge will so advise counsel in the case, other interested parties, the Chief Trial Judge, and trial judiciary staff.

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RULE 2. COMMUNICATIONS

1. Purpose. This rule establishes general procedures for communications among counsel, the Military Judge and trial judiciary staff.

2. These procedures are designed to avoid *ex parte* communications, to ensure that procedural matters leading to trial are handled efficiently, and to provide efficient and expeditious methods of communications. *Ex parte* communication by a party with the Military Judge or *vice versa* concerning the case is prohibited except as authorized by the M.C.A. or the M.M.C.

3. The preferred, and most reliable, method of communication with the Military Judge and counsel is email; the following email conventions will be followed. Failure to comply with these rules will result in the communication being returned for lack of compliance with these rules.
Also see Rule 3, Motion Practice

a. All emails or other communications for the Military Judge will be sent to the Chief Clerk of the Trial Judiciary at MLAdd-OMCTrialJudiciary@osd.mil. Email will not be sent directly to the Military Judge.

b. All e-mails sent to the Chief Clerk of the Trial Judiciary for a Military Judge shall also be sent "cc" to counsel for both sides, the Chief Defense Counsel, the Chief Prosecutor, the Chief Legal Clerks for the Prosecution and Defense, and the paralegals assigned to the case. In addition, all filings will be "cc" to the Director, Office of Court Administration, Office of Military Commissions.

c. Emails will be kept to a single subject and use a simple, descriptive, subject line.

d. If the email pertains to a specific case use the case name in the subject line of every email. If an Appellate Exhibit designation has been assigned that designation shall be included in the subject line.

e. Identify, in the body of the email, each attachment being sent.

f. Every paragraph and sub-paragraph of any email to the Military Judge that contains more than one paragraph or sub-paragraph will be numbered or lettered to provide for easy reference. A logical numbering or lettering scheme will be used, such as: 12 a (1) (a) (i).

g. All attachments to a filing will be sent in the same email as the document to which it is an attachment. If such email would exceed the capabilities of the LAN, the original email must indicate that additional attachments will be in a subsequent email.

h. Text attachments will be, in order of preference, in Microsoft Word, HTM/HTML, or RTF. In addition to the text version, a PDF version may be included. Attachments will not be in "track changes" or "mark-up" format.

i. If a draft order or other document requiring signature is provided to the Military Judge for consideration a Word version must also be attached

j. If it is necessary to send images, in order of preference, PDF, JPG, BMP, or TIFF may be used. If a party wishes to use some other file format, the party must request and receive permission from the trial judiciary staff.

k. Save all emails you send for your record copy of the communication.

l. Avoid archiving or compressing files (such as WinZip). Before sending an archived or compressed file, get permission from the trial judiciary staff.

m. If the Military Judge will need to know classified information to resolve the matter, that fact must be noted in the email and the location of the materials that he/she will need to review (if such facts or locations are not classified or protected).

n. Given the potential number of counsel and changes in the trial teams, all parties must ensure that all who need the email receive a copy. If any addressee notices that an email was not "cc" to a person who needs to have a copy, such addressee shall forward a copy to the person who needs that email and advise the sender and all other "cc" recipients of the failure to include the person.

4. Because of potential changes to the composition of trial teams, the Military Judge or trial judiciary staff may elect to send an email to the Chief Defense Counsel or Chief Prosecutor, and/or their respective Chief Legal NCOs, for distribution to all counsel, or all counsel of a particular team. The trial judiciary staff and the Military Judge will be copied on the email that is forwarded to those to whom distribution was directed in compliance with these instructions.

5. When a telephonic conference is necessary, the trial judiciary staff will arrange the conference call unless otherwise directed by the Military Judge. Conference calls will be in accordance with R.M.C. 802.

6. When authorized by these instructions, or directed by the Military Judge, any member of the trial judiciary staff may sign for, and issue, directions, instructions, requests, or rulings to the parties and others "For the Military Judge" or "By Direction of the Military Judge." Signatures "for" or "by direction of" carry the same force and effect as if signed by, or personally issued by, the Military Judge.

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RULE 3: MOTION PRACTICE

1. Purpose. This rule establishes general procedures for motion practice among counsel, the Military Judges and trial judiciary staff. These procedures are designed to avoid *ex parte* communications, to ensure that procedural matters leading to trial are handled efficiently, and to provide efficient and expeditious motion practice.

2. Ex Parte Communications. *Ex parte* communication by a party in a case, to include the Office of Military Commissions, DoD General Counsel or any intelligence or law enforcement agency, with the Military Judge is prohibited except as authorized by the M.C.A. or the M.M.C. This is to preclude any actual or perceived attempt to improperly influence the Commission in violation of 10 U.S.C. § 949b. This does not include administrative matters necessary for the administrative management of the Office of Trial Judiciary.

3. Public Release of Filings: It is judicial policy that all filings and judicial orders be released to the public, subject to any regulatory restrictions imposed by the Department of Defense, unless filed under seal, filed *ex parte*, are classified or they are otherwise ordered by the Military Judge not to be released (*see Rule 6*).

4. Communication with the Military Judge: All emails or other communications for the Military Judge will be sent to the Chief Clerk of the Trial Judiciary at MLAdd-MCTrialJudiciary@osd.mil . Email will not be sent directly to the Military Judge (*see Rule 2*).

5. Definitions:

a. Motion: an application to the Military Judge for particular relief or for the Military Judge to direct another to perform, or not perform, a specific act. A motion as used herein also specifically includes those motions addressed in R.M.C. 905, 906, and 907.

b. Filing: includes a written motion, response, reply, supplement, notice of a motion, special request for relief, or other communication involved in resolving a motion.

c. Response: the opposing party's answer to a motion.

d. Reply: the moving party's answer to a response.

e. Supplement: an additional filing in regard to a previously filed motion, response, or reply.

f. Redacted Filing: a copy of a motion, response or reply or supplemental filing that has been reviewed by the DoD Review Team (*see l, below*).

(1) Information protected by virtue of being classified, under the terms of a protective order or otherwise protected by law (e.g. Privacy Act) must be deleted by the party filing the motion or by the DoD Review Team.

(2) Redacted copies are not to be considered judicial documents of the Commission and will not be included in the Record of Trial unless otherwise properly introduced into evidence. Only original filings will be considered as judicial documents.

g. Draft Redacted Filing: a copy of a motion, response or reply or supplemental filing that has been redacted by the filing party to comply with protective orders and statutory requirements (e.g. Privacy Act).

(1) A "draft Redacted Filing" must accompany all submissions by a filing party except those filed *ex parte*. A motion, response or reply or supplemental filing will not be considered filed unless a draft Redacted Copy is provided.

(2) The draft Redacted filing will be provided to the DoD Review Team as required by para 19-4 of reference (c) (*see Rule 6*).

h. Certification of Conference: a statement by the moving party confirming that the moving party has conferred with the opposing party and whether the opposing party concurs with or objects to the requested relief. All motions must contain a Certificate of Conference.

i. Certification of Service: a statement by a party confirming that their motion, response or reply has been served on opposing counsel. All motions, responses, replies and supplemental filings must have a Certificate of Service. Service may be accomplished by email or the provision of a hard copy.

j. Oral Argument: all motions, responses and replies will indicate whether the parties are requesting oral argument on the issue.

k. Sealed Filing: a document is filed under seal to prevent general disclosure and is done so by direction or concurrence of the military judge. A document sealed by the Military Judge may not be unsealed except by direction of the judge; a sealed document may not be disclosed to parties beyond those indicated in the sealing directive.

l. DoD Review Team: the Security Classification/Declassification Review Team, consisting of original classification authorities from DoD components and commands, established IAW OSD Memorandum 09260-08, OSD Memorandum 10522-08 and OSD Memorandum 12079-08 (*see Para 18-1b of reference (c)*).

6. Computation of Time:

- a.** In computing any period of time prescribed or allowed by these Rules, the day of the act, event, or default from which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included, unless it is a Saturday, a Sunday, or a legal holiday, in which event the period runs until the end of the next day which is not one of the aforementioned days.
- b.** When a time is used in these Rules, or in a message, order, email, or other directive from a Military Judge, that time refers to Eastern Standard Time, unless otherwise specifically stated.
- c.** If a filing is sent on a Friday after 1600 or on Saturday, or Sunday, the filing is considered to have been received the following Monday. If the following Monday is a federal holiday, the filing is received on the following Tuesday. A filing sent on a federal holiday is not received until the first business day after the federal holiday.
- d.** A filing sent after 1600 Monday - Thursday is considered as being received the next business day.

7. Timing for filing motions, responses, and replies.

a. A motion, response, reply or supplement is only considered filed when received by the Chief Clerk of the Trial Judiciary and all conditions precedent (Certification of Conference; Certification of Service and draft Redacted Filing) have been met.

b. Motions.

(1) Timing. Motions addressed in R.M.C. 905(b) (1) – (6) must be raised and made by the time provided in R.M.C. 905(b) unless the Military Judge directs otherwise. As to other motions, the Military Judge will ordinarily establish a deadline for the filing of motions by way of an Order.

(2) Format: *See* Form 3-1.

(3) Waiver. Motions which are not made in a timely fashion, or as directed by the Military Judge are waived.

a. Requests for an extension of time to file or exceptions to waiver must be addressed to the Military Judge with motion-specific reasons for failure to make the motion in a timely fashion.

b. A request for waiver must be submitted as an unclassified document; if classified information is necessary to support the request it should be submitted separately as a classified attachment.

c. Responses.

(1) **Timing.** Unless the Military Judge provides otherwise, a response is due within 14 calendar days after a motion is filed subject to paragraph 6, above.

(2) **Format:** *See* Form 3-2.

(3) **Waiver.** Responses which are not made in a timely fashion are waived.

a. Requests for an extension of time to file or exceptions to waiver must be addressed to the Military Judge with motion-specific reasons for failure to make the response in a timely fashion.

b. A request for waiver should be submitted as an unclassified document; if classified information is necessary to support the request it must be submitted as a classified attachment

d. Replies.

(1) **Reply Optional:** Counsel may submit a reply to a response, however Counsel must take care that matters that should have been raised in the original motion are not being presented for the first time as a reply. Replies are unnecessary to simply state that the party disagrees with a response. If a reply is not filed, that indicates that the party stands on their motion or initial filing, and it does not indicate agreement with a response.

(2) **Timing:** Replies shall be filed within seven calendar days of receiving a response unless the party does not desire to file a response.

(3) **Format:** *See* Form 3-3.

(4) **Waiver.** Replies which are not made in a timely fashion are waived.

a. Requests for an extension of time to file or exceptions to waiver must be addressed to the Military Judge with motion-specific reasons for failure to make the reply in a timely fashion.

b. A request for waiver should be submitted as an unclassified document; if classified information is necessary to support the request it must be submitted as a classified attachment

8. Burdens of Proof and Persuasion

a. As a general rule, the burden of proof (production of evidence and preponderance of

evidence), and the burden of persuasion are on the moving party. (See R.M.C. 905(c)). In any motion in which the moving party does not believe that the general rule should apply, or believes that one or both of the burdens should change after a certain quantum of evidence is introduced, the party must provide in the filing:

- (1) A statement of the burden of proof (production of evidence) for that motion;
- (2) A statement of the burden of persuasion in the particular motion;
- (3) The point, if any, at which either the burden of proof or the burden of persuasion is shifted to the non-moving party; and,
- (4) The legal argument in support of the statement.

b. A response must address those matters concerning shifting of the burden(s) raised by the moving party.

9. Rulings on Motions.

a. The Military Judge may make final rulings on all motions based upon the written filings of the parties submitted in accordance with this Rule and the facts and law as determined by the Military Judge, unless:

- (1) Material facts necessary to resolution of the motion are in dispute and require the taking of evidence;
- (2) A party correctly asserts in a filing that the law does not permit a ruling on filings alone, accompanied by citation to the authority which prohibits the Military Judge from ruling on the filings alone; or,
- (3) The Military Judge determines that oral argument is necessary to provide a full and fair trial.

b. See also R.M.C. 905(e).

c. A ruling by the Military Judge may either be done during a session of the Commission or in writing; a written ruling is only required in the discretion of the Military Judge.

10. Procedures for Filing a Motion, Response, Reply or Supplemental Filing

a. **Format:** generally see Form 3-1, 3-2, or 3-3

(1) A filing that is *ex parte* or sealed IAW M.C.R.E. 505 or 506 will so indicate above the filing designation. See *Form 3-1*

(2) All filings that are classified will be protected and marked following standard procedures as set out in DoD directives, Chapter 18 of reference (c), and any applicable protective orders.

(3) If an otherwise unclassified motion contains one or more classified attachments the attachment(s) will be filed separately and an unclassified tab used to designate the attachment and the motion filed according to its proper classification.

(4) A Certification of Conference; a Certification of Service and a draft redacted filing must be included in all filings.

b. Appellate Exhibit Designation: before service on the opposing party or filing the party making the motion must contact the Director, Office of Court Administration, to obtain the Appellate Exhibit number for the filing; all subsequent filings concerning the original motion must use that designation. The Appellate Exhibit serves as the official designation for any filing.

(1) Once a filing has been assigned an Appellate Exhibit number, all future communications - whether in hard copy or by email - concerning that series of filings will use the Appellate Exhibit as a reference in addition to the name of the filing. This includes adding the initial file designations to the style of all filings, the subject lines of emails, and the file names to ALL email attachments.

Examples:

* An email subject line forwarding a response to AE003 in US v Jones should read: "*AE003 US v Jones: Defense Response - Motion to Exclude Statements of Mr. Smith.*" The filename of the filings shall be the same as the response being sent.

* The filename of a document that is an attachment to the response should read: "*AE003 US v Jones: Defense Response - Motion to Exclude Statements of Mr. Smith - attachment - CV of Dr Smith.*"

(2) The names given to matters that may appear on the Filings Inventory - such as the subject of a motion - will not be classified or otherwise protected as the Filings Inventory is a working document and is intended to be transmitted through unsecured networks. Counsel must therefore ensure that the names of their filings are not in themselves classified.

c. Service of Filing: all filings must be served on the opposing party or parties before filing with the Commission. A Certification of Service must be included for all filings.

d. Filing the Motion, Response, Reply or Supplemental Filing

(1) The party filing a motion, response, reply or supplement will do so with the Chief

Clerk of the Trial Judiciary. A motion, response, reply or supplement thereto will not be accepted for "filing" without:

- (a) Certification of Service
- (b) Certification of Conference
- (c) Original and draft redacted copy. The original filing will be submitted in *pdf* format; the draft redacted copy as required by reference (c) .
- (d) If the motion is requesting that the Military Judge issue an order it must contain a Word version of a draft order.

(2) Unclassified Filings:

- (a) Unclassified filings may still be filed under seal or *ex parte* and must be marked IAW para 10a (1), above.
- (b) Unclassified filings will be filed with the Chief Clerk of the Trial Judiciary using email at MLAdd-OMCTrialJudiciary@osd.mil . The documents to be filed must be attachments to the transmittal email.

(3) Classified Filings:

- (a) Classified filings, or those believed to be classified may also be filed *ex parte* and/or sealed.
- (b) Classified Filings will be filed with the Chief Clerk of the Trial Judiciary on SIPERS at MLAdd-OMCTrialJudiciary@osd.mil.
- (c) Filing must adhere to all requirements for service and timeliness.
- (d) Party making the classified filing must send the Chief Clerk of the Trial Judiciary an unclassified notice of the filing using the Appellate Exhibit number and an unclassified title so that the filing can be accounted for through normal procedures.

(4) Paper or Filing by CD:

- (a) Motions, responses, replies and supplemental filings thereto may be filed by paper or CD due to classification or location constraints. Before doing so the filing party must so notify with Chief Clerk of the Trial Judiciary.
- (b) Filings submitted in paper or CD format must adhere to all other requirements for filing.

(c) Chief Clerk of the Trial Judiciary will specify to the filing party how paper or CD filings will be accepted and how many copies will be required of each.

f. Special Provisions:

(1) **Ex Parte filings:** notice of ex parte filings must be served on the opposing party.

(2) **Attachments to filings:** Common publications (e.g. DoD regulations, pamphlets, etc), published cases and other general references should not be attached to a filing. The filing party may reference these and, if appropriate provide a URL link to the document. Excerpts from general references may be included if not more than 3 -5 pages in length.

Form 3-1 Format for a Motion

Filed Ex Parte Under Seal

UNITED STATES OF AMERICA

v.

[Name of Accused]

[aka if any; not required]

AE 002

Defense Motion

to Suppress Statement Allegedly Made by the Accused
to Joe Jones

[Date motion filed]

Note: Use bold as shown above.

NOTE: The following will be included in **separately numbered paragraphs**. Use Arabic numbers.

1. A statement that the motion is being filed within the time frames and other established guidance or direction of the Military Judge.
2. A concise statement of the relief sought.
3. (Optional) An overview of the substance of the motion.
4. (May be required) Statement concerning burden of proof.
5. The facts, and the source of those facts (witness, document, physical exhibit, etc.). Each factual assertion will be in a separate, lettered sub-paragraph. This will permit responses to succinctly admit or deny the existence of facts alleged by the moving party. If the facts are, or the identity of the source is, protected or classified, that status will be noted.
6. Why the law requires the relief sought in light of the facts alleged, including proper citations to authority relied upon.
7. Whether oral argument is requested or required by law. If asserted that argument is required by law, citations to that authority, and why the position of the party cannot be made fully known by filings.
8. The identity of witnesses who will be required to testify on the matter in person, and/or evidentiary matters that will be required. Listing a witness is not a request for the witness. Requests for production of witnesses by the defense must be made separately, and in accordance with R.M.C. 703. Stating the evidence needed is not a discovery request or a request for access to evidence.
9. A certification of conference indicating that the moving party has conferred with the opposing party and whether the opposing party concurs with or objects to the requested relief.

10. 11. Additional information not required to be set forth as above.

11. A list of attachments. Normally Attachment A will be the certificate of service.

Form 3-2 Format for a Response

AE 002

UNITED STATES OF AMERICA

v.

[Name of Accused]

[aka if any; not required]

Government Response

To Defense Motion to Suppress Statement Allegedly
Made by the Accused to Joe Jones

[Date motion filed]

Note: Use bold as shown above.

NOTE: The following will be included in separately numbered paragraphs. Use Arabic numbers.

1. A statement that the response is being filed within the time frames and other established guidance or direction of the Military Judge.
2. Whether the responding party believes that the motion should be granted, denied, or granted in part. If granted in part, the response shall be explicit about what relief, if any, the responding party believes should be granted.
3. (Optional) Overview - This paragraph is not required even if the motion had an overview.
4. Those facts cited in the motion that the responding party agrees are correct. When a party agrees to a fact in motions practice, it shall constitute a good faith belief that the fact will be stipulated to for purposes of resolving a motion. The agreed upon facts will correspond to the subparagraph in the motion containing the facts involved.
5. The responding party's statement of the facts, and the source of those facts (witness, document, physical exhibit, etc.), insofar as they may differ from the motion. As much as possible, each factual assertion should be in a separate, lettered subparagraph. If the facts or identity of the source is protected or classified, that status will be noted. These factual assertions will correspond to the subparagraph in the motion containing the facts involved.
6. Why the law does not require or permit the relief sought in light of the facts alleged, including proper citations to authority relied upon.
7. (May be required) Address issue regarding burdens if addressed in the motion, or it is otherwise required to be addressed.
8. Whether oral argument is requested or required by law. If asserted that argument is required by law, citations to that authority, and why the position of the party cannot be made fully known by filings.

9. The identity of witnesses who will be required to testify on the matter in person, and/or evidentiary matters that will be required. Listing a witness is not a request for the witness. Requests for production of witnesses by the defense must be made separately, and in accordance with R.M.C. 703. Stating the evidence needed is not a discovery request or a request for access to evidence.

10. Additional information not required to be set forth as above.

11. A list of attachments. Normally Attachment A will be the certificate of service.

Form 3-3 Format for a Reply

UNITED STATES OF AMERICA

v.

[Name of Accused]

[aka if any; not required]

AE 002

Defense Reply

to Government Response to Defense Motion to
Suppress Statement Allegedly Made by the Accused to
Joe Jones

[Date motion filed]

Note: Use bold as shown above.

NOTE: The following will be included in separately numbered paragraphs. Use Arabic numbers.

1. A statement that the reply is being filed within the time frames and other established guidance or direction of the Military Judge.
2. In separately numbered paragraphs, address the response as needed. When referring to the response, identify the paragraph in the response being addressed.
3. Citations to additional authority if necessary.
4. The identity of witnesses not previously mentioned in the motion or response who will be required to testify on the matter in person, and/or evidentiary matters not previously mentioned in the motion or response that will be required. Listing a witness is not a request for the witness. Requests for production of witnesses by the defense must be made separately, and in accordance with R.M.C. 703. Stating the evidence needed is not a discovery request or a request for access to evidence.
5. Additional information not required to be set forth as above.
6. A list of any additional attachments. Normally Attachment A will be the certificate of service

Military Commissions Trial Judiciary

8 December 2011

Military Commissions Rules of Court

RULE 4. APPEARANCE, ABSENCE, AND EXCUSAL, RELIEF OR WITHDRAWAL OF COUNSEL

1. Purpose. This rule governs the entry of appearance of counsel, absence, and excusal, relief or withdrawal of counsel.

2. Detailing and Appearance.

a. Military Counsel.

(1) Military counsel have made an appearance on behalf of the United States or an accused when such counsel are detailed by proper authority to a case which has been referred for trial by a Military Commission.

(2) Upon referral of a case, the Chief Defense Counsel and the Chief Prosecutor will provide copies of detailing documents to the trial judiciary staff and, if known, to opposing counsel.

(3) Until the detailed defense counsel is relieved or excused from his/her duty of representation by competent Authority, in accordance with R.M.C. 505, counsel will continue to represent the interests of an accused.

(4) Under R.M.C.109, 503 and 506, it is the responsibility of the Chief Defense Counsel to provide representation for an accused at all times by detailing a qualified defense counsel. R.M.C. 502 outlines the qualifications and duties of detailed defense counsel, associate or assistant defense counsel, and civilian defense counsel. (*See also Chapter 9 of reference (c)*).

b. Civilian Defense Counsel. A civilian defense counsel will be deemed to have entered an appearance with the Commission when counsel submits Form 4-1, the notice of appearance and agreement, including MC Form 9-2, Affidavit and Agreement by Civilian Defense Counsel, by email to the Military Judge through the trial judiciary staff.

c. Learned Counsel. A military or civilian counsel, experienced in capital litigation, appointed under the provisions of 10 U.S.C. § 949a(2)(C)(ii).

d. Associate or Assistant Defense Counsel. An associate or assistant defense counsel may perform any act or duty which a defense counsel may perform under law, regulation, or custom of the service, under the supervision of the defense counsel. (*See R.M.C. 502(d)(7)*). Detailed defense counsel or civilian counsel, if they are lead counsel, should ensure that assistant defense counsel are always afforded the appropriate supervision. Assistant defense counsel may not appear alone at any session of a Military Commission

or a R.M.C. 802 conference, and may not submit motions under only their signature. Assistant defense counsel have made an appearance when a written notice of detail is provided to the Military Judge by the Chief Defense Counsel.

e. Standby Counsel. If a party has stand by counsel under R.M.C. 506(d) and the party desires the standby counsel's presence at counsel table, the party will notify the Military Judge, the trial judiciary staff, and opposing counsel.

f. If any counsel believes that his/her participation in the Military Commissions or representation of an accused is or may be prohibited because of ethical or other considerations, he/she shall follow the procedures set forth in R.M.C.109.

3. Presence of Counsel at Commission sessions. The following rules govern the presence of counsel at Commission sessions.

a. **General Rule:** all defense counsel who have entered an appearance in a specific case must attend all sessions of that case before the Commission.

b. The Military Judge may authorize defense counsel's absence from a particular session with advanced waiver of that counsel's presence by their client. Any counsel seeking authorization for absence from a session will request, by motion, permission from the Military Judge and provide written evidence of the waiver by the client. The following requirements must be met.

(1) A signed waiver by the accused must be provided to the Military Judge in advance of the scheduled session. The waiver must indicate that:

(a) The accused is expressly waiving the presence of a named counsel for the scheduled Commission session and be signed by the accused, detailed defense counsel, and the lead defense counsel, if other than the detailed defense counsel. The waiver will be in English or, if the original is in a language other than English, translated into English.

(b) The accused and lead counsel for the defense and the counsel seeking permission to be absent are aware that absence does not permit delay or deferral of business of the Commission because said counsel is absent, and that another counsel for the defense who will be present can fully address and litigate, if necessary, any business of the Commission.

(c) The accused understands that another of his defense counsel is responsible for ensuring all business of the Commission can be conducted at the session.

(d) The request is not for the purposes of seeking delay and will not, in fact, delay Commission proceedings.

(e) The format contained at Form 4-2, Waiver of Counsel, may be used by the defense.

c. If a counsel's presence is waived by the client and such absence has been authorized by the Military Judge, that absence will not limit the business that is scheduled to be accomplished at the session for which a counsel has been authorized to be absent.

d. In lieu of a signed waiver the client may, at a session at which the counsel is present, state that the counsel's presence is waived for all subsequent sessions at which the civilian counsel does not appear. The client must state that he understands those matters addressed in paragraph 3.b above and specifically that he understands that other matters may be handled at such sessions which would normally have been handled by that counsel and that he waives such advice and assistance.

f. In cases in which there has been an on-the-record or written waiver of the future presence of counsel at sessions that counsel will not be required to be present at all sessions.

g. If, at any session, the accused seeks to revoke his written or on-the-record waiver of the presence of the counsel, that counsel will be required to be present at all subsequent sessions of the Commission. Alternatively, the counsel may request to withdraw from the case completely, and the request may be granted at the discretion of the Military Judge. Any such revocation of waiver by the accused during a given session will not require the counsel's presence during the session at which the revocation of waiver was made.

4. Excusal, Relief or Withdrawal of Defense Counsel After Arraignment.

a. Excusal/Relief/Withdrawal: The termination of all representational responsibility of detailed counsel or a qualified civilian counsel after entering an appearance. *See R.M.C. 505(d)(2) and 506(b).*

b. Written notice of termination of representation of detailed counsel is required. Written notice of such termination will be provided to all parties including the military judge. Defense counsel who has entered an appearance in a Commission session will not be excused without permission of the Military Judge.

5. Excusal, Relief or Withdrawal of Government Counsel After Arraignment. The excusal, relief or withdrawal of a prosecutor is at the discretion of the Chief Prosecutor and will be indicated on the record at the start of a session. At least one prosecutor must be present at all sessions of the Commission.

Form 4-1 Notice of Appearance and Agreement

UNITED STATES OF AMERICA)	CIVILIAN DEFENSE COUNSEL
)	NOTICE OF APPEARANCE
v.)	AND AGREEMENT
)	
NAME)	(DATE)
)	
)	
)	

1. Pursuant to procedures of court/instruction for counsel, I, ATTORNEY'S FULL NAME, hereby provide notice to the Military Judge of my appearance on behalf of CLIENT'S FULL NAME. My office address, phone numbers, and email address are: ADDRESS, VOICE AND FAX PHONE NUMBERS, & EMAIL ADDRESS. I am an active member in good standing licensed to practice in the following jurisdictions: LIST BAR ADMISSIONS.
2. I have attached MC Form 9-2, Affidavit and Agreement by Civilian Defense Counsel.

COUNSEL NAME

Form 4-2 Waiver of Presence of Counsel

UNITED STATES OF AMERICA)	WAIVER OF PRESENCE OF COUNSEL
)	
v.)	
)	(DATE)
NAME)	

1. I, ACCUSED'S FULL NAME, hereby provide notice to the Military Judge that I waive the presence of FULL NAME OF ATTORNEY, my defense counsel for the Commission session scheduled for DATE. By my signature below, I certify that:

a. I have fully discussed this waiver with my defense counsel, NAME OF COUNSEL WITH WHOM DISCUSSED, and he/she has fully advised me of, and I understand my right to, have my defense counsel present for Commission sessions. I have also been advised and understand that the absence of NAME OF ABSENT ATTORNEY will not delay or defer the business of the Commission, whether previously scheduled or arising during the Commission session. I further understand and agree that NAME OF COUNSEL WHO WILL BE PRESENT AT THE SESSION is/are competent and fully capable of representing me and litigating all matters that are scheduled for or may come up at the Commission session. I further certify that this waiver is not made in an attempt to delay the proceedings and in fact will not delay the proceedings.

b. I am voluntarily executing this waiver of counsel after being fully advised of my right to counsel and discussing that right with my defense counsel. No one has threatened me or in any way forced me to execute this waiver and I believe it is in my best interest to execute it.

ACCUSED

I/We, NAME OF DETAILED DEFENSE COUNSEL & LEAD DEFENSE COUNSEL (if other than DDC), by my/our signature below, certify to the Military Judge that:

1. I/we have fully discussed the substance of this waiver with the accused, NAME OF ACCUSED, and he fully understands its content and impact.

2. This waiver will not in any way delay or inhibit the business of the Commission, whether scheduled or that may arise at the next session, and this waiver is not offered to delay or defer the business of the Commission.

3. The Detailed Defense Counsel, NAME OF DDC TO BE PRESENT, is fully qualified and competent to litigate all matters that should arise at the scheduled Commission session.

4. I believe it is in the best interest of the accused that he execute this waiver.

Detailed Defense Counsel/Date

Lead Defense Counsel/Date

Military Commissions Trial Judiciary

8 December 2011

Military Commissions Rules of Court

RULE 5. FILINGS INVENTORY

1. Purpose. This rule establishes:

a. The Filings Inventory is a tracking document to set forth which filings and other matters are before the Military Judge. It is considered a working document of the trial judiciary and as such will not become part of the Record of Trial unless otherwise directed by the Military Judge

b. Requirements and formats for the Chief Clerk of the Trial Judiciary to maintain a Filings Inventory.

c. Responsibilities for counsel to check the accuracy of a Filings Inventory to ensure that counsel are certain of those matters pending before the Military Judge.

2. Establishing the Filings Inventory. The Chief Clerk of the Trial Judiciary shall establish and maintain a Filings Inventory for each case referred to the Commission indicating those filings pending before the Military Judge.

a. The Appellate Exhibit number will be used as the designation for a motion and subsequent filings pertaining to that motion.

b. Amicus curie briefs will be filed in the chain of the original motion. *See Rule 8.*

c. Third party challenges to whether material presented at trial, at a hearing or in a filing, ruling, order or transcript may be released to the public or is not appropriately designated as "protected" will be filed as a motion and given an Appellate Exhibit number.

d. The Chief Clerk of the Trial Judiciary may, as necessary, add a simple description of the nature of the filing in the section titled "Notes."

e. The Filings Inventory shall

(1) Indicate the date on which motions, responses, replies, and supplemental filings are filed (*see Rule 3*) and orders of the judge are issued.

(2) It may also indicate

(a) When the motions, responses, replies, supplemental filings and orders are sent for security review IAW with paras 17-1c and 19-4 of reference (c);

(b) When they are received back from security review

(c) When they are sent to the Office of Military Commissions webmaster for public release

3. Distribution of the Filings Inventory.

a. As directed by paragraph 19-4d of reference (c) the Filings Inventory will be sent to the Office of Military Commissions webmaster after every update.

b. The Chief Clerk of the Trial Judiciary, when directed by the Military Judge, will distribute copies of the Filings Inventory to all counsel on the case and the Director of Court Administration, Office of Military Commissions.

4. Counsel responsibility when receiving the Filings Inventory. The Filings Inventory is one method by which counsel can be sure which filings have been received by the Military Judge, and which matters are before the Military Judge.

a. Counsel will examine each Filings Inventory when received and notify the Chief Clerk of the Trial Judiciary, Military Judge, and opposing counsel of any discrepancies.

b. If counsel believes they have submitted a filing which is not reflected on the Filings Inventory, they shall immediately send that filing - with all attachments - to the Chief Clerk of the Trial Judiciary, Military Judge, and opposing counsel, noting the discrepancy.

c. If there is a discrepancy in the Filings Inventory and counsel fail to take the corrective action as indicated above and in paragraph 5, below, the Military Judge may elect not to consider that filing.

5. Effect of omission in Filings Inventory.

a. If a filing or other matter is not on the Filings Inventory, it may not be before the Military Judge for decision. If a matter has been mistakenly left off the Filings Inventory, it is the responsibility of counsel to note the omission and advise the Chief Clerk of Trial Judiciary (*See* paragraph 4, above).

b. If counsel believes that a matter should be on the Filings Inventory and have made that known to the Chief Clerk of the Trial Judiciary, and the Chief Clerk does not or fails to include the matter on the Filings Inventory, it is the responsibility of counsel to raise the matter with the Military Judge.

c. Failure to fulfill the responsibilities noted above constitutes waiver should the Military Judge not address or rule upon a matter that is not on the Filings Inventory.

6. Format: The Filings Inventory will indicate the Appellate Exhibit number provided by the Director, Office of Court Administration, the date of any filing and the dates that the respective filings were sent for security review, received back from security review and send to the Office of Military Commissions webmaster.

a. The Filings Inventory will reflect any special limitations on a filing including if classified, filed under seal or filed *ex parte*.

b. The Filings Inventory will generically reflect where the original of classified filings are stored (e.g. with Director, Office of Court Administration)

c. *See Form 5-1*

FILINGS INVENTORY – US V. _____

AS OF ____ HOURS, DAY/MONTH/YEAR

Red: classified/sealed/exparte

Green: Open

AE	Motion Filed	Response Filed	Reply Filed	Ruling Issued	Notes
002: Pro Motion for Continuance	dd/mm/yy	dd/mm/yy	dd/mm/yy	dd/mm/yy	
087: Docket Order	NA	NA	NA	dd/mm/yy	
099: <i>Def Ex Parte Motion to Use Red</i>	dd/mm/yy	dd/mm/yy	dd/mm/yy	dd/mm/yy	Ruling is unclassified
103: Def Motion to Compel w/Classified Attachment E	dd/mm/yy	dd/mm/yy	dd/mm/yy	dd/mm/yy	Classified Attachment E retained by Office of Court Administration
154: Pro Motion for Protective Order	dd/mm/yy	dd/mm/yy	dd/mm/yy		
177: Media Challenge to Protective Order (AE 154)	dd/mm/yy	dd/mm/yy	dd/mm/yy	dd/mm/yy	See ROT, oral ruling at session mm/dd/yy
182: Def Motion to Reconsider (AE 177)	dd/mm/yy				
Amici (Def)	dd/mm/yy				

Military Commissions Trial Judiciary

8 December 2011

Military Commissions Rules of Court

RULE 6. PUBLIC ACCESS, RELEASE OF RECORDS

- References:** (a) Military Commissions Act of 2009, 10 U.S.C §§ 9481 (c), 9481 (c), 9490, 949p
(b) Manual for Military Commissions, 2010, (M.M.C.), R.M.C. 103 (7); 108; 701 (f),
(k), (l)(2), 706 (3), (4); 801; 804; 806; 1103
(c) DoD Regulation for Trial by Military Commission

1. Judicial Policy: The Military Judge has the responsibility to ensure that a Commission is conducted in an impartial and orderly manner that reflects the seriousness of the proceeding and the independence of the Commission. Trials must be held in a manner that enable calm, deliberate and detached decision making on the issues presented whether by the judge or panel. The rights of all parties must be protected while affording public access and adhering with the requirements of national security. Consistent with these responsibilities the Military Judge will ensure that all Commission proceedings are open and transparent to the extent possible.

2. Public Access:

a. Within limitations imposed by the DoD, the media and public are encouraged to attend Commission proceedings and shall be permitted to observe all trial proceedings, unless otherwise determined by the Military Judge. No one will be permitted to disrupt the judicial atmosphere of a Commission. Commission security personnel and the bailiff will ensure that those watching a trial are aware of, and adhere to, proper decorum throughout the proceedings.

b. Unless otherwise directed by the Military Judge, or security requirements, spectators may enter and leave the courtroom during open sessions but will not be permitted to disturb or interrupt Commission proceedings by their conduct. Spectators will not indicate or demonstrate in any manner agreement or disagreement with testimony or procedures at a trial, nor will their appearance or attire be permitted to detract from the dignity of the proceedings or to create a disruption. Any spectator who disrupts the Commission or fails to demonstrate appropriate demeanor for a judicial proceeding will be escorted from the courtroom and not allowed to return without the judge's permission.

c. R.M.C 806 (c) does not allow courtroom proceedings in Commission proceedings to be broadcast, televised, recorded, or photographed for the purpose of public dissemination except as set out in paragraph 2.d. below.

d. Contemporaneous closed-circuit video or audio transmissions are authorized under the provisions of R.M.C 806(c), for all proceedings subject to the provisions set out below. This will permit viewing or hearing by victims, the media or other spectators when courtroom facilities are inadequate to accommodate a reasonable number of spectators.

(1) Notification: If contemporaneous video or audio transmissions are anticipated as necessary Government counsel will petition the Military Judge by a motion before arraignment (*see Rule 3*).

(2) Security: This motion will set out for the judge the locations to which the transmissions are to be made and the security oversight at each site to ensure compliance with any directives of the judge.

(3) Notice of the transmission will be placed on the record by the Government at the start of each individual session that is to be the subject of contemporaneous video or audio transmissions.

(4) The Government will ensure that no potential witness on the merits observes the trial from a remote location unless, IAW paragraph 16-4b4 of reference (c), the Government notifies the Military Judge of that witnesses' potential observation. If a potential witness inadvertently observes a trial on the merits the prosecution will promptly notify the Military Judge and defense counsel

e. No one other than a trial participant, identified on the record, or security personnel, are allowed inside the bar of the courtroom without the Military Judge's permission when a Commission is in session.

f. If a Military Judge is requested by either party to close part-or-all of a proceeding the judge may do so IAW the provisions of 10 U.S.C. § 949d. The burden of establishing the need to close a session is on the moving party. The Military Judge will announce the decision, and the basis for it, prior to closing the courtroom.

3. Release of Records

a. Judicial Policy: It is judicial policy that all motions, responses and replies, supplemental filings and judicial orders be released to the public, subject to any security restrictions imposed by the Department of Defense unless filed under seal (for purposes other than security review), filed *ex parte*, are classified or they are otherwise ordered by the Military Judge not to be released.

b. Definitions:

(1) **Redacted Filing:** a copy of a motion, response or reply or supplemental filing that has been reviewed by the DoD Review Team. A "draft Redacted Filing" must accompany all submissions by a filing party except those filed *ex parte*. A motion, response or reply or supplement thereto will not be considered filed unless a draft Redacted Copy is provided (*see Rule 3*).

(a) Information protected by virtue of being classified, protected under the terms of a protective order issued by the Commission or otherwise protected by law (e.g. Privacy Act) must be deleted by the party filing the motion or by the DoD Review Team.

(b) Redacted copies are not to be considered judicial documents of the Commission and will not be included in the Record of Trial as an exhibit unless otherwise properly introduced into evidence. Only original, filings will be considered as judicial documents.

(2) **Record of Trial:** the Record of Trial is the full, verbatim, record of the trial with all exhibits and allied papers. It is the responsibility of the Government, IAW 10 U.S.C § 948l(c) to control and prepare the Record of Trial. The contents of the Record of Trial shall be IAW R.M.C. 1103.

(3) **Transcript:** a portion of the trial proceedings that, IAW paragraph 19-4e of reference (c), is made available to the public. Transcripts are not judicial records unless authenticated by the Military Judge and should not be considered an accurate representation of the proceedings.

c. Release of Transcripts: A Military Judge may, to preserve the integrity of a Commission proceeding, direct that part or all of a transcript not be released under the provisions of paragraph 19-4a of reference (c). Any directive will minimize the amount of information that may not be released and will be lifted as soon as the need for limiting release ends.

d. Security review of Filings

(1) Paragraph 17-1c and 19-4 of reference (c) require filings to be reviewed for classified or other protected information before being released to the public. This section set out the responsibilities of the Chief Clerk of the Trial Judiciary to facilitate that review.

(2) It is judicial policy that all filings, regardless of classification, undergo review by the DoD Review Team prior to being released to the Office of Military Commissions website IAW paragraph 17-1c1 and 19-4 of reference (c).

(a) This policy and these procedures apply to motions, responses, replies, supplemental filings, amicus filings and challenges to protected materials,

(b) Because of their nature the following filings will not be sent for review: *ex parte* filings by the defense and filings sealed at the request of the defense IAW R.M.C. 505 or 506.

(3) The Chief Clerk of the Trial Judiciary will immediately notify the DoD Review Team and such non-DoD federal departments or agencies that have been designated in writing when any filing requiring review has been received.

(a) **Unclassified Filings:** Unclassified filings will be forwarded by the most expeditious means to the Defense Review Team and any designated departments or agencies.

(b) SIPERS Filings:

- (1) Must fulfill all requirements for filings set out in Rule 3 before being accepted for filing.
- (2) Proponent counsel must provide an unclassified notice of filing to the Chief Clerk of the Trial Judiciary and all parties.
- (3) The Chief Clerk of the Trial Judiciary will have the Filing forwarded to the Defense Review Team and any designated agencies
- (4) If a designated department or agency does not have SIPERS capability the Chief Clerk of the Trial Judiciary will arrange for that entity to come to the judicial chambers to receive a copy at an agreed upon date and time or for a courier to carry a copy as necessary.

(c) Paper or CD Filings: if the proponent cannot use electronic filing procedures the following apply:

- (1) Must fulfill all requirements for filings set out in Rule 3 before being accepted for filing.
- (2) Proponent counsel must provide an electronic unclassified notice of filing to the Chief Clerk of the Trial Judiciary and all parties.
- (3) Proponent must hand carry a paper original and 10 CD copies to the Chief Clerk of the Trial Judiciary's office. If classified, all appropriate markings and protections will apply.
- (4) If the filing cannot be transmitted electronically the Chief Clerk of the Trial Judiciary will arrange for the Defense Review Team and each designated entity to either come to the judicial chambers to receive a copy at an agreed upon date and time or have a courier hand carry the filings for review

(d) Redacted Filings: Documents returned to the Chief Clerk of the Trial Judiciary approved for public release will be forwarded to the website without further review.

Military Commissions Trial Judiciary

8 December 2011

Military Commissions Rules of Court

RULE 7. USE OF TECHNOLOGY IN THE COURTROOM

1. **“Court Room Technology”** 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 Commission 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.

2. **General Rule:**

a. During trial, any material to be introduced into evidence and published by electronic means must first be properly admitted under the Military Commission Rules of Evidence (M.C.R.E.).

b. When used during closing arguments, any matter displayed electronically must 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.

c. Use of courtroom technology is within the discretion of the Military Judge to admit or exclude consistent with applicable authority.

d. A session will not be delayed or otherwise interrupted by virtue of the unavailability of courtroom technology.

3. **Pre-Trial Requirements.** This is a requirement for notice and does not provide any substantive right of discovery for any party to obtain the content of any courtroom technology not otherwise subject to the rules governing discovery.

a. Notice.

(1) To ensure facilities (i.e., a properly equipped courtroom) and equipment are available (e.g., where portable equipment is needed) and to obtain the assent of the Military Judge, counsel shall provide notice of the intent to use courtroom technology by motion at any time. The motion 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 Commission). No further elaboration is necessary in the motion.

(2) The motion shall describe generally the technology and purpose desired for use of electronic media and shall indicate whether any exhibit is classified or otherwise protected. No further elaboration is necessary in the motion.

(3) Pretrial notice is not required for the use of courtroom technology 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.

b. Disclosure.

(1) Where a party has provided notice of intent to use courtroom technology, counsel should discuss the proposed use with the Military Judge at a conference under R.M.C. 802.

(a) The Military Judge may, by a Case Management Order or other directive, set the date on which disclosure, if any, of courtroom technology to the Commission or to opposing counsel is required.

(b) The Military Judge may allow different disclosure dates for different uses of courtroom technology 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 classified information.

(2) Opening statement or closing argument. If electronic media is intended for use in opening statement or closing argument, counsel shall discuss such use with the Military Judge at an R.M.C. 802 conference.

(a) Use of electronic media must comply with the Rules for Military Commission, Military Commission Rules of Evidence, and case law applicable to opening statements and closing arguments.

(b) Counsel are highly encouraged to disclose the content of such electronic media to opposing counsel. This 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.

(c) As a precondition to using electronic media in opening statements or closing arguments, the Military Judge may require disclosure of the nature of the presentation, or the contents thereof, to the Military 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 fair consideration to protecting the value of the presentation from premature disclosure.

(3) Case in Chief. The content of courtroom technology 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 Case Management Order 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 Military Judge.

c. Remote live testimony.

(1) Remote live testimony includes, but is not limited to, testimony by video-conference, closed circuit television, telephone, or other similar technology. To use remote live testimony, counsel must provide notice to opposing counsel and to the Military Judge, using the procedures set forth in paragraph 2.a., 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 Military Judge, requesting such remote live testimony and setting out the justification for it, pursuant to the Rules for Military Commission (*see R.M.C. 914A when implemented*) and governing case law.

(3) In a motion for remote live testimony counsel must set out the methods that will be use to ensure the integrity of remote testimony.

(4) Counsel requesting remote live testimony must annotate their witness list to indicate which witnesses are expected to testify remotely and by what means.

4. Trial Procedure.

a. Admission and Publishing of Exhibits.

(1) Loading Media.

(a) 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 Military Judge. Permission to preload any evidence into courtroom electronic devices, or to connect laptops to electronic display media, should be requested pre-trial at an R.M.C. 802 conference.

(b) Classified information 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 Military Judge at a pretrial conference under R.M.C. 802.

(2) Offering/Admitting Evidence Electronically. The procedures for the use of electronic media should be the subject of discussion with the Military Judge at a conference under R.M.C. 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), M.M.C., 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 Military Judge.

(a) 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. Once the Commission 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 Military Judge to do so, counsel may activate the members' monitors.

(b) 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 Commission members without the permission of the Military 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.

(c) 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.

(d) 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 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. 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 Military Judge to publish an item of evidence by electronic means.

b. Remote Live Testimony.

(1) Before beginning any remote live testimony, proponent counsel shall request an Article 39(a), M.C.A, 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.

(2) 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 must 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, proponent counsel must move to substitute a 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 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 must 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.

(c) Upon admission into evidence by the Military 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 Military Judge to make the necessary correction.

(4) "Clear All" Function. When counsel has completed questioning a witness using courtroom technology, 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 Military Judge to activate the "clear all" function. Only the Military 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.M.C. 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 Military Judge will assemble the members in open court and replay the desired audio or audio-video evidence, if determined to be appropriate; alternatively the transcript, if available, may be read to the members.

Military Commissions Trial Judiciary

8 December 2011

Military Commissions Rules of Court

RULE 8. AMICUS CURIAE BRIEFS

1. Purpose. This rule establishes general procedures for submitting an *amicus curiae* brief. An *amicus* brief, which logically addresses an important matter not previously considered by the Commission, or addresses an important matter in a way that another brief filed with the Commission does not, might be of benefit. Briefs that do not meet this standard would not assist the Commission.

2. Submitting briefs. A person individually, or on behalf of an organization or entity, may provide an *amicus* brief to the Chief, Office of Court Administration, Office of Military Commissions. The person submitting the brief must meet the following qualifications, and such qualifications shall be stated in the first paragraph of the brief.

(a) The submitter is an attorney who is licensed to practice before the highest court of any State of the United States or the District of Columbia;

(b) If the submitter is a party to any Commission case in any capacity, has an attorney-client relationship with any person whose case has been referred to a Military Commission, is currently or is seeking to be *habeas* counsel for any such person, or is currently or is seeking to be next-friend for such person, the submitter must so state and further state the submission is only to be considered for its value as an *amicus* brief and not for any other purpose to include as a brief on behalf of any specific party to any Commission proceeding; and,

(c) The submitter certifies, by submitting the brief, that he or she in good faith as a licensed attorney believes that the law is accurately stated, that he or she has read and verified the accuracy of all points of law cited in the brief, and that he or she is not aware of any contrary authority not cited to in the brief or substantially addressed by the contrary authority cited to in the brief.

3. Format. Any *amicus* brief submitted to the Chief, Office of Court Administration, Office of Military Commissions shall comport with the following:

(a) The brief must be in PDF (Adobe Acrobat) format as an attachment to the email submitting the brief to the Chief, Office of Court Administration, Office of Military Commissions.

(b) The brief, when printed, will contain one inch margins on 8 1/2 x 11 paper and be in a 12 point type face. The brief will be double-spaced and will not exceed 25 pages.

(c) The brief may use URLs (web links) as cites to legal authority not generally available through legal research services such as LEXIS or Westlaw. URL matters are not part of the brief, and the brief will be rejected by the Clerk of Court, Office of Military Commissions or the Military Judge, if URL matters are viewed as an attempt to exceed page limitations. Parties submitting briefs are responsible for ensuring that the URL is functional on the date of submission.

(d) The brief must follow the format set forth in Form 8-1.

4. Action by the Chief, Office of Court Administration, Office of Military Commissions.

When received by the Chief, Office of Court Administration, Office of Military Commissions, he or she shall:

(a) Have an Appellate Exhibit number assigned

(b) Send a copy to the Chief Clerk of the Trial Judiciary;

(c) Send a copy to the Chief Defense Counsel and Chief Prosecutor who may, in turn, forward such briefs to other counsel associated with the case.

5. Consideration by a Military Commission.

(a) An *amicus* brief may be considered by a Military Commission only if:

(1) A filing (motion, response, or reply) by a party cites and endorses an *amicus* brief and a copy of the brief is appended to the motion filing; and,

(2) The *amicus* brief cited is relevant to the issues being asserted in the filing; and,

(3) The *amicus* brief, the certification, and its manner of submission meet the criteria in paragraphs 2 and 3 above.

(b) The Military Judge may consider an *amicus* brief *sua sponte*, regardless of the provisions of this paragraph.

6. Other matters.

(a) No person may argue an *amicus* brief before the Military Judge without specific, prior leave from the Military Judge. However, any party may invite the attention of the Military Judge to an *amicus* brief cited in the party's motion or response or in oral argument when such argument is permitted.

(b). The submission, processing, and consideration of *amicus* briefs will not be allowed to delay the Commission.

7. Public Access: Amicus motions, to include responses from the parties, will be immediately released to the public subject to any administrative requirements imposed by DoD for security review unless otherwise prohibited by the Military Judge.

8. Time frame exceptions.

(a) If a significant *amicus* brief has been made available as provided in paragraph 4, above, after a party has filed a motion, response, or reply on the same or a substantially similar issue, and before the Military Judge has issued a ruling on the record or in writing, a party may request the Military Judge consider the *amicus* brief by:

(1) Requesting in the body of an email that the Military Judge consider the brief and attaching the brief; *and*,

(2) Stating those matters raised in the brief that were not considered or known before all filings were due.

(b) If the Military Judge agrees to consider the brief, the Military Judge may allow the opposing party to file a response within the time allocated by Rule 3 or as otherwise ordered by the judge. As a general rule, no reply to that response will be permitted. No adverse inferences will be drawn from an election by the opposing party not to respond to an *amicus* brief.

Form 8-1 Format for an *Amicus* Brief

UNITED STATES v. (Name of Accused)

BEFORE A MILITARY COMMISSION
CONVENED PURSUANT TO THE
MILITARY COMMISSIONS ACT OF 2006

(Date brief is sent to the Director, Office of Court
Administration, Office of Military Commissions)

Amicus Brief filed by
(person filing the brief)
*[on behalf of (if applicable, indicate the entity on
whose behalf the brief is submitted)]*

NOTE: The following will be included in separately numbered paragraphs. Use Arabic numbers. Sub paragraphs will be numbered or lettered.

1. (Required in every brief.). My name is _____. I certify that I am licensed to practice before the (state jurisdiction). I further certify:

a. I am not a party to any Commission case in any capacity, I do not have an attorney-client relationship with any person whose case has been referred to a Military Commission, I am not currently nor I am seeking to be *habeas* counsel for any such person, and I am not currently nor am I seeking to be next-friend for such person. **OR,**

b. I am (describe the condition listed in paragraph 1a above and the specific individual case involved) and I further state the submission is only to be considered for its value as an *amicus* brief and not for any other purpose to include as a brief on behalf of any specific party to any Commission proceeding.

c. I certify my good faith belief as a licensed attorney that the law in the attached brief is accurately stated, that I have read and verified the accuracy of all points of law cited in the brief, and that I am not aware of any contrary authority not cited to in the brief or substantially addressed by the contrary authority cited to in the brief.

2. **Issue(s) Presented.** [Set forth, in a concise statement, each issue presented.]

3. **Statement of Facts.** [Set forth accurately all facts pertinent to the issues raised.]

4. **The law.**

5. **Argument.** (Optional.)

Signature Block
Office Address
Email Address
Phone Number

Military Commissions Trial Judiciary

8 December 2011

Military Commissions Rules of Court

RULE 9. MILITARY COMMISSION BAILIFF

1. Purpose: This Rule sets out the duties and responsibilities for bailiffs supporting the Military Commissions at Guantanamo Bay, Cuba.

2. Assignment, Uniform and General Duties:

- a.** The bailiff works at the direction of the Military Judge to insure the orderly conduct of the trial. When the Commission is not in session, the bailiff will perform those tasks assigned by the Military Judge or the trial judiciary staff.
- b.** Bailiffs will be enlisted members, in the grade of E-4 or above, of any armed force. The bailiff must be licensed to drive a commercial passenger vehicle.
- c.** Bailiff will wear the duty uniform of his or her service. They will not carry side arms.
- d.** When the Commission is in session, the bailiff's place of duty is inside the courtroom unless the Military Judge directs the bailiff to leave the courtroom to perform other duties. When the members are in deliberations, the bailiff will remain near the deliberation room.
- e.** Bailiffs will report to the judicial chambers, in proper uniform, at the time prescribed by the trial judiciary staff.
- f.** Questions about the bailiff's duties will be directed to the trial judiciary staff

Military Commissions Trial Judiciary

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RULE 10. COURT SECURITY OFFICER

1. **Purpose:** This rule sets out the functions and responsibilities of the Court Security Officer.
2. The Court Security Officer (CSO), and any Assistant Court Security Officers (ACSO), are officers of the court. *Ex parte* communication by a party in a case, to include the Office of Military Commissions, DoD General Counsel or any intelligence or law enforcement agency, with the CSO/ASCO is prohibited except as authorized by the M.C.A. or the M.M.C. This is to preclude any actual or perceived attempt to improperly influence the Commission in violation of 10 U.S.C. § 949b. This does not include administrative matters necessary for the management of the security responsibilities of the Office of Trial Judiciary.
3. The CSO is the principle security advisor to the Chief Trial Judge, to the Director, Trial Judiciary Staff, and for the sitting trial judges. CSO/ASCO provide expertise in advising trial judges on protective orders, procedures for using classified evidence in trial proceedings and all other aspects of security requirements presented to the Military Judge for determination.
4. The CSO and ASCO work for the Chief Clerk of the Trial Judiciary.
5. CSO/ASCO serve as primary security liaison between the trial judiciary and the Office of Military Commissions, the DoD, and other federal law enforcement and intelligence entities on all security matters within the limitations of paragraph 2, above.
5. The Court Security Officer is responsible for the development, implementation, and management of the security program for the Office of the Trial Judiciary, Office of Military Commissions. This includes, but is not limited to, the following specific responsibilities:
 - a. Serves as the internal information security expert for the Office of the Trial Judiciary.
 - b. Provides training as necessary, to all the military judges and trial judiciary staff ensuring proper information security practices in accordance with established organizational information security policies and procedures.
 - c. Develops and implements information security policies and procedures for the Office of Trial Judiciary.
 - d. Monitors compliance with information security policies and procedures.

6. Under the direction of the Chief Clerk of the Trial Judiciary the CSO/ACSO will

- a. Develop, implement, and oversee the policies, instructions, procedures, control systems, and methods for classification and declassification review for all filings (*see Rules 3 and 6*).
- b. Ensure that classification requirements, document marking, safeguarding, and use restrictions are followed by the military judges and by the staff of the Office of the Trial Judiciary.
- c. Ensure that personnel access controls and need to know criteria are complied with by the military judges and the trial judiciary staff.
- d. Ensure that physical storage and control requirements for classified materials are followed.
- e. Ensure that the transmittal, transfer, reproduction, and destruction of classified materials is accomplished IAW established regulations.
- f. Work with the Office of Court Administration to make sure that all filings are available for the Record of Trial.

7. As participants in sessions of a Commission the CSO/ASCO will be under oath. The following oath will be executed prior to participating in Commission sessions.

“Do you swear (or affirm) that you will faithfully and impartially perform, according to your conscience and the laws applicable to trials by military commission, all the duties incumbent on you as the court security officer to this military commission, (so help you God)?”

The oath may be executed as a one-time oath for all cases. A copy of the oath will be retained by the Office of Trial Judiciary.

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Military Commissions Rules of Court

RULE 11 CLASSIFIED INFORMATION (M.C.R.E. 505)

1. **Purpose:** This rule sets out the parameters for reviews of classified information under the provisions of M.C.R.E 505 and sets the requirements for retention of the information provided for judicial review.
2. Before requesting a review under M.C.R.E. 505 the requesting party, absent exigent circumstances, will request that the Original Classification Authority (OCA) review the materials for declassification. The request and results will be annotated in any motion for a review.
3. Any conferences conducted IAW Rule 802 or *ex parte* discussions with either party in regard to a review under M.C.R.E 505 will be recorded by a court reporter, transcribed and sealed as part of the Record of Trial. It will be afforded the requisite security classification.
4. In order to insure that any documents reviewed by the Military Judge are available for later use in the Commission or for use by appellate authority the procedures outlined below will apply in all cases.

a. Requesting party will file an *ex parte* motion requesting judicial review with the Chief Clerk of the Trial Judiciary IAW M.C.R.E. 505.

- (1) When filing the *ex parte* motion, the requesting party will also provide unclassified notice of the motion to the other party and to the Chief Clerk of the Trial Judiciary
- (2) The requesting motion will include a proposed order.
- (3) Motion will include an index that contains a detailed description of each item to be reviewed; e.g. "X Agency Duty Log, dated 12 July 2004, 32 pages"
- (4) If multiple binders of information are to be provided for review a copy of the index will be placed in each binder.
- (5) Binders will be numbered sequentially for each case.

b. Requesting party will coordinate with trial judiciary staff and Court Security Officer for date and location for review by the Military Judge

c. When the Military Judge conducts the review of materials representatives of the party requesting review will not be present but must be generally available in case the judge has questions or requires changes to any summaries draft for discovery purposes.

d. At the conclusion of the judicial review the Military Judge may sign an order, if appropriate, and will sign a chronology indicating the documents and date of review.

1. The signed chronology will be retained with any order pertaining to the review

2. If no order is issued the chronology will be retained as a sealed appellate exhibit.

3. An unclassified "place holder" with a general description of the material reviewed will be placed in the Record of Trial.

e. The original documents reviewed by the Military Judge will be sealed by the court reporter, marked as an appellate exhibit and retained in a classified storage facility with controlled access, and approved by the Director of Court Administration, until the Record of Trial is authenticated by the Military Judge.

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RULE 12 PAYMENT OF LEARNED COUNSEL

- 1. Purpose:** Paragraph 9-6G of reference (c) requires the Military Judge, in a case that has been referred capital, to review the hours and fees of learned counsel before payment by the Convening Authority.
- 2. Payment submitted for review by a Military Judge must be accompanied by:**
 - (a)** Documentation required by reference (c).
 - (b)** An affidavit or sworn statement by the Detailed Defense Counsel setting forth that he/she has reviewed the hours and expenses submitted and that in his/her professional estimation they are correct, and are proper and necessary to the defense of the client.
- 3.** Requests for review will be submitted, with required documentation to the Chief Clerk of the Trial Judiciary at MLAdd-MCTrialJudiciary@osd.mil.
- 4.** The Military Judge, after review of the submitted documentation, may validate the voucher based upon the representations of the Defense.
- 5.** The review of the Military Judge will be forwarded to the Convening Authority, Office of Military Commissions for payment under the terms of the agreement or contract with learned counsel executed by the Convening Authority.