

Office of the Presiding Officer
Military Commission

October 4, 2004

SUBJECT: Presiding Officers Memorandum (POM) # 10 - Witness Requests, Requests to Depose a Witness, and Alternatives to Live Testimony

1. This POM governs how counsel may obtain a decision from the Presiding Officer, or the Commission, to obtain witnesses or alternatives to live testimony. It also contains the procedure to request to depose a witness.

2. This POM establishes the procedures for requesting the Commission to produce a witness on motions, the merits, sentencing, or otherwise, that has been denied by the Prosecution or the Appointing Authority. While this POM does not stipulate the format *for an initial request to the Prosecution or the Appointing Authority*, it is strongly recommended that counsel use the format below. By so doing, if the initial request is denied, the Commission may make an efficient and speedy decision on the matter to assist counsel in preparing their cases. Failure to provide the necessary information when making a request for a witness often leads to requests being initially denied by the government, which can produce needless inefficiency when a challenge to that decision is taken to the Presiding Officer or the Commission.

3. A request, or noting that a particular witness is needed (or needs or should be deposed), in a motion or other filing is NOT a substitute for a witness request. If counsel are aware that a witness is necessary or should be deposed on a motion or other filing, not only should that be addressed in accordance with POM #4-1, but *the counsel is also required to file a request* in accordance with this POM.

4. If the defense requests, and the prosecution has denied, a defense request, the defense shall within 3 duty days of learning of the government's denial - or when there has been inaction by the government on the request for 3 duty days - submit a "Request for Witness (or a Request for a Deposition)" as outlined below to opposing counsel, the Presiding Officer, and the Assistant. Each request shall be separate, and each request shall be forwarded by a separate email with the subject line: Witness Request (or Request for a Deposition) - [Name of Witness] - US. v. [Name of Case]. Counsel may forward the request either by attachment or in the body of an email. Each of the below items shall be in a separate, numbered paragraph:

a. Paragraph 1: {Style.} A formal document is unnecessary. An attachment or email shall be styled: Witness Request (or Request for a deposition) - [Name of Witness] - US. v. [Name of Case].

b. Paragraph 2: {Identity of witness and translator needs.} The name of the witness to include alias, mailing address, residence if different than mailing address,

telephone number, and email address. Also indicate the language and dialect the witness speaks (if not English) so translator services can be made available if necessary.

c. Paragraph 3: {Synopsis of witness' testimony}. What the requester believes the witness will say. *Note:* Unnecessary litigation often occurs because the synopsis is insufficiently detailed or is cryptic. A well-written synopsis is prepared as though the witness were speaking (first person), and demonstrates both the testimony's relevance and that the witness has personal knowledge of the matter offered.

d. Paragraph 4: Source of the requestor's knowledge about the synopsis. In other words, how does counsel know that the witness will testify as stated?

e. Paragraph 5: Proposed use of the testimony - motions (specify the motion), case-in-chief, rebuttal, sentencing, other.

f. Paragraph 6: How and why the requestor believes the witness is reasonably available, and the date of the last communication with the witness and the form of that communication.

g. Paragraph 7: Whether the requestor would agree to an alternative to live testimony to present what is described in the synopsis to the Commission, or the reasons why such an alternative is NOT acceptable. (*Note:* It is unnecessary to state that live testimony is better than an alternative so the Commission can personally observe a witness' demeanor. State here reasons *other than* that basis.)

- (1). Conclusive notice.
- (2). Stipulation of fact.
- (3). Stipulation of expected testimony.
- (4). Telephonic.
- (5). Audio-visual.
- (6). Video taped deposition.
- (7). Video-taped interview.
- (8). Written statement.

h. Paragraph 8: Whether any witness requested by the defense, or being called by the government, could testify to substantially the same matters as the requested witness.

i. Paragraph 9 If the witness is to testify as an expert, the witness' qualifications to do so. This may be accomplished by appending a *curriculum vitae* to the request. This

should also include a statement of law as to why the expert is necessary or allowable on the matter in question.

j. Paragraph 10: Other matters necessary to resolution of the request.

5. Action by the government upon receipt of a request - government agreement. If the government and defense agree that the witness should be produced or deposed, the government need not prepare a response to the request. If the parties agree to an alternative to the live testimony of a witness in the form of a writing (conclusive notice, stipulation, or statement), the parties will immediately prepare the agreed upon writing. Once agreement has been reached on the request (and the writing), the prosecution shall notify opposing counsel, the Presiding Officer, and the Assistant that agreement has been reached.

6. Action by the government upon receipt of a request - government does not agree. If the government will not produce the requested witness or does not agree to a deposition, or if the government and defense cannot agree on the wording of any writing that will be a substitute, the government will prepare a response within 3 duty days of receiving a request and file it with opposing counsel, the Presiding Officer, and the Assistant. The prosecution shall address, by paragraph number, each assertion in the defense request to which the government does not agree or wishes to supplement.

7. Timing. Requests for witnesses, unless otherwise directed by the Presiding Officer, shall be made to the prosecution by the defense not later than 30 business days before the session in which the witness is first needed to testify.

8. Resolution by the Presiding Officer. In accordance with paragraph MCO #1, section 5H, the Presiding Officer will approve those witness requests to the extent the witness is necessary and reasonably available. The decision will be communicated to the prosecution and the defense.

9. If the Presiding Officer does not approve the request, the defense shall give notice within 3 duty days if they intend to request the entire Commission to grant the request in accordance with MCO #1, Section 6D(2)(a).

Signed by:

Peter E. Brownback III
COL, JA, USA
Presiding Officer

