



**MILITARY COMMISSIONS
TRIAL JUDICIARY
RULES OF COURT**

1 September 2016



OFFICE OF THE SECRETARY OF DEFENSE
MILITARY COMMISSIONS TRIAL JUDICIARY
4800 Mark Center Drive, Suite 11F09-02
Alexandria, VA 22350-2100

OMC-TJ

20 July 2016

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, 2012, (M.M.C.)
(c) DoD Regulation for Trial by Military Commission (2011 Edition)

1. Purpose. To prescribe Rules of Court for the Military Commissions consistent with the references.

2. Background. These Rules of Court are specifically promulgated pursuant to 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 Military 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 These rules are effective 1 September 2016 and shall remain in effect until cancelled, superseded, or modified.

JAMES L. POHL
Colonel, U.S. Army
Chief Judge, Military Commissions
Trial Judiciary



Military Commissions Trial Judiciary

1 September 2016

Military Commissions Rules of Court

INDEX

	<u>Page</u>
Summary of Changes	i
Rule 1: Interpretation, Short Form, Citations, Modification	1
Rule 2: Communications	3
Rule 3: Motion Practice	7
Rule 4: Appearance, Absence, and Excusal, Relief, or Withdrawal of Counsel	31
Rule 5: Filings Inventory	41
Rule 6: Public Access and Release of Records	43
Rule 7: Use of Technology in the Courtroom	47
Rule 8: <i>Amicus Curiae</i> Briefs	55
Rule 9: Military Commission Bailiff	61
Rule 10: Court Information Security Officer	63
Rule 11: Classified Information (M.C.R.E. 505)	65
Rule 12: Learned Counsel	67

SUMMARY OF CHANGES FROM 5 MAY 2014 RULES OF COURT

RC 1

- 1.1. (update for 2012 Manual for Military Commissions)
- 1.2. (fully identify Military Commissions Act of 2009)
- 1.3. (changes “may” to “should”)
- 1.3. (provide an example of how to cite to a rule three (3) levels deep in the Rules of Court)

RC 2

- 2.1. (reorganize sentence, adds “between counsel and Trial Judiciary staff” and “if authorized” to communications directly with Military Judge)
- 2.2. (add “unauthorized” and “or the Military Judge”)
- 2.3. (add “via the Trial Judiciary Staff”)
- 2.3.a. (reworded for clarity and add “(hereinafter Chief Clerk)” to replace Chief Clerk of the Trial Judiciary throughout the Rules of Court)
- 2.3.b. (adds “as a copy” to define what “cc” refers, replaces “both sides” with “the parties”, replaces “Clerks” with noncommissioned Officers (NCOs) / Paralegals, and adds requirement for sender of e-mail transmitting a pleading to declare “The appropriate parties are included in this e-mail.” in the body of the e-mail)
- 2.3.d. (changes structure of subject lines of e-mails concerning a specific case)
- 2.3.e. (requires listing of attachments to e-mails in the body of the e-mail)
- 2.3.f. (extends the numbering scheme example)
- 2.3.g. (allows sending multiple e-mails to file a pleading exceeding capabilities of the e-mail system, replaces “placeholders” with “tabs marking attachments” and defines what is the record copy of a pleading)
- 2.3.g. (adds guidance on filing pleadings containing information of various classification levels)
- 2.3.h. (directs reader to separate provisions on filing PDF attachments and images and videos as attachments)
- 2.3.j. (clarifies permissible file format for videos and images and adds “assigned to the case”)
- 2.3.k. (adds “attorney assigned to the case”)
- 2.3.l. (replaces “will need to know” with “must review”)
- 2.4. (adds “Prosecution and/or Defense “ to identify which trial teams, adds “on the judge’s behalf” to provide authority for Trial Judiciary Staff sending e-mails, adds “/ Paralegals”, and deletes “on the e-mail that is forwarded to those to whom distribution was directed in compliance with these instructions”)
- 2.5. (adds “video teleconference” and “conducted”)

RC 3

- 3.1. (replaces “among counsel, the Military Judge, and trial judiciary staff” with “for those appearing before or petitioning a military commission for relief” and add “unauthorized” to *ex parte* communication)
- 3.2. (adds “with the Military Judge”, “/Convening Authority” and “ or these rules”)

- 3.3. (adds “the filings and judicial orders are”)
- 3.5.a. (deletes “also specifically” and adds “but is not limited to,”)
- 3.5.b. (deletes “notice of joinder, special request for relief,” and adds “brief” and “or any other matter appropriate to be marked as an appellate exhibit in the record of trial”)
- 3.5.e. (adds “or”, deletes “or reply”, adds, “or response” twice, adds “in the absence of new facts or new case law”, clarifies the process for filing a supplement if directed by the Military Judge without filing a Motion for Leave to File a Supplement, and reorganizes section into three (3) numbered subsections)
- 3.5.e.(1). (adds “contain a concise summary of the new facts or case law, and state why the new facts or case law should be considered by the commission.”)
- 3.5.e.(2). (deletes “A supplemental filing must affirmatively state it contains either new facts, not known at the time of filing, or newly decided case law, contain a concise summary of the new facts or case law, and state why the new facts or case law should be considered by the commission.”)
- 3.5.f. (adds “ to correct” and reorganizes section into two (2) numbered subsections and adds a third numbered subsection on retention of the original filing in the record of trial.)
- 3.5.g. (replaces “message” with “e-mail”, adds “recalled” and references Form 3-4 as an example of a corrected copy)
- 3.5.h. (changes “defendants” to “accused”)
- 3.5.i.(4). (rewritten “A party otherwise joined to the original motion by operation of this rule who wishes to state a separate position on the motion may do so in its Motion to Decline Joinder. If the party who originally filed the motion withdraws the motion, it is considered moot. The party stating a separate position on the motion must file a new motion IAW these rules to and have it considered by the military commission and thus preserve the issue for the record.”)
- 3.5.i. (breaks single paragraph into four (4) sub-paragraphs (1) – (4), rewords sub-paragraph (2) to improve clarity / readability, adds reference in RC 3.5.e in sub-paragraph (4))
- 3.5.k. (adds “not including a Saturday, a Sunday, or legal holidays”, “hour time”, and replaces “a Certificate is not required for motions serving notice; e.g., a motion serving notice of a filing IAW M.C.R.E. 505.” with “motions to be filed *ex parte*, *in camera*, under seal, or as otherwise provided by these rules, M.C.R.E. 505, or by order of the Military Judge.”)
- 3.5.m. (deletes “replies”)
- 3.5.n. (adds “one containing ... information”, “or reviewing and appellate authorities when deemed necessary for the proper fulfillment of their duties under the M.C.A. In order to access information sealed for reasons of classification the individual must possess the requisite security clearance and a recognized need to know.” And breaks second half of the paragraph into three (3) sub-paragraphs (1) - (3))
- 3.5.p. (deletes “This is a title parties attach to certain motions.” And adds “such motions”, “other” and RC 3.7.(e)(2))
- 3.5.q. (adds rule on Third Party Filings)
- 3.6.a. (breaks the paragraph into three (3) sub-paragraphs and adds two (2) additional sub-paragraphs: “(4) a day where the Office of Personnel Management (OPM) declares the Federal Government in the National Capital Region to be closed on its webpage; or,

(5) an unforeseen circumstance occurs and the Military Judge issues a notice that the time period will not be included in the computation.” and, in sub-paragraph (3) “legal” is replaced with “federal”)

- 3.7.a. (adds “, i.e., the filing has been reviewed and accepted by the Chief Clerk or another member of the Trial Judiciary staff. Trial Judiciary staff will send an e-mail to all addresses on the e-mail filing the pleading announcing the date of acceptance of the pleading.”)
- 3.7.c.(2). (rewrites the rule and adds guidance for Third Party Filings)
- 3.7.c.(4)(b). (replaces “A request for” and “request” with “Assertions of” and “assertion” respectively and replaces “separately as a classified attachment” with “IAW RC 3.10.d.(3).”)
- 3.7.c.(4)(c). (adds “calendar”)
- 3.7.c.(4)(d) (replaces “filed” with “titled”)
- 3.7.d.(3)(b). (replaces “separately as a classified attachment” with “IAW RC 3.10.d.(3).”)
- 3.7.d.(3)(c). (adds “calendar”)
- 3.7.d.(3)(d). (replaces “filed” with “titled”)
- 3.7.e.(1). (replaces “If a reply is not filed, that” and “, and it does not indicate agreement with a response.” with “The absence of a reply does not indicate agreement with a response. Instead, the absence of a reply”)
- 3.7.e.(2). (adds “any”, replaces “receiving” with “the filing of”, and deletes “unless the party does not desire to file a response.”)
- 3.7.e.(4)(b). (replaces “separately as a classified attachment” with “IAW RC 3.10.d.(3).”)
- 3.7.e.(4)(c). (adds “(1) business”)
- 3.7.e.(4)(c). (replaces “filed” with “titled”)
- 3.7.e.(4)(d). (replaces “filed” with “titled”)
- 3.8.a. (deletes “for the burden shift”)
- 3.8.b. (adds “the burden of proof, the burden of persuasion, and the”)
- 3.9.a. (replaces “and the facts and law as determined by the Military Judge unless” with “unless the Military Judge determines”)
- 3.10.a. (restructured into eleven (11) sub-paragraphs with some renumbering)
- 3.10.a.(1)(a). (restructured into five (5) sub-paragraphs (a) – (e), in sub-paragraph (a) adds “on all four sides of each page”) and adds sub-paragraph (e) “use portrait mode for page orientation.”)
- 3.10.a.(2). (adds sub-paragraph (c) “use portrait mode for page orientation”)
- 3.10.a.(5). (adds “DoD Manual 5200.01, DoD Information Security Program”)
- 3.10.a.(6). (adds “the motion will be filed according to its proper classification. The classified” and replaces “The motion will be filed according to its proper classification.” with “A copy of the entire motion, properly marked, with the classified attachment(s) will be filed as a complete package IAW the highest level of classified information in the motion or attachment.”)
- 3.10.a.(7). (new provision)
- 3.10.a.(8). (delete “and a draft redacted filing”)
- 3.10.a.(11). (new provision)

- 3.10.b. (reorganizes rule by breaking it into four (4) sub-paragraphs, changes timelines for requesting Appellate Exhibit numbers from two (2) to three (3) business days and for filing once an Appellate Number is issued from one (1) to two (2) business days)
- 3.10.b.(3) Examples. (adds an example for naming a single file pleading attached to an e-mail)
- 3.10.c. (directs filing party to consider the size of the pleading when determining mode of filing and service on opposing party/parties)
- 3.10.d.(1). (adds “moving” and “identified as an attachment”)
- 3.10.d.(1)(c) (rewritten to clarify draft order requirement)
- 3.10.d.(2)(a) (adds “under”)
- 3.10.d.(3)(b). (adds “Depending on the level of classified information in a classified filing and the size of the filing, they”, “either” “via an e-mail”, “on a CD”, and “The filing party will coordinate with the Chief Clerk’s office at the time it requests the AE filing number to resolve logistical issues associated with the Chief Clerk’s physical receipt and acceptance of the classified material.”)
- 3.10.d.(3)(c). (adds “format” and “in these Rules of Court”)
- 3.10.d.(3)(d). (replaces “making” with “submitting”)
- 3.10.d.(4). (new provision on Paper Filings)
- 3.10.e.(2). (adds “in their entirety” and “noting the date last accessed by the filing party”)
- 3.10.e.(3). (new provision on delivery of classified filings)
- 3.10.f. (new provision on Withdrawal of Motions)
- Form 3-4 (new example of a corrected copy of a filing)

RC 4

- Title (replace “ABSENCE” with “PRESENCE”)
- 4.1. (replace “absence” with “presence”)
- 4.2. (delete “Detailing and”)
- 4.2.a.(3). (adds “If detailed military counsel makes an appearance before a Military Judge, excusal must be approved by the Military Judge. (*See* RC 4.4.b.).”)
- 4.2.b. (new provision on General Service (GS) Civilian Defense Counsel)
- 4.2.c. (adds “If detailed civilian defense counsel makes an appearance before a Military Judge, excusal must be approved by the Military Judge. (*See* RC 4.4.b.).”)
- 4.2.e. (deletes “Assistant defense counsel may not appear alone at any session of a Military Commission or an R.M.C. 802 conference and may not submit motions under only their signature.”)
- 4.2.f. (adds “orally”)
- 4.2.g. (replaces “he” with “counsel”)
- 4.3.b. (deletes “[a]s long as at least one qualified counsel for each party is present, other counsel for each party may be absent from a military commission session with the permission of the judge.” and defines “qualified counsel”)
- 4.3.b.(1). (replaces “written evidence of the “ with “a signed”, adds “or an on-the-record waiver of the presence of counsel”, and replaces “must” with “should”)
- 4.4.a. (adds “detailed GS civilian counsel”)
- 4.4.b. (adds reference back to RC 4.2.a. and RC 4.2.b.)

RC 5

- 5.1.c. (deletes “to ensure counsel are certain of those matters pending before the Military Judge”)
- 5.2. (replaces “document” with “mechanism”, adds “The Filings Inventory is separate and distinct from filing inventories maintained by”, deletes “maintains its own separate filing inventories” and deletes “The Chief Clerk of the Trial Judiciary’s filings inventories are only to be distributed in accordance with RC 5.4.b.”)
- 5.3. (deletes “indicating those filings pending before the Military Judge.” and adds “The content and format will be established by internal Trial Judiciary policy.”)
- 5.3.a. – 5.3.e. (sub-paragraphs deleted in their entirety)
- 5.4. (adds “The Chief Clerk’s filings inventories are only to be distributed in accordance with this rule or the direction of the Military Judge.”)
- 5.4.a. (deleted)
- 5.5.b. (deletes “which is” and replaces “send” with “deliver”)
- 5.5.c. (sub-paragraph deleted in its entirety)
- 5.6.a. (deletes “mistakenly”)
- 5.6.b. (deletes “or fails”, adds “take corrective action by including” and deletes “include”)
- 5.6.c. (deleted in its entirety)
- 5.7. (deleted in its entirety)

RC 6

- 6.2.a. (adds or “other overriding interests”)
- 6.2.b. (adds “gallery of the” before courtroom; replaces “but will not be permitted to” with “so long as their conduct does not”; deletes “by their conduct” and “will not indicate or demonstrate”; replaces “nor will their appearance or attire be permitted to” with “wearing attire which”; adds “the gallery of the” and, adds “Military” before Judge)
- 6.2.e. (adds Chief Defense Counsel for Military Commissions to list of individuals who are allowed inside the bar of the courtroom)
- 6.2.d.(2). (replaces “This” with “The Government”; deletes “for the judge”; and adds “Military” before Judge)
- 6.2.d.(4). (replaces “prosecution” with “Government”)
- 6.2.f. (deletes “is requested by either party to close part or all of a proceeding, the Judge”; adds “and R.M.C. 806” and “Normally”)
- 6.3.a. (adds “via the webpage operated by the Office of Military Commissions”; and “or other Original Classification Authority”)
- 6.3.b.(1). (adds “Team and has been found by the Review Team to contain information that needs to be redacted”)
- 6.3.b.(3). (adds “An unofficial /unauthenticated” before “transcript”)
- 6.3.c. (adds “an unofficial/unauthenticated”)
- 6.3.d.(1). (2nd sentence deleted in its entirety)
- 6.3.d.(2) (adds “except those described in RC 6.3.d.(3) below”)
- 6.3.d.(2)(a). (deleted in its entirety)
- 6.3.d.(2)(b). (renumbered as 6.3.d.(3))

- 6.3.d.(3) (renumbered as 6.3.d.(4))
- Renumbered 6.3.d.(4)(b)(ii). (adds “After the SIPRNET filing is accepted by the Chief Clerk, the” and “I.A.W. RC 3.10.d.(3).. The unclassified notice will also be filed as the first pages of the classified filing.”)
- Renumbered 6.3.d.(4)(b)(iii). (adds “the SIPRNET filing with any unclassified notice of filing” and “departments or”)
- Renumbered 6.3.d.(4)(b)(iv). (deleted in its entirety)
- Renumbered 6.3.d.(4)(c). (adds “(e-mail)”)
- Renumbered 6.3.d.(4)(c)(ii). (adds “After the classified filing is accepted by the Chief Clerk, the” and “I.A.W. RC 3.10.d.(3).”)
- Renumbered 6.3.d.(4)(c)(iv). (deleted with 6.3.d.(3)(c)(v) renumbered as 6.3.d.(3)(c)(iv))
- Renumbered 6.3.d.(4)(c)(iv). (“judicial chambers” replaced with “Office of the Trial Judiciary”)
- 6.3.e. (adds “OMC” before “webmaster”)

RC 7

- 7.2.a. (deletes “both the security requirements of”)
- 7.2.b. (adds “unless otherwise provided by the Military Judge.”)
- 7.2.f. (May 2014 provision completely replaced)
- 7.3.a.(1) (adds “In order”; “an e-mail”; replaces “the opposing party before it intends to use the technology.” with “Office of Military Commission –South Courtroom Technology section.”; replaces “This notice will be provided via e-mail to all parties.” With “The notice does not need to conform to the requirements of RC 3.”; adds “The e-mail should be sent with sufficient time for the Office of Military Commission –South Courtroom Technology section to acquire any needed specialized equipment from CONUS based vendors.”)
- 7.3.a.(3). (deletes “unless already approved”)
- 7.3.b.(1). (adds “pre-trial” to conference and replaces “under” with “conducted IAW”)
- 7.3.b.(1)(a). (deletes “a Case Management” and “other”)
- 7.3.b.(2). (adds “attended by all parties”)
- 7.3.b.(3). (replaces “disposed of” with “addressed” and “Case Management Order” with “Military Judge’s order or directive”)
- 7.4.a.(2). (replaces “a conference under R.M.C. 802” with “an R.M.C. 802 conference prior to the hearing”)
- 7.4.a.(3)(a). (adds “or during trial”)
- 7.4.a.(4)(b). (replaces “outside the members’ presence” with “for the truth of the matter asserted” and adds “electronic exhibits are” and “a witness”)
- 7.4.c.(2). (adds references to R.M.C. 905 and 906)
- 7.4.a.(4)(d). (deleted in its entirety)
- 7.4.a.(5)(a). (“judge” replaced with “Military Judge”)
- 7.4.a.(5)(b). (“judge” replaced with “Military Judge”)
- 7.4.a.(6). (adds “Member and” to title of section and “judge” replaced with “Military Judge”)
- 7.5.a (Adds “slide show used in an” and deletes “or otherwise”)

RC 8

- 8.1. (deletes “logically”; replaces “them” with “*amicus* briefs”; adds “An *amicus curiae* briefer is different from a Third Party Filer. Third Party Filers are addressed in Rule 3.q.”)
- 8.3. (replaces “to” with “for filing with”)
- 8.3.b. (replaces “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 without leave of the court.” with “The brief will have one inch (1”) margins, be filed using 8 ½” x 11” paper, double-spaced, and in 12 point font. All attachments to the brief must also have one (1”) margins and be filed using 8 ½” x 11” paper. If the party filing the *amicus* brief has an attachment which does not comply with these formatting rules, the filing party, prior to submitting the brief to the Chief Clerk will coordinate with the Chief Clerk to develop a solution.”)
- 8.3.c. (adds “The party filing the *amicus* brief will note the date and time the URL was last accessed as a footnote. The URL will not direct the reader to information which the U.S. Government may deem classified.”)
- 8.5.a.(1). (deletes “motion” at end of subsection)
- 8.6.a. (replaces “No person” with “A party may not” and deletes “motion or response”)
- 8.6.c. (adds as a new provision “Generally, a scheduled hearing or the disposition of a case will not be delayed pending action on a Motion for Leave to File an *Amicus* Brief, or a motion of *amicus curiae* to participate in a hearing, or in order to await the filing of an *amicus curiae* brief.”)
- 8.8.a.(1). (replaces “the motion, response, or reply” with “a supplemental pleading that”)

RC 9

- 9.2.a. (adds “hearing /”; deletes “not”; and adds “When the Commission is not in session, supervision of the bailiff will revert back to the parent unit / chain of command.”)
- 9.2.d. (adds “, controlling access to and from the deliberation room. The Trial Judiciary staff will ensure the bailiff is provided an access roster for the deliberation room.”)

RC 10

- Title and throughout Rule 10 (“Court Security Officer” changed to “Court information Security Officer and “CSO” changed to “CISO”)
- 10.3. (replaces “aspects of” with “relevant issues concerning information” and deletes “requirements”)
- 10.4. (replaces “Chief Clerk” with “Staff Director”)
- 10.5. (adds “information”)
- 10.6. (replaces “Chief Clerk” with “Staff Director”)
- 10.6.b. (deleted with 10.6.c renumbered as 10.6.b.)
- 10.6.d. (deleted with 10.6.e renumbered as 10.6.c., 10.6.f. renumbered as 10.6.d., and 10.6.g. renumbered as 10.6.e.)
- 10.6.g. (adds new sub-paragraph: “Ensure all material intended to be introduced / displayed in court by a party, and to authorized extensions of the court has undergone appropriate reviews by the original classification authorities prior to the materials being introduced / displayed IAW RC 6.3 and RC 7.”)

RC 11

- 11.4.a.(1). (adds “after the *ex parte* motion is accepted for filing. The unclassified notice will be the first pages of the classified *ex parte* motion. (See RC 3.10.a.(5) and RC 3.10.d.(3)).”)
- 11.4.a.(2). (adds reference to RC 2.3.i)
- 11.4.a.(5). (replaces “case” with “motion”)
- 11.4.b. (adds “Information” to Court Information Security Officer)
- 11.4.d. (deletes “with a general description of the material reviewed.”)

RC 12

- 12.2. (adds “Payment Requests” as subject of sub-paragraph, adds “requests”)
- 12.2.b. (adds “Military” and “who has appeared before the Commission “ and “If the Detailed Military Defense Counsel has not had the opportunity to appear before the Commission, a statement from the Chief Defense Counsel or the Deputy Chief Defense Counsel explaining when Detailed Military Defense Counsel will appear will accompany the Forms 12-1 and 12-2.”)

RULE 1

INTERPRETATION, SHORT FORM CITATIONS, MODIFICATION

- 1.** The Rules of Court (RC) are established pursuant to the Manual for Military Commissions (M.M.C.) 2012 and 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.** The Rules of Court shall be interpreted to be consistent with the Military Commissions Act of 2009 (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 (2) shall prevail.
- 3.** The Rules of Court should be cited as RC followed by the Arabic numeral of the Rule and then the Arabic paragraph number, and if applicable, subparagraph letters. For example, this Rule and paragraph should be cited as RC 1.3. and the Rule dealing with a waiver of a reply should be cited as RC 3.7.e.(4). (*See* pg 14.).
- 4.** The Rules of Court will be added to or modified as required. Counsel and all other interested parties will be furnished any additions or modifications as soon as they are made.
- 5.** In the interests of justice, a Military Judge may modify or change any Rule of Court or portion thereof, or determine a certain Rule of Court or portion thereof is not applicable to a given trial by Military Commission. When taking such action, a Military Judge will so advise counsel in the case, other interested parties, the Chief Trial Judge, and the Trial Judiciary staff.

******* This Page Intentionally Left Blank*******

RULE 2

COMMUNICATIONS

- 1. Purpose.** This Rule establishes general procedures for communications among counsel, between counsel and the Trial Judiciary staff, and if authorized, with the Military Judge.
- 2.** These procedures are designed to avoid unauthorized *ex parte* communications, to ensure procedural matters leading to trial are efficiently handled, and to provide 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., the M.M.C. or the Military Judge.
- 3.** The preferred, and most reliable, method of communication with the Military Judge, via the Trial Judiciary staff, and counsel is e-mail. Failure to comply with these rules may result in the communication being returned for lack of compliance with these rules or other plenary relief as the Military Judge may direct. *See* RC 3, Motion Practice. The following e-mail conventions will be followed:

a. All e-mails or other communications for the Military Judge will be sent to the Chief Clerk of the Trial Judiciary (hereinafter Chief Clerk) at osd.pentagon.OMC.list.trial-judiciary@mail.mil. E-mail will not be sent directly to the Military Judge. The Trial Judiciary Staff, in consultation with the Military Judge, will determine, whether to forward any e-mails to the Military Judge. E-mails are not part of the record of trial unless they are included as an attachment to a filing.

b. All e-mails sent to the Chief Clerk for a Military Judge shall also be sent as a copy (“cc”) to counsel for the parties, the Chief Defense Counsel, the Chief Prosecutor, the Chief Legal Noncommissioned Officers (NCOs) / Paralegals for the Prosecution and Defense, and the paralegals assigned to the case. In addition, all filings will be sent as a copy (“cc”) to the Director, Office of Court Administration, Office of Military Commissions. All e-mails transmitting a pleading will contain the following statement in the body of the e-mail: “The appropriate parties are included in this e-mail.”

c. E-mails will be kept to a single subject and use a simple, descriptive, subject line.

d. If the e-mail pertains to a specific case, use the case name in the subject line of every e-mail. If an Appellate Exhibit designation has been assigned, include the designation in the subject line; for example: *US v Smith* - AE 001 - Defense Motion to Compel Discovery.

e. Identify, in the body of the e-mail, each attachment being sent; for example: *US v Smith* - AE 001 - Defense Motion to Compel Discovery with attachments A through F. List the attachments in the body of the e-mail.

f. Every paragraph and sub-paragraph of any e-mail to the Trial Judiciary containing 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: 1, 2, 3, 3a, 3b, 3b(1), etc.

g. All attachments to a filing will be sent in the same e-mail as the document to which it is an attachment. If the attachments must be sent in multiple e-mails due to the size of the file, the original e-mail must indicate that additional attachments will be in a subsequent e-mail, and the subsequent e-mails should refer back to the original e-mail; for example: e.g. *US v Smith - AE 001 - Defense Motion to Compel Discovery with attachment C and D, message 2 of 3.* (See also examples at RC 3.10.b.(3).). Where filings contain classified information or enclosures, in addition to the unclassified filings and tabs marking attachments, a complete filing, properly marked, must be filed at the highest classification level. This complete filing is the record copy. (See also RC 3.10.b.(6) and (7) for guidance on filing filings with classified information in either the pleading or in the attachment(s).).

h. Text attachments will be in PDF format with the exception of a draft order required by RC 2.3.i., below. Images will be filed in accordance with RC 2.3.j., below. Motions or 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. The draft order shall include a watermark indicating that it is a draft. The watermark will state, “DRAFT ORDER / (PARTY NAME) / DD/MM/YR.” A draft order will be unsigned and should not include a “//s//” or any other marking indicating the Military Judge has signed it.

j. If it is necessary to send videos, use the following formats in order of preference: AVI, WMV, MPG, VOB, or MOV. If it is necessary to send images or photographs, use the following formats in order of preference: JPG, TIF, PDF, or BMP. If a party wishes to use some other file format, the party must request and receive permission from the Chief Clerk, the Trial Judiciary Staff Director, or a Trial Judiciary Staff attorney assigned to the case.

k. Before sending an archived or compressed file, request and receive permission from the Chief Clerk, the Trial Judiciary Staff Director, or a Trial Judiciary Staff Attorney assigned to the case.

l. If the Military Judge must review classified information to resolve a matter, an unclassified description of the materials and the location of the classified materials to be reviewed shall be noted in the e-mail.

4. Because of potential changes to the composition of Prosecution and/or Defense trial teams, the Military Judge or Trial Judiciary staff, on the judge’s behalf, may elect to send an e-mail to the Chief Defense Counsel or Chief Prosecutor, and/or their respective Chief Legal NCOs / Paralegals, for distribution to all counsel or all counsel of a particular team. The Trial Judiciary staff will be copied on such e-mails.

5. When a telephonic or video tele-conference is necessary, the Trial Judiciary staff will arrange the conference call / video teleconference unless otherwise directed by the Military Judge. Conference calls or video teleconferences will be conducted 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.

******* This Page Intentionally Left Blank*******

RULE 3

MOTION PRACTICE

1. Purpose. This rule establishes general procedures for motion practice for those appearing before or petitioning a military commission for relief. These procedures are designed to avoid unauthorized *ex parte* communications, ensure procedural matters leading to trial are handled efficiently, and provide efficient and expeditious motion practice.

2. Ex Parte Communications. *Ex parte* communication with the Military Judge by a party in a case, the Office of Military Commissions/Convening Authority, DoD General Counsel, or any intelligence or law enforcement agency, is prohibited except as authorized by the M.C.A., the M.M.C, or these rules. 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 the Trial Judiciary.

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

4. Communication with the Military Judge. All e-mails or other communications for the Military Judge will be sent to the Chief Clerk at osd.pentagon.OMC.list.trial-judiciary@mail.mil. E-mail will not be sent directly to the Military Judge. (*See* RC 2).

5. Definitions (including procedures for some filings).

a. Motion: A motion is 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 includes, but is not limited to, those motions addressed in R.M.C. 905, 906, and 907.

b. Filing: A filing includes a written motion, response, reply, amendment, supplement, brief, a communication involved in resolving a motion, or any other matter appropriate to be marked as an appellate exhibit in the record of trial.

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

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

e. Supplement: A supplement is an additional filing in regard to a previously filed motion or response. A supplemental filing may only add new facts, not known at time of filing, or newly decided case law to an existing motion or response; it may not raise new issues or advance new argument concerning an existing motion or response in the absence of new facts or new case law. The Military Judge has the discretion to direct the parties to file supplemental

pleadings despite the above limitations and without requiring the parties to seek permission to file the supplement via filing a Motion for Leave to File a Supplemental Filing as set forth in the subsections (1) - (3) below.

(1) A Motion for Leave to File a Supplemental Filing must be filed before the subject supplement is filed. In a separately numbered paragraph, the Motion for Leave to File a Supplement must affirmatively state the supplemental filing will contain either new facts not known at the time of filing or newly decided case law. In addition, it will contain a concise summary of the new facts or case law and state why the new facts or case law should be considered by the commission.

(2) A supplemental filing may not be filed unless and until the Military Judge grants the Motion for Leave to File the Supplemental Filing.

(3) The supplemental filing itself does not require a Certificate of Conference.

f. Amending a Pleading: A party may only amend an existing motion, response, or reply to correct a misstatement of fact or law or to correct a clerical error. An amendment may only be made with the permission of the Military Judge.

(1) A Motion for Leave to File an Amended Filing must be filed before the subject amendment is filed. An amended filing may not be filed unless and until the Military Judge grants the Motion for Leave to File the Amended Filing

(2) The amended filing will contain an asterisk next to the word “Amendment” in the caption, and a footnote linked to that asterisk will specify the change(s) from the original filing.

(3) An amended filing does not replace the original filing in the record unless specifically ordered by the Military Judge.

g. Corrected or Substituted Filing. Once a filing has been accepted by the Chief Clerk, it may only be changed in accordance with RC 3.5.f., above. If a party desires to submit a corrected or substituted filing before it is accepted for filing by the Chief Clerk, the party should recall the e-mail containing the original filing and resubmit the new filing. The e-mail accompanying the new filing should state the party does not wish to file the original filing and list the time and date the original filing was sent. The recalled original filing will not be accepted for filing and will not become part of the official record of trial. (*See* Form 3-4 for an example of a corrected copy).

h. Joint Motion. In a case with multiple accused, a “Joint Motion” is a motion filed by two or more accused.

i. Joinder. Joinder occurs in a case with multiple accused, when one or more of the accused file a motion or one or more accused joins the original motion. Those accused not a signatory to a motion filed by another accused are presumed to have joined the motion.

(1) If an accused does not want to join a particular motion or a specific portion of a motion, the party must file a Motion to Decline Joinder within seven (7) calendar days from the day the underlying motion is filed.

(2) If more than seven (7) calendar days elapse since the original motion was filed, the party must file a Motion for Leave to File Out of Time and receive permission from the Military Judge to file the proposed Motion to Decline Joinder.

(3) A Certificate of Conference is not required for a Motion to Decline Joinder or a Motion for Leave to File the Motion to Decline Joinder Out of Time.

(4) A party otherwise joined to the original motion by operation of this rule who wishes to state a separate position on the motion may do so in its Motion to Decline Joinder. If the party who originally filed the motion withdraws the motion, it is considered moot. The party stating a separate position on the motion must file a new motion IAW these rules to and have it considered by the military commission and thus preserve the issue for the record.

j. Redacted Filing. A copy of a motion, response, reply, or supplemental filing that has been reviewed by the DoD Review Team. (*See* RC 3.5.o). 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.

k. Certification of Conference. A statement by the moving party confirming the moving party has conferred with the opposing party and whether the opposing party concurs with or objects to the requested relief. Opposing parties will be provided a minimum of 24 hours, not including a Saturday, a Sunday, or legal holidays, to concur with or object to the requested relief. If a party fails to indicate its position after the 24 hour time period expires, the party is presumed to object to the requested relief, and the moving party should state the opposing party did not respond within the required time. Motions will not be accepted for filing unless and until either the opposing party informs the moving party of the former's position or fails to respond within 24 hours. All motions must contain a Certificate of Conference except motions to be filed *ex parte*, *in camera*, under seal, or as otherwise provided by these rules, M.C.R.E. 505, or by order of the Military Judge. A Certificate of Conference is not required when filing the supplement to a motion. (*See* RC 3.5.e. and 3.10.a.(9)).

l. Certification of Service. A statement by a party confirming their motion, response, reply, supplement, or notice has been served on opposing counsel. All motions, responses,

replies, supplemental filings and notices of joining a motion must have a Certificate of Service. Service may be accomplished by e-mail, providing a hard copy, or providing a copy on CD.

m. Oral Argument. All motions, responses, and supplemental filings will indicate whether the parties are requesting oral argument on the issue. IAW R.M.C. 905(h), the decision to grant oral argument on a written motion is within the sole discretion of the Military Judge.

n. 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 sealed document is not necessarily one containing classified information. A document sealed by the Military Judge may not be unsealed except by direction of the Military Judge or reviewing and appellate authorities when deemed necessary for the proper fulfillment of their duties under the M.C.A. In order to access information sealed for reasons of classification the individual must possess the requisite security clearance and a recognized need to know. A sealed document may not be disclosed to parties beyond those indicated in the sealing directive. *Ex parte* filings are presumed to be under seal and will be treated accordingly.

(1) A Motion for Leave to File a Sealed Pleading must be filed before the subject filing is filed unless the pleading is classified or *ex parte*. In a separately numbered paragraph, the Motion for Leave to File a Sealed Pleading must affirmatively state the basis for sealing the substantive filing.

(2) A Sealed Filing may not be filed unless and until the Military Judge grants the Motion for Leave to File the Sealed Filing.

(3) A Draft Sealing Order must accompany the Sealed Filing. (*See* RCs 2.3.i and 3.10.d.(1)(c)).

o. DoD Review Team. The Security Classification/Declassification Review Team (hereinafter DoD Review Team), consisting of Original Classification Authorities from DoD components and commands, established I.A.W. OSD Memoranda 09260-08, 10522-08 and 12079-08. will review all filings for sensitive and classified information prior to public release. (*See* RC 3.3). (*See also* Regulation for Trial by Military Commission 2011 Edition (R.T.M.C.) Para 18-1b. for additional authority for the DoD Review Team).

p. Emergency Motion. Naming a motion an “Emergency Motion” has no legal effect and such motions will not be handled differently from any other motion unless the Military Judge so directs. The timelines contained in RCs 3.7 and 3.10 will be followed unless the Military Judge, at his discretion, directs a compressed briefing schedule in accordance with RC 3.7.d.(1) and RC 3.7.e.(2).

q. Third Party Filing. A filing by a party other than the Defense or Prosecution and not an *amicus curiae* briefer, seeking particular and singular relief from a military commission. (Rule 8 addresses *amicus curiae* briefers.)

(1) A Third Party Filing will be considered by a military commission only when the presiding military judge determines it is appropriate or required to be considered. The Third Party will state the legal basis for why the commission should consider the filing in the overview paragraph.

(2) The Third Party will comply with this Rule (RC 3) concerning the mechanics (obtaining Appellate Exhibit numbers, formatting, certificate of service, etc.) of filing the pleading. The individual filing the pleading will state his/her qualification in the first paragraph of the pleading.

(3) The Chief Clerk will administratively process the Third Party Filing as if it were filed by either the Defense or Prosecution.

(4) If the Military Judge determines a Third Party Filing will be considered, the Chief Clerk will notify the parties via e-mail in accordance with RC 3.7.(a).

(5) Upon receiving notice that a Third Party filing was accepted for consideration, the parties may join, respond, and reply to the Third Party filing in accordance with these rules, unless the Military Judge directs otherwise.

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:

(1) a Saturday;

(2) a Sunday;

(3) a Federal holiday;

(4) a day where the Office of Personnel Management (OPM) declares the Federal Government in the National Capital Region to be closed on its webpage; or,

(5) an unforeseen circumstance occurs and the Military Judge issues a notice that the time period will not be included in the computation.

In such cases, the period runs until the end of the next business day.

b. When a time is used in these Rules, or in a message, order, e-mail, or other directive from a Military Judge, that time refers to Eastern Standard or Daylight Savings Time, whichever is currently in effect, unless otherwise specifically stated.

c. If a filing is received on a Friday after 1600 or on Saturday or Sunday, the filing is considered to have been filed the following Monday. If the following Monday is a Federal holiday, the filing is filed on the following business day. A filing sent on a Federal holiday is not considered filed until the first business day after the holiday.

d. A filing received after 1600 Monday - Thursday is considered filed the next business day.

7. Timing for Filing Motions, Responses, and Replies.

a. A motion, response, reply, supplement, or amendment is only considered filed when received by the Chief Clerk and all conditions precedent have been met, i.e., the filing has been reviewed and accepted by the Chief Clerk or another member of the Trial Judiciary staff as being administratively compliant with the Rules of Court. Trial Judiciary staff will send an e-mail to all addresses on the e-mail filing the pleading announcing the date of acceptance of the pleading.

b. The Chief Clerk, personnel assigned to the Chief Clerk's office, the Trial Judiciary Staff Director, and Trial Judiciary staff attorneys are authorized to reject a filing if such filing fails to satisfy all requirements listed in these rules, including being properly formatted.

c. 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) Joining a Motion. In a case with multiple accused, upon receiving notice that a Third Party filing was accepted for consideration, the parties may join, respond, and reply to the Third Party filing in accordance with these rules, unless the Military Judge directs otherwise. (*See* RC 3.5.i.).

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

(4) 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) Assertions of waiver must be submitted as an unclassified document; if classified information is necessary to support the assertion, it must be submitted IAW RC 3.10.d.(3).

(c) Requests for extensions of time to file a motion must be filed as a Motion For Extension of Time to File a Motion To (title of the substantive motion) and be filed at least five (5) calendar days before the subject motion is due to the Commission.

(d) Requests to file a motion out of time must be titled as a Motion for Leave to File (title of the substantive motion) Out of Time and be filed before the subject motion. The substantive motion may not be filed unless and until the Military Judge grants the Motion for Leave to File (title of the substantive motion) Out Of Time.

d. Responses.

(1) **Timing.** Unless the Military Judge provides otherwise, a response is due within 14 calendar days after a motion or supplement is filed unless another party later joins the motion. The time for the opposing party to make a response begins anew after a new party joins an existing motion.

(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 must be submitted as an unclassified document; if classified information is necessary to support the request, it must be submitted IAW RC 3.10.d.(3).

(c) Requests for extensions of time to file a response must be filed as a Motion For Extension of Time to File a Response To (title of the substantive motion) and be filed at least three (3) calendar days before the subject response is due to the Commission.

(d) Requests to file a response out of time must be filed as a Motion for Leave to File Response to (title of the substantive motion) Out of Time and be filed before the subject response. The response may not be filed unless and until the Military Judge grants the Motion for Leave to File Response to (title of the substantive motion) Out Of Time.

e. Replies.

(1) **Reply Optional.** Counsel may submit a reply to a response; however Counsel must ensure matters which 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 the party disagrees with a response. The absence of a reply does not indicate agreement with a response. Instead, the absence of a reply indicates the party stands on their motion or initial filing.

(2) **Timing.** Unless the Military Judge provides otherwise, any replies shall be filed within seven (7) calendar days of the filing of 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 must be submitted as an unclassified document; if classified information is necessary to support the request, it must be submitted IAW RC 3.10.d.(3).

(c) Requests for extensions of time to file a reply must be titled as a Motion for Extension of Time to File a Reply To (title of the substantive motion) and be filed at least one (1) business day before the subject reply is due to the Commission.

(d) Requests to file a reply out of time must be titled as a Motion for Leave to File Reply to (title of the substantive motion) Out of Time and be filed before the subject reply. The reply may not be filed unless and until the Military Judge grants the Motion for Leave to File Reply to (title of the substantive motion) Out Of Time.

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 these general rules should apply, or believes one or both of the burdens should change after a certain quantum of evidence is introduced, the moving party must provide justification in the filing consisting of:

(1) A statement of the burden of proof (production of evidence) for that motion;

- (2) A statement of the burden of persuasion for that 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 the burden of proof, the burden of persuasion, and the 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 submitted by the parties in accordance with these Rules, unless the Military Judge determines:

- (1) Material facts necessary to a 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) Oral argument is necessary to provide a full and fair trial.

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

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

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

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

- (1) All pleadings will:
 - (a) have one inch (1”) margins on all four sides of each page;
 - (b) be formatted for 8 ½” x 11” sized paper;
 - (c) be double-spaced;
 - (d) use Times New Roman 12 point font; and,
 - (e) use portrait mode for page orientation.

(2) All attachments to pleadings must:

- (a)** have one inch (1”) margins on all four sides of each page;
- (b)** be formatted for 8 ½” x 11” sized paper; and,
- (c)** use portrait mode for page orientation.

If an attachment does not comply with these formatting rules, the filing party, prior to submitting the pleading to the Chief Clerk, will coordinate with the Chief Clerk to develop a solution.

(3) 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).

(4) All filings will indicate in the title which party is making the motion, response, reply, or supplemental filing.

(5) All classified filings will be protected and marked following standard marking procedures, as set out in DoD Manual 5200.01, DoD Information Security Program, other DoD directives, Chapter 18 of the R.T.M.C., and any applicable protective orders. It is the responsibility of the filing party to identify and mark classified information in their pleadings.

(6) If a filing contains classified information, whether in the body of the pleading or in the attachment(s), the filing will be filed as one (1) complete, properly marked, PDF document using a service method - SIPRNET, CD, or paper – consistent with the size of the document and the highest level of classified information in the filing. This will be the record filing.

(7) If the classified information is only in the attachment(s), a copy of the unclassified pleading and the unclassified attachment(s) will be filed without any documents placed behind the tab(s) identifying the classified attachment(s). Court Reporters will create and insert an appropriate place holder to serve in place of the classified attachment(s).

(8) A Certification of Service must be included in all filings. (*See also* RC 3.5.1.).

(9) A Certificate of Conference is required for all motions, except those identified in RC 3.5.k. A Certificate of Conference is not required in a response, a reply, a notice or a supplemental filing.

(10) Captions shall follow the original motion’s caption unless the caption is inflammatory, prejudicial, or disrespectful to the Commission.

(11) All attachments will be listed at the end of the pleading. Each attachment will be individually marked as an attachment, even if there is just one (1) attachment, the Certificate of Service. The Certification of Service will always be the first attachment.

b. Appellate Exhibit Designation. Prior to any filing with the Commission, or service of any filing on the opposing party, the party making the filing must contact the Chief Clerk by sending an e-mail to osd.pentagon.OMC.list.trial-judiciary@mail.mil to obtain the Appellate Exhibit (AE) number for the filing. The Office of Court Administration will be copied on all AE requests at osd.pentagon.omc.list.convening-authority-of-court-admin@mail.mil. The e-mail should list what type of filing the party is seeking to make (motion, reply, response, etc.) and provide a description of the filing (i.e., Motion to Exclude SGT Smith’s Statement).

(1) A party seeking an AE number will send the e-mail to the Chief Clerk not more than three (3) business days prior to when the party intends to make the filing. The Chief Clerk will provide AE numbers in a timely fashion.

(2) Once a party receives an AE number, it must file its proposed pleading using the assigned AE number within two (2) business days of receiving the AE number. If the assigned AE number is not utilized within the two (2) business days, the AE number will no longer be authorized. In this event, the Chief Clerk will recall the AE number and the party will be required to submit a new request for an AE number for the proposed filing. All subsequent filings concerning the original motion must use the same AE designation with an alphabetical or numeric sub-designation, e.g., AE 075A, AE 075B, AE 075C, AE 075-1, AE 075-2, etc. The Appellate Exhibit serves as the official designation for any filing.

(3) Once a filing has been assigned an AE number, all future communications, whether in hard copy or by e-mail, concerning that series of filings will use that AE number 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 e-mails, and the file names to ALL e-mail attachments.

Examples:

* An e-mail subject line forwarding a response to AE 003 in *US v Jones* should read: “US v Jones AE 003A Government Response to AE 003”.

* The filename of the response attached to the above e-mail should read “AE 003A - Gov Resp to AE 003”.

* The filename of a document that is the second attachment to the response should read: “AE 003A – Attch B to Gov Resp to AE 003”.

(4) 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 the names of their filings are not in themselves classified.

c. Service of Filings. All filings with the Commission must be served on the opposing party or parties either before filing, if hard copy or by CD, or concurrently if done electronically. A Certification of Service must be included for all filings. (*See* RC 3.5.1.). The parties will take into consideration the size of their filings when determining the mode of service/delivery upon opposing party/parties and the Chief Clerk.

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

(1) The moving party will submit the filing to the Chief Clerk. A motion, a response, a reply, a supplement thereto, or an amendment will not be accepted for “filing” without:

(a) Certification of Service.

(b) Certification of Conference (if required).

(c) If the motion requests the Military Judge issue an order, the filing must contain a proposed draft order. A PDF version will be a part of the motion and a Word version will be attached to the e-mail along with the filing. The Word version of the draft order shall be watermarked indicating it is a draft. *See* RC 2.3.i for guidance on watermarking a draft Word document and RC 3.10.b.(3) for guidance on naming the files.

(2) Unclassified Filings.

(a) Unclassified filings may be filed under seal or *ex parte* and must be marked IAW RC 3.10.a.

(b) Consistent with RC 2.3., unclassified filings will be filed with the Chief Clerk. The filing party should file using e-mail at osd.pentagon.OMC.list.trial-judiciary@mail.mil whenever possible. The documents to be filed must be attachments to the transmittal e-mail.

(3) Classified Filings.

(a) Classified filings, or those believed to be classified, may also be filed *ex parte* and/or under seal.

(b) Depending on the level of classified information in a classified filing and the size of the filing, they will be filed with the Chief Clerk via an e-mail on SIPRNET at osd.mc-alex.omc.list.trial-judiciary-all@mail.smil.mil or hand carried on a CD or in paper format to the Chief Clerk's office after making prior arrangements with the Chief Clerk. Prior to filing the classified pleading, the filing party will coordinate with the Chief Clerk's office to resolve logistical issues associated with the Chief Clerk's physical receipt and acceptance of the classified material.

(c) The filing must adhere to all requirements for format, service, and timeliness in these Rules of Court.

(d) If the pleading itself does not contain any classified information, but there is classified information in at least one (1) attachment, an unclassified notice is not required. The submission and service of the unclassified pleading with its unclassified attachment(s) to the Chief Clerk and opposing party fulfills the unclassified notice requirement in RC 3.10.d.(3)(d) below.

(e) If the pleading itself does contain classified information, the party submitting the classified filing must send the Chief Clerk an unclassified notice of the filing using the AE number and an unclassified title so the filing can be accounted for through normal procedures and added to the Filings Inventory. The notice will not be sent until the classified filing is accepted by the Chief Clerk.

(f) The unclassified notice will also be the first pages of the corresponding classified filing for the record of trial created IAW RC 3.10.a.(5). The filing party will comply with the service requirements of RC 3.10.c. in filing the unclassified notice.

(4) Paper Filings.

(a) Filing may be accomplished in paper format in the limited circumstances where an electronic filing (e-mail or CD) of the document is not possible due to classification, size, or location constraints.

(b) Filings submitted in paper format must adhere to all other requirements for filing.

(c) Before making a filing in paper format the filing party must make arrangements with the Chief Clerk to submit the filing. If the filing is accepted in paper format, the submission of an electronic copy to the Commission by e-mail or CD is not required. The filing party must comply with the service requirements of RC 3.10.c.

e. 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 in their entirety. The filing party may reference these, and if appropriate, provide a URL link to the document noting the date last accessed by the filing party. Excerpts from general references may be included if not more than five (5) pages in length.

(3) **Delivery of classified filings.** Parties desiring to file a CD or hardcopy (paper copy) of a pleading with classified information requiring storage in a Sensitive Compartmented Information Facility (SCIF) will coordinate with the Chief Clerk / Trial Judiciary staff concerning the time of delivery. The parties will arrive at the facility with the pleading at the time prescribed by the Chief Clerk / Trial Judiciary staff, but not later than 1500 hours (3:00 PM) to allow for the review / acceptance of the filings and the performance of other administrative tasks associated with the proper handling and transfer of classified information.

f. Withdrawal of Motions.

(1) **Filing.** The original filing party can seek to withdraw a motion from consideration by the Commission by filing a motion requesting its withdrawal.

(2) **Basis Moot.** Once the basis for a motion is moot, the party who originally filed said motion shall file a motion to withdraw.

(3) **Compliance.** A written withdrawal motion will comply with the requirements for a motion in RC 3.10. An oral motion must be made in court on the hearing record.

(4) **Joinder.** In a trial with multiple accused, withdrawal by the original filing party withdraws the motion from consideration by the Commission as to all parties. A different party may file the motion as a new motion by following the procedures in RC 3.10. A new AE number must be requested and issued.

******* This Page Intentionally Left Blank*******

<p>UNITED STATES OF AMERICA</p> <p>v.</p> <p>[Name of Accused]</p> <p>[aka if any; not required]</p>	<p>AE 123</p> <p>Defense/Government Motion To (Relief Requested In Motion)</p> <p>[Date motion filed]</p>
--	--

1. Timeliness.

This motion is filed timely pursuant to Military Commissions Trial Judiciary Rule of Court 3.7.c.(1).

2. Relief Sought.

A concise statement of the relief sought by the moving party, alternative relief may be requested. Each motion will only address a single issue.

3. Overview.

A summary of the relief sought and justification for the relief.

4. Burden of proof.

As the moving party, the Government/Defense must demonstrate by a preponderance of the evidence that the requested relief is warranted. R.M.C. 905(c)(1)-(2). (*See* RC 3.8).

5. Facts.

6. Law and Argument.

7. Conclusion.

8. Oral Argument.

The Government/Defense does not request oral argument. (*See* RC 3.5.m.).

9. Witness and Evidence.

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 neither a discovery request nor a request for access to evidence.

10. Certificate of Conference.

The Government/Defense has conferred with the Defense/Government concerning this motion, as set forth in greater detail above. The Defense/Government does/does not oppose this motion. (*See* RC 3.5.k., and RC 3.10.a.(8).

11. Additional Information.

The Government/Defense has no additional information.

12. List of attachments.

- A. Certificate of Service, dated 3 April 2012. (*See* RC 3.5.1, RC 3.10.a.(7), and RC 3.10.a.(10).
- B. Government/Defense Request for Discovery, dated 28 March 2012.
- C. Draft Order.

Respectfully submitted,

//s//
SIGNATURE BLOCKS
OF COUNSEL(S) OF RECORD WITH
//s// or other representation of a signature

<p>UNITED STATES OF AMERICA</p> <p>v.</p> <p>[Name of Accused]</p> <p>[aka if any; not required]</p>	<p>AE 123A</p> <p>Government/Defense Response To Government/Defense...(Response To A Specific Request For Relief (May want to refer to AE number the response will be referring to)</p> <p>[Date motion filed]</p>
--	--

1. A statement the response is being filed within the time frames and other established guidance or direction of the Military Judge. (*See* RC 3.7.d.).
2. Whether the responding party believes 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 the responding party agrees are correct. When a party agrees to a fact in motions practice, it shall constitute a good faith belief 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 and will correspond to the subparagraph in the motion containing the facts. If the facts or identity of the source is protected or classified, that status will be noted.
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.

<p>UNITED STATES OF AMERICA</p> <p>v.</p> <p>[Name of Accused]</p> <p>[aka if any; not required]</p>	<p>AE 123B</p> <p>Defense/Government Reply To Government/Defense Response To (The Motion The Response Caption Located On Response AE)</p> <p>[Date motion filed]</p>
--	---

1. A statement the reply is being filed within the time frames and other established guidance or direction of the Military Judge. (RC 3.7.e).
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 neither a discovery request nor a request for access to evidence.
5. Additional information not required to be set forth as above.
6. A list of any additional attachments. (*See* RC 3.5.1.).
 - A. Certificate of Service, dated 3 April 2012.
 - B. Defense Request for Funding, dated 28 March 2012.
 - C. Additional Documentation

Respectfully submitted,

//s//

Signature Block of Counsel On Record
With //s// or other representation of a
Signature.

<p>UNITED STATES OF AMERICA</p> <p>v.</p> <p>[Name of Accused]</p> <p>[aka if any; not required]</p>	<p>AE 123 (Corrected Copy)*</p> <p>Defense/Government Motion To (Relief Requested In Motion)</p> <p>[Date motion filed]</p>
--	--

1. Timeliness.

This motion is filed timely pursuant to Military Commissions Trial Judiciary Rule of Court 3.7.b.(1).

2. Relief Sought.

A concise statement of the relief sought by the moving party, alternative relief may be requested. Each motion will only address a single issue.

3. Overview.

This paragraph will summarize an overview the progress of the case. This paragraph is not intended to state facts outlined in paragraph five (5) of this Appellate Exhibit.¹

4. Burden of proof.

As the moving party, the Government/Defense must demonstrate by a preponderance of the evidence that the requested relief is warranted. R.M.C. 905(c)(1)-(2). (*See* RC 3.8).

5. Facts.

6. Law and Argument.

7. Conclusion.

¹ This footnote will have the explanation of what information is changed to correct the information within the AE. Each correction will be a separate footnote with explanation of correction. (RC 3.3.e.)

8. Oral Argument.

The government/defense does not request oral argument. (*See* RC 3.5.m.).

9. Witness and Evidence.

No witness or other evidence is anticipated at this time.

10. Certificate of Conference.

The government/defense has conferred with the defense/government concerning this motion, as set forth in greater detail above. The Defense/Government does/does not oppose this motion. (*See* RC 3.5.k., and RC 3.10.a.(6)).

11. Additional Information.

The Government/Defense has no additional information.

12. List of attachments.

- A. Certificate of Service, dated 3 April 2012. (*See* RC 3.5.1, and RC 3.10.a.(6)).
- B. Government/Defense Request for Discovery, dated 28 March 2012.

Respectfully submitted,

SIGNATURE BLOCKS
OF COUNSEL(S) OF RECORD WITH
//s// or other representation of a signature

******* This Page Intentionally Left Blank*******

RULE 4

APPEARANCE, PRESENCE, AND EXCUSAL, RELIEF, OR WITHDRAWAL OF COUNSEL

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

2. 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 Chief Clerk; the Director, Office of Court Administration; and, to opposing counsel. If opposing counsel is not known, the detailing documents will be provided to the Chief Prosecutor or Chief Defense Counsel, as appropriate.

(3) Until the detailed defense counsel is relieved or excused from his or her duty of representation by competent authority, in accordance with R.M.C. 505, counsel will continue to represent the interests of an accused. If detailed military counsel makes an appearance before a Military Judge, excusal must be approved by the Military Judge. (*See* RC 4.4.b.).

(4) Under R.M.C.s 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* R.T.M.C. Chapter 9).

b. General Schedule (GS) Civilian Defense Counsel. The rules applicable to detailing and appearance of military counsel (RC 4.2.a) are equally applicable to GS civilian defense counsel.

c. Civilian Defense Counsel. A civilian defense counsel is a civilian attorney who is not a General Schedule federal government employee. Such an attorney could be pro bono or learned 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 e-mail to the Chief Clerk. If detailed civilian defense counsel makes an appearance before a Military Judge, excusal must be approved by the Military Judge. (*See* RC 4.4.b.).

d. Learned Counsel. A military or civilian counsel, experienced in capital litigation, appointed under the provisions of 10 U.S.C. § 949a(2)(C)(ii). Learned counsel will be detailed and make an appearance in accordance with RC 4.2.a-b.

e. Associate or Assistant Defense Counsel. An associate or assistant defense counsel may perform any act or duty a defense counsel may perform under law, regulation, or custom of the service, under the supervision of the lead defense counsel. (*See* R.M.C. 502(d)(7)). Detailed military defense counsel, GS civilian defense counsel, or civilian counsel, if they are lead counsel, should ensure assistant defense counsel are always afforded appropriate supervision.

Assistant defense counsel is considered to have made an appearance when a written notice of detail is provided to the Military Judge by the Chief Defense Counsel.

f. Standby Counsel. If an accused has standby counsel under R.M.C. 506(d)(2) and the accused desires the standby counsel's presence at counsel table, the accused must so inform the Military Judge either by written motion or orally during a session of the Commission.

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

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

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

b. Exception to General Rule. R.M.C. 805(c) allows counsel for each party to be absent from a Commission session with the permission of the Military Judge as long as at least one qualified counsel for each party is present. Qualified counsel means detailed military counsel, detailed GS civilian counsel, civilian counsel, or learned counsel in a capital case.

(1) Accused does not object. 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 a signed waiver by the client or an on-the-record waiver of the presence of counsel. The signed waiver by the accused should be provided to the Military Judge in advance of the scheduled session.

(2) Accused objects. If an accused objects to defense counsel's absence, the Military Judge may require litigation to proceed "in the absence of one or more defense counsel...if the Military Judge finds that, under the circumstances, a continuance is not warranted and that the accused's right to be adequately represented would not be impaired." R.M.C. 805(c), Discussion.

c. Revocation of Waiver. If, at any session, the accused seeks to revoke his written or on-the-record waiver of the presence of the counsel, that counsel may be required by the Military Judge 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 terms are defined as the termination of all representational responsibility of detailed military counsel, detailed GS civilian defense 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 military or GS civilian defense counsel is required. Written notice of such termination will be provided to all parties including the Military Judge. A defense counsel who has entered an appearance in a Commissions session will not be excused without permission of the Military Judge. (*See also* RC 4.2.a. and RC 4.2.b.).

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 detailed prosecutor must be present at all sessions of the Commission.

<p>UNITED STATES OF AMERICA</p> <p>v.</p> <p>NAME OF ACCUSED</p>	<p>Civilian Defense Counsel Notice Of Appearance And Agreement</p> <p>(Date)</p>
---	--

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.

2. My office address, phone numbers, and email address are:

ADDRESS
VOICE AND FAX PHONE NUMBERS
EMAIL ADDRESS.

3. I am an active member in good standing licensed to practice in the following jurisdictions:

LIST BAR ADMISSIONS.

4. I have attached MC Form 9-2, Affidavit and Agreement by Civilian Defense Counsel.

Attachment:

A. MC Form 9-2. (See Figure 9.2, Regulation for Trial by Military Commissions).

//s//
Signature Block
Office Address
Email Address
Phone Number

ATTACHMENT A

**Figure 9.2 – Affidavit and Agreement by Civilian Defense Counsel
(MC Form 9-2)**

AFFIDAVIT AND AGREEMENT BY CIVILIAN DEFENSE COUNSEL

Pursuant to the Military Commissions Act of 2009, Pub. L. No. 111-84, , *codified in part at* 10 U.S.C. §§ 948a– 948d, the Manual for Military Commissions promulgated April 27, 2010, and Chapter 9 of the Regulation for Trial by Military Commission, I _____ [Name of Civilian Attorney] _____, make this Affidavit and Agreement for the purposes of applying for qualification as a member of the pool of civilian defense counsel available to represent the accused before military commissions and serving in that capacity.

I. Oaths or Affirmations. I swear or affirm that the following information is true to the best of my knowledge and belief:

A. I have read and understand the Secretary’s Manual for Military Commissions, and all other Military Commissions Regulations, Orders, Instructions and Directives applicable to trial by military commissions. I will read all amendments, rescissions or promulgations pertinent to the aforementioned.

B. I am aware that my qualification as a civilian defense counsel does not guarantee my access to any information subject to the national security privilege under 10 U.S.C. §§ 949p-1– 949p-7.

II. Agreements. I hereby agree to comply with all applicable regulations and rules for counsel, including any rules of court governing proceedings and any protective orders, and specifically agree, without limitation, to the following:

A. I will notify the Chief Defense Counsel and, as applicable, the relevant military judge immediately if, after the execution of this Affidavit and Agreement but prior to the conclusion of proceedings (defined as the review and final decision of the Court of Military Commission Review), there is any material change in any of the information provided in my application, including this Affidavit and Agreement, for qualification as member of the civilian defense counsel pool. I understand that such notification shall be in writing and shall set forth the substantive nature of the changed information.

B. I will be well prepared and will conduct the defense zealously, representing the accused throughout the military commission process, from the inception of my representation through the completion of any post-trial proceedings as detailed in 10 U.S.C. §§ 950a-950j and R.M.C. 1101-1209. Prior to undertaking representation of the accused, I will ensure that I can commit sufficient time and resources to handle the accused’s case expeditiously and competently. In making this assessment, I am aware that the military judge may deny any request for a delay or continuance of proceedings based on reasons relating to matters that arise in the course of my law practice or other professional or personal activities that are not related to military commission

proceedings, if in the military judge's determination such a continuation would unreasonably delay the proceedings.

C. The defense team shall consist entirely of myself, detailed defense counsel, and other personnel provided by the Chief Defense Counsel, the military judge, or the Convening Authority. I understand I must include the justification for particular individuals to be added to the defense team in a request to the Chief Defense Counsel, the military judge, or the Convening Authority as appropriate, and I will state any special requests regarding access to the accused, classified information, as defined at 10 U.S.C. § 948a(2), or privileged under 10 U.S.C. §§ 949p-1 – 949p-7, R.M.C. 701, and Mil. Comm. R. Evid. 505, or the ability to enter into a confidential relationship. Regarding entering into a confidential relationship, I understand that those determined eligible to receive attorney confidences or attorney work product containing facts specific to the case will be required to complete an affidavit similar to this Form prior to receiving any attorney confidences or attorney work product containing facts specific to the case. I further understand that those I request to have access to the accused, other detainees, or classified information will be required to obtain a security clearance and be specifically approved for access to each individual or item of classified information requested, prior to access being granted. I understand that nothing in this agreement allows me to disregard any laws, rules, regulations, or instructions governing the handling of classified information or privileged information. I will make no claim against the U.S. Government for any fees or costs associated with my conduct of the defense or related activities or efforts.

D. Recognizing that my representation does not relieve detailed defense counsel of duties specified in 10 U.S.C. § 949c(b) and R.M.C. 502(d)(7), I will work cooperatively with such counsel to ensure coordination of efforts and to ensure such counsel is capable of conducting the defense independently if necessary.

E. During my representation of an accused before a military commission, I will comply with the following restrictions on my communications and travel:

1. I will not discuss, transmit, communicate, or otherwise share documents or information that are classified or protected/privileged, with anyone who does not have the necessary security clearance, and will only share with properly cleared persons as is necessary to represent my client before a military commission. In any case of doubt regarding whether I may share information about a case with another, I understand that I have an affirmative duty to request clarification from the Deputy General Counsel (Personnel and Health Policy) or military judge before discussing, transmitting, communicating, or otherwise sharing documents or information. I understand that nothing in this agreement allows me to disregard any laws, rules, regulations, or instructions governing the handling of classified information and material, or other protected information.

2. I understand that once proceedings have begun, I may be required by the military judge to remain at the site of the proceedings until he or she approves my departure.

3. I understand I will obtain prior approval from the Convening Authority for a country clearance for travel to Guantanamo Bay, Cuba.

F. At no time, to include any period subsequent to the conclusion of the proceedings, will I make any public or private statements regarding any closed sessions of the proceedings or any document or material constituting classified, protected, or privileged information under 10 U.S.C. § 948a(24) or subject to the national security privilege under 10 U.S.C. §§ 949p-1 – 949p-7, R.M.C. 701, and Mil. Comm. R. Evid. 505. This restriction does not apply to discussions with other members of the defense team or the Chief Defense Counsel who are appropriately authorized to receive the specific classified information and privileged information in question, when such disclosure is related to the defense efforts on behalf of the accused during military commission proceedings or subsequent review. I understand that nothing in this agreement allows me to disregard any laws, rules, regulations, instructions, or protective orders governing the handling of classified or privileged information.

G. I understand and agree to comply with all rules, regulations and instructions governing the handling of classified information and material or other privileged information.

H. I understand that there may be reasonable restrictions on the time and duration of contact I may have with my client, as imposed by the Convening Authority, the military judge, detention authorities, or regulation.

I. I understand that communications with an accused are not protected if they would facilitate criminal acts or a conspiracy to commit criminal acts, or if those communications are not related to the seeking or providing of legal services to the client.

J. I agree that I shall reveal to the Chief Defense Counsel, and any other appropriate authorities, information relating to the representation of my client to the extent that I reasonably believe necessary to prevent the commission of a future criminal act that I believe is likely to result in death or substantial bodily harm, or significant impairment of national security.

K. I understand and agree that nothing in this Affidavit and Agreement creates any substantive, procedural, or other rights for me as counsel or for my client(s).

/s/: _____

Print Name: _____

Address: _____

Date: _____

STATE OF)
COUNTY OF)

Sworn to and subscribed before me, by _____, this ___ day of _____, 20__.

Notary
My commission expires:

******* This Page Intentionally Left Blank*******

RULE 5

FILINGS INVENTORY

1. Purpose. This rule establishes:

- a. The definition of a Filings Inventory.
- b. Requirements and formats for the Chief Clerk to maintain a Filings Inventory.
- c. Responsibilities for counsel to check the accuracy of a Filings Inventory when received.

2. Definition. The Filings Inventory is a tracking mechanism to set forth which filings and other matters are before the Military Judge. It is considered a working document of the Military Judge and as such will not become part of the Record of Trial unless otherwise directed by the Military Judge. The Filings Inventory is separate and distinct from filing inventories maintained by the Office of Military Commissions on its website.

3. Establishing the Filings Inventory. The Chief Clerk shall establish and maintain a Filings Inventory for each case referred to the Commission. The content and format will be established by internal Trial Judiciary policy.

4. Distribution of the Filings Inventory. The Chief Clerk, when directed by the Military Judge, will distribute copies of the Filings Inventory to all counsel on the case and to the Director of Court Administration, Office of Military Commissions. The Chief Clerk's filings inventories are only to be distributed in accordance with this rule or the direction of the Military Judge.

5. Counsel's responsibility when receiving the Filings Inventory. The Filings Inventory is one method by which counsel can determine 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 and opposing counsel of any discrepancies.

b. If counsel believes they have submitted a filing not reflected on the Filings Inventory, they shall immediately deliver that filing, with all attachments, to the Chief Clerk and opposing counsel, noting the discrepancy and documenting timely submission in compliance with these rules.

6. 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 left off the Filings Inventory, it is the responsibility of counsel to note the omission and advise the Chief Clerk. (*See RC 5.5.*)

b. If counsel believes a matter should be on the Filings Inventory and has made that known to the Chief Clerk, and the Chief Clerk does not take corrective action by including the matter on the Filings Inventory, it is the responsibility of counsel to raise the matter with the Military Judge.

RULE 6

PUBLIC ACCESS AND RELEASE OF RECORDS

1. Judicial Policy. The Military Judge has the responsibility to ensure a Commission is conducted in an impartial and orderly manner that reflects the gravity of the proceeding and the independence of the Commission. Trials must be held in a manner that enables 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 to the requirements of national security. Consistent with these responsibilities and competing interests, the Military Judge will ensure all Commission proceedings are as open and transparent as possible.

2. Public Access.

a. Within limitations imposed by the DoD, the media and the public are encouraged to attend Commission proceedings and shall be permitted to observe all trial proceedings, unless the Military Judge determines the requirements of national security or other overriding interests require a closed courtroom. 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 mandate, spectators may enter and leave the gallery of the courtroom during open sessions, so long as their conduct does not disturb or interrupt Commission proceedings. Spectators shall refrain from indicating or demonstrating in any manner, agreement or disagreement with testimony or procedures at a trial, wearing attire which detracts from the dignity of the proceedings, creates a disruption, or prejudices the rights of any party. Any spectator who disrupts the Commission or fails to demonstrate appropriate demeanor for a judicial proceeding will be escorted from the gallery of the courtroom and not be allowed to return without the Military Judge's permission.

c. R.M.C 806(c) does not allow Commission proceedings to be broadcast, televised, recorded, or photographed for the purpose of public dissemination except as set out in RC 6.2.d..

d. Contemporaneous closed-circuit television 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 and hearing by victims, the media, and other spectators when courtroom facilities are inadequate to accommodate a reasonable number of spectators.

(1) Notification. If contemporaneous video or audio transmissions are anticipated, Government counsel will petition the Military Judge by a motion before arraignment. (*See* RC 3).

(2) Security. The Government motion will set out the locations to which the transmissions are requested to be made and the security oversight at each site to ensure compliance with any directives of the Military Judge.

(3) Notice on the Record. 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) Sequestration. The Government will ensure no potential witness on the merits observes the trial from a remote location unless, IAW R.T.M.C. 16-4b4, the Government notifies the Military Judge of that witnesses' potential observation. If a potential witness on the merits inadvertently observes a trial, the Government will promptly notify the Military Judge and defense counsel.

e. No one other than a trial participant, as identified on the record, the Chief Defense Counsel for Military Commissions, court personnel, 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 party requests all or part of a session be closed, the Military Judge may do so IAW the provisions of 10 U.S.C. § 949d and R.M.C. 806. The burden of establishing the need to close a session is on the moving party. Normally, the Military Judge will announce the decision, and the basis for it, prior to closing the courtroom.

3. Release of Records.

a. Judicial Policy. All motions, responses, replies, supplemental filings, and judicial orders shall be released to the public via the webpage operated by the Office of Military Commissions, subject to any security restrictions imposed by the DoD or other Original Classification Authority (OCA), unless such documents are filed under seal (for purposes other than security review) or *ex parte*, are classified, or are otherwise ordered by the Military Judge not to be released.

b. Definitions.

(1) Redacted Filing. A copy of a motion, response, reply, supplemental filing, or other filing that has been reviewed by the DoD Review Team and has been found by the Review Team to contain information that needs to be redacted.

(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 of filings are not 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, un-redacted filings will be considered 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 § 9481(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 document generated contemporaneously with the Commission proceedings that purports to record the words spoken by the parties, witnesses, court personnel, and the Military Judge during the conduct of the proceedings. An unofficial /unauthenticated transcript is made available to the public IAW R.T.M.C. paragraph 19-4e. These unauthenticated transcripts are not judicial records and may not be 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 an unofficial /unauthenticated transcript not be released under the provisions of R.T.M.C. 19-4a. Any such directive will minimize the amount of information that may be withheld and will be lifted as soon as the need for limiting the release ends.

d. Security Review of Filings

(1) R.T.M.C. 17-1c and 19-4 requires filings be reviewed for classified or other protected information before being released to the public.

(2) All filings, except those described in RC 6.3.d.(3) below, regardless of the document's status (classified or unclassified), shall undergo review by the DoD Review Team prior to being released to the Office of Military Commissions (OMC) website IAW R.T.M.C. 17-1(c)(1) and 19-4.

(3) Because of their nature, the following filings will not be sent for review: *ex parte* filings, filings sealed at the request of the defense IAW M.C.R.E. 505 or 506, and other filings sealed for reasons other than security by the Military Judge.

(4) The Chief Clerk 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 DoD Review Team and any designated departments or agencies.

(b) SIPRNET Filings.

(i) SIPRNET filings must comply with all requirements set forth in RC 3.

(ii) After the SIPRNET filing is accepted by the Chief Clerk, the proponent counsel must provide an unclassified notice of filing to the Chief Clerk and all parties I.A.W. RC 3.10.d.(3). The unclassified notice will also be filed as the first pages of the classified filing.

(iii) The Chief Clerk shall forward the SIPRNET filing with any unclassified notice of filing to the Defense Review Team and any designated departments or agencies.

(c) Paper or CD Filings. If the proponent cannot use electronic (e-mail) filing procedures, the following procedures apply:

(i) Paper or CD filings must comply with all requirements set forth in RC 3.

(ii) After the classified filing is accepted by the Chief Clerk, the proponent counsel must provide an electronic unclassified notice of filing to the Chief Clerk and all parties I.A.W. RC 3.10.d.(3).

(iii) Proponent must hand carry a paper original and one (1) CD copy to the Chief Clerk's office. If classified, all appropriate markings and protections will apply.

(iv) If the filing cannot be transmitted electronically, the Chief Clerk will arrange for the DoD Review Team and each designated entity to either come to the Office of the Trial Judiciary to receive a copy at an agreed upon date and time or have a courier hand carry the filings for review.

e. Redacted Filings. Documents returned to the Chief Clerk approved for public release will be forwarded to the OMC webmaster without further review unless sealed by the Military Judge for a reason other than security

RULE 7

USE OF TECHNOLOGY IN THE COURTROOM

1. Definition. “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 the 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. This definition also includes other media which perform a function analogous to those items listed in the definition but not specifically listed above. The Military Judge enjoys plenary discretion to designate novel media or other technology not specifically contemplated by the rule as “Court Room Technology” for the purposes of applying this Rule of Court.

2. General Rule.

a. It is the responsibility of counsel to make sure any courtroom technology they plan to use meets all security requirements mandated by the location where the technology will be used and the classification level of information to be conveyed to the Commission.

b. 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.), unless otherwise provided by the Military Judge.

c. When used during closing arguments, any matter displayed electronically must either have been admitted into evidence, or must represent a fair comment on the evidence admitted, such as an accurate summary of data or other similar demonstrative aid. (*See* RC 7.6.).

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

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

f. Security Review of Displays.

(1) Any displays, whether technology based or not, a party or a party's witness intends to use must undergo the standard classification review before it is publically displayed. The using party is responsible for entering the item into the review process. The party will provide to the Court Information Security Officer (CISO) the item, be it PowerPoint slides, videos/video clips, or documents, not less than three (3) business days prior to the party’s travel to U.S. Naval Station Guantanamo Bay, Cuba for the hearing in the case in which the item is to be utilized. If the using party is asking for review of a

video/video clip, it may be necessary to hand-deliver it on a disk to the CISO if the file size is such that e-mailing is not achievable. If the party fails to meet this three (3) business day suspense, a proper security review may not be possible and the party may be precluded from using the material in court.

(2) In those cases where after arrival on U.S. Naval Station Guantanamo Bay, Cuba a party discovers it will be necessary to display a document, slide(s), video(s), etc., in open court, the party will immediately notify the CISO of the new requirement. This notice can be accomplished either in person or by an e-mail message. The party will submit the item to the CISO allowing no less than 48 hours (clock time) prior to the proposed usage for a proper classification review to take place.

(3) No later than one hour prior to the scheduled start of court on the day it will be presented, the presenter will provide the CISO a second copy of the material intended to be used, to ensure the material remains unchanged from what was submitted for review and approved for use.

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) In order to ensure facilities (i.e., a properly equipped courtroom) and equipment are available (e.g., where portable equipment is needed) counsel shall provide an e-mail notice of intent to use courtroom technology to the Office of Military Commission –South, Courtroom Technology section. A copy of the notice will also be sent to all parties. The notice does not need to conform to the requirements of RC 3. The Trial Judiciary does not need to receive this e-mail. The e-mail shall generally describe 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 e-mail. The e-mail should be sent with sufficient time for the Office of Military Commission –South, Courtroom Technology section to acquire any needed specialized equipment from continental United States (CONUS) based vendors.

(2) The e-mail shall indicate whether any exhibit is classified or otherwise protected.

(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.

b. Disclosure.

(1) Where a party has provided notice of intent to use courtroom technology before members, counsel should discuss the proposed use with the Military Judge at a pre-trial conference conducted IAW R.M.C. 802.

(a) The Military Judge may, by Order or 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 an opening statement or closing argument, counsel shall discuss such use with the Military Judge at an R.M.C. 802 conference attended by all parties.

(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 material either side proposes to present using courtroom technology 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 addressed in accordance with the terms of the Military Judge's order or directive 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 arguments, 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-teleconference, 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 RCs 2 and 3.

(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 its use, pursuant to the Rules for Military Commission (*See* R.M.C. 905, 906 and 914A) and governing case law.

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

(4) Counsel requesting remote live testimony must annotate their witness list to indicate which witnesses are expected to testify remotely and what method of courtroom technology will be used.

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 at an R.M.C. 802 conference prior to the hearing.

(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 an R.M.C. 802 conference prior to the hearing.

(2) **Offering/Admitting Evidence Electronically.** The procedures for the use of electronic media should be the subject of discussion with the Military Judge at an R.M.C. 802 conference prior to the hearing.

(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 R.M.C. 803 session or during trial, 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(s) 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 for the truth of the matter asserted, such as when electronic exhibits are used to refresh recollection or to impeach a witness, 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 Commission so the fact is captured in the verbatim transcript.

(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 Military 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. Counsel may request and be granted permission from the Military Judge to publish a series of admitted items without seeking permission for each item individually.

(6) Member and 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 Military 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 R.M.C. 803 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.

5. Preservation of Evidence for the Record

a. Electronic Media Not Admitted as Evidence. When electronic media is used at trial but is not admitted into evidence, such as a PowerPoint slide show used in an opening statement or closing argument, or an item used to refresh recollection, 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 the electronic media exhibit be “saved” as annotated and marked as the appropriate exhibit number and 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. Court reporters will maintain backups of all screen snapshots to ensure files are not accidentally deleted.

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 included as part of the original record of trial.

6. Use of Electronic Media in Deliberations. 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.

RULE 8

AMICUS CURIAE BRIEFS

1. Purpose. This rule establishes general procedures for submitting an *amicus curiae* brief. An *amicus* brief, which addresses an important matter not previously considered by the Commission, or addresses an important matter in a way another brief filed with the Commission does not, may be of benefit and may be requested or permitted by the Commission. The Commission is not bound to consider *amicus* briefs. An *amicus curiae* briefer is different from a Third Party Filer. Third Party Filers are addressed in RC 3.q.

2. Submitting briefs. A person individually, or on behalf of an organization or entity, may provide an *amicus* brief to the Chief Clerk. The person submitting the brief must obtain an Appellate Exhibit number in accordance with RC 3. 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 other Commission case in any capacity or has an attorney-client relationship with any person whose case has been referred to a Military Commission, or serves as counsel in habeas proceedings for any detainee, 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 in good faith as a licensed attorney believes the law is accurately stated, he has read and verified the accuracy of all points of law cited in the brief, and he is not aware of any contrary authority not cited in the brief or not substantially addressed by the contrary authority cited in the brief.

3. Format. Any *amicus* brief submitted for filing with the Chief Clerk shall comport with the following:

a. The brief must be in PDF (Adobe Acrobat) format as an attachment to the e-mail submitting the brief to the Chief Clerk in accordance with RC 3.

b. The brief will have one inch (1") margins, be filed using 8 ½" x 11" paper, double-spaced, and in 12 point font. All attachments to the brief must also have one (1") margins and be filed using 8 ½" x 11" paper. If the party filing the *amicus* brief has an attachment which does not comply with these formatting rules, the filing party, prior to submitting the brief to the Chief Clerk will coordinate with the Chief Clerk to develop a solution.

c. The brief may use URLs (web links) to cite legal authority not generally available through legal research services such as LEXIS or Westlaw. Parties submitting briefs are responsible for ensuring the URL is functional on the date of submission. The party filing the *amicus* brief will note the date and time the URL was last accessed as a footnote. The URL will not direct the reader to information which the U.S. Government may deem classified.

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

4. Action by the Chief Clerk. When received, the Chief Clerk shall process the brief in accordance with RC 3.10.

5. Consideration by a Military Commission.

a. An *amicus* brief may be considered by a Military Commission 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 filing;

(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 RCs 8.2 and 8.3.

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

6. Other matters.

a. A party may not 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 filed pleading 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.

c. Generally, a scheduled hearing or the disposition of a case will not be delayed pending action on a Motion for Leave to File an *Amicus* Brief, or a motion of *amicus curiae* to participate in a hearing, or in order to await the filing of an *amicus curiae* brief.

7. Public Access. *Amicus* briefs, 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 RC 8.4., 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 a supplemental pleading that the Military Judge consider the brief; and

(2) Stating those matters raised in the *amicus* 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 RC 3.7.d. or as otherwise ordered by the Military 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.

<p>UNITED STATES</p> <p>v.</p> <p>(Name of Accused)</p> <p>BEFORE A MILITARY COMMISSION CONVENED PURSUANT TO THE MILITARY COMMISSIONS ACT OF 2009</p>	<p>AE 123</p> <p><i>Amicus Brief filed by (person filing the brief) [on behalf of (if applicable, indicate the entity on whose behalf the brief is submitted)]</i></p> <p><u><i>(Date brief is sent to the Chief Clerk of the Trial Judiciary)</i></u></p>
---	---

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 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 am seeking to be *habeas* counsel for any such person, and I am not currently nor am seeking to be next-friend for such person. **OR,**

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.

b. I certify my good faith belief as a licensed attorney that the law in the attached brief is accurately stated, I have read and verified the accuracy of all points of law cited in the brief, and 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

******* This Page Intentionally Left Blank*******

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. The Office of the Chief Prosecutor, Office of Military Commissions is responsible for providing bailiff support.

2. Assignment, Uniform, and General Duties.

a. The bailiff works at the direction of the Military Judge to ensure the orderly conduct of the hearing / trial. When the Commission is in session, the bailiff will perform tasks assigned by the Military Judge or the Trial Judiciary staff. When the Commission is not in session, supervision of the bailiff will revert back to the parent unit / chain of command.

b. Bailiffs will be enlisted members, in the grade of E-4 or above, of any armed force.

c. Bailiffs will wear the duty uniform of their 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, controlling access to and from the deliberation room. The Trial Judiciary staff will ensure the bailiff is provided an access roster for 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.

g. Anytime witnesses are expected to testify during a session or a panel of member is present, two (2) bailiffs will be used.

******* This Page Intentionally Left Blank*******

RULE 10

COURT INFORMATION SECURITY OFFICER

- 1. Purpose.** This rule sets out the functions and responsibilities of the Court Information Security Officer. (CISO)
- 2.** The (CISO) and any Assistant Court Information Security Officers (ACISOs) are officers of the court. The *ex parte* prohibitions contained in RCs 2.2 and 3.2 apply to communications with them.
- 3.** The CISO is the principal information security advisor to the Chief Trial Judge, to the Director of the Trial Judiciary Staff, and to the sitting trial judges. The CISO and ACISO provide expertise in advising trial judges on protective orders, procedures for using classified evidence in trial proceedings, and all other relevant issues concerning information security presented to the Military Judge for determination.
- 4.** The CISO and ACISO work for the Staff Director of the Trial Judiciary.
- 5.** The CISO and ACISO serve as primary information 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 on *ex parte* communications. *See* RC 10.2.
- 6.** Under the direction of the Staff Director, the CISO and ACISO will:
 - a.** Develop, implement, and oversee the policies, instructions, procedures, control systems, and methods for classification and declassification review for all filings. (*See* RCs 3, 6, and 7).
 - b.** Ensure personnel access to controlled areas and “need to know” criteria are complied with by the Military Judges and the Trial Judiciary staff.
 - c.** Ensure the transmittal, transfer, reproduction, and destruction of classified materials is accomplished IAW established regulations.
 - d.** Work with the Office of Court Administration to make sure all filings are available for the Record of Trial.
 - e.** Ensure all material intended to be introduced/displayed in court by a party, and to authorized extensions of the court has undergone appropriate reviews by the original classification authorities prior to the materials being introduced/displayed IAW RC 6.3. and RC 7.0.

******* This Page Intentionally Left Blank*******

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 forth 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 the Original Classification Authority (OCA) review the materials for declassification. The request and results will be annotated in any motion for review.

3. Any conferences conducted IAW R.M.C. 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. The requisite security classification will be applied to the transcription.

4. In order to ensure 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. The requesting party will file an *ex parte* motion requesting judicial review with the Chief Clerk I.A.W. M.C.R.E. 505.

(1) When filing the *ex parte* motion, the requesting party will also provide an unclassified notice of the motion to the other party and to the Chief Clerk after the *ex parte* motion is accepted for filing. The unclassified notice will be the first pages of the classified *ex parte* motion. (*See* RC 3.10.a.(5) and RC 3.10.d.(3)).

(2) The requesting motion will include an unclassified version of the proposed order. (*See* RC 2.3.i).

(3) The 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 provided for review, a copy of the index will be placed in each binder.

(5) Binders will be numbered sequentially for each motion.

(6) Motions filed IAW M.C.R.E. 505g will be filed at least thirty (30) days prior to any hearing at which an Accused desires to offer the materials that are the subject of the M.C.R.E. 505 motion.

b. The requesting party will coordinate with the Trial Judiciary staff and the CISO 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 Military Judge has questions or requires changes to any summaries drafted for discovery purposes.

d. At the conclusion of the judicial review, the Military Judge may publish an order, if appropriate. An unclassified “place holder,” 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.

RULE 12

PAYMENT OF LEARNED COUNSEL

1. Purpose. Paragraph 9-1a.6.G., Regulation for Trial by Military Commission 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 Requests. Payment requests submitted for review by a Military Judge must be accompanied by:

a. Completed copies of Forms 12-1 and 12-2; and

b. An affidavit or sworn statement by the Detailed Military Defense Counsel who has appeared before the Commission setting forth that he/she has reviewed the hours and expenses submitted, and that in his/her professional estimation they are correct, proper, and are necessary to the defense of the client. If the Detailed Military Defense Counsel has not had the opportunity to appear before the Commission, a statement from the Chief Defense Counsel or the Deputy Chief Defense Counsel explaining when Detailed Military Defense Counsel will appear will accompany the Forms 12-1 and 12-2.

3. Requests for review will be submitted, with required documentation, to the Trial Judiciary at Osd.pentagon.OMC.list.trial-judiciary@mail.mil.

4. The Military Judge, after review of the submitted documentation, may validate the voucher based upon the representations of the Defense. The Military Judge may also require additional documentation of hours and fees claimed.

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.

Form 12-1

1. CIR./DIST./DIV. CODE	2. PERSON REPRESENTED	3. VOUCHER NUMBER																					
4. DIST.DKT./DEF. NUMBER																							
5. ATTORNEY'S NAME (First Name, M.I., Last Name, including any suffix) AND MAILING ADDRESS																							
6. NAME AND MAIL ADDRESS OF LAW FIRM																							
7. STAGE OF PROCEEDINGS Check the box which corresponds to the stage of the proceedings during which the work claimed at Item 15 was performed even in the work is intended to be used in connection with a later stage of the proceedings. CHECK NO MORE THAN ONE BOX. Submit a separate voucher for each state of the proceeding.																							
<table style="width:100%; border:none;"> <tr> <td style="width:33%;"><u>CAPITAL PROSECUTION</u></td> <td style="width:33%;"><u>HABEAS CORPUS</u></td> <td style="width:33%;"><u>OTHER PROCEEDING</u></td> </tr> <tr> <td>a. <input type="checkbox"/> Pre-Trial</td> <td>g. <input type="checkbox"/> Habeas Petition</td> <td>l. <input type="checkbox"/> Stay of Execution</td> </tr> <tr> <td>e. <input type="checkbox"/> Appeal</td> <td>k. <input type="checkbox"/> Petition for U.S. Supreme Court</td> <td>m. <input type="checkbox"/> Appeal of Denial to Stay</td> </tr> <tr> <td>b. <input type="checkbox"/> Trial</td> <td>h. <input type="checkbox"/> Evidentiary Hearing</td> <td>n. <input type="checkbox"/> Petition for Writ of Certiorari to the U.S. Supreme Court</td> </tr> <tr> <td>f. <input type="checkbox"/> Petition for the U.S. Supreme Court</td> <td>i. <input type="checkbox"/> Dispositive Motions</td> <td>o. <input type="checkbox"/> Other</td> </tr> <tr> <td>c. <input type="checkbox"/> Sentencing</td> <td>j. <input type="checkbox"/> Appeal</td> <td></td> </tr> <tr> <td>d. <input type="checkbox"/> Other Post Trial</td> <td></td> <td></td> </tr> </table>			<u>CAPITAL PROSECUTION</u>	<u>HABEAS CORPUS</u>	<u>OTHER PROCEEDING</u>	a. <input type="checkbox"/> Pre-Trial	g. <input type="checkbox"/> Habeas Petition	l. <input type="checkbox"/> Stay of Execution	e. <input type="checkbox"/> Appeal	k. <input type="checkbox"/> Petition for U.S. Supreme Court	m. <input type="checkbox"/> Appeal of Denial to Stay	b. <input type="checkbox"/> Trial	h. <input type="checkbox"/> Evidentiary Hearing	n. <input type="checkbox"/> Petition for Writ of Certiorari to the U.S. Supreme Court	f. <input type="checkbox"/> Petition for the U.S. Supreme Court	i. <input type="checkbox"/> Dispositive Motions	o. <input type="checkbox"/> Other	c. <input type="checkbox"/> Sentencing	j. <input type="checkbox"/> Appeal		d. <input type="checkbox"/> Other Post Trial		
<u>CAPITAL PROSECUTION</u>	<u>HABEAS CORPUS</u>	<u>OTHER PROCEEDING</u>																					
a. <input type="checkbox"/> Pre-Trial	g. <input type="checkbox"/> Habeas Petition	l. <input type="checkbox"/> Stay of Execution																					
e. <input type="checkbox"/> Appeal	k. <input type="checkbox"/> Petition for U.S. Supreme Court	m. <input type="checkbox"/> Appeal of Denial to Stay																					
b. <input type="checkbox"/> Trial	h. <input type="checkbox"/> Evidentiary Hearing	n. <input type="checkbox"/> Petition for Writ of Certiorari to the U.S. Supreme Court																					
f. <input type="checkbox"/> Petition for the U.S. Supreme Court	i. <input type="checkbox"/> Dispositive Motions	o. <input type="checkbox"/> Other																					
c. <input type="checkbox"/> Sentencing	j. <input type="checkbox"/> Appeal																						
d. <input type="checkbox"/> Other Post Trial																							
HOURS AND COMPENSATION CLAIMED																							
8. CATEGORIES (Attach itemization of services with dates)	HOURS CLAIMED	TOTAL AMOUNT CLAIMED																					
a. In-Court Hearings (Rate per Hour = \$ _____)																							
b. Interviews and Conferences																							
c. Witness Interviews																							
d. Consultation with Investigators and Experts																							
e. Obtaining and Reviewing the Court Record																							
f. Obtaining and Reviewing Documents and Evidence																							
g. Consulting with Expert Counsel																							
h. Legal Research and Writing																							
i. Travel																							
j. Other (Specify on additional sheets)																							
Totals: Categories b thru j (Rate per hour = \$ _____)																							
CLAIM FOR TRAVEL AND EXPENSES (Attach Itemization of expenses with dates)																							
9. Travel Expenses (lodging, parking, meals, mileage, etc.)																							
Other Expenses (other than expert, transcripts, etc.)																							
GRAND TOTALS (CLAIMED AND ADJUSTED):																							
I certify that the foregoing is a true and accurate statement of the hours expended and expenses incurred during the dates covered by this billing.																							
FROM _____ TO _____																							
_____ Attorney		_____ Date																					
I swear that I have reviewed the hours and expenses and that in my professional estimation they are correct, and are proper and necessary for the defense of the client.																							
_____ Detailed Defense Counsel		_____ Date																					

