

## **RCM Suggestions**

Current language in normal font, *suggested language in red italic*

### **Rule 802. Conferences**

(a) *In general.* After referral, the military judge may, upon request of any party, *any counsel representing a witness*, or *sua sponte*, order one or more conferences with the parties *and any counsel representing a witness as described in subsection (g)* to consider such matters as will promote a fair and expeditious trial.

...

*(g) Rights of witnesses represented by counsel. Counsel representing a witness shall be included in any conference held under subsection (a) in which matters impacting that witness' rights under statute or these Rules are discussed. Counsel representing a witness may be included in any other conference held under subsection (a) at the discretion of the military judge.*

### **Rule 905. Motions generally.**

[...]

(i) Service. Written motions shall be served on all other parties *and any named victim or victim's counsel, at the time service is made upon the other parties*. Unless otherwise directed by the military judges, the service shall be made upon counsel for each party.

### **Rule 1001. Presentencing procedure**

(a) *In general.*

(1) *Procedure.* After findings of guilty have been announced, the *prosecution, defense and victim, personally or through counsel*, may present matter pursuant to this rule to aid the court-martial in determining an appropriate sentence. Such matter shall ordinarily be presented in the following sequence—

(A) Presentation by trial counsel of:

- (i) service data relating to the accused taken from the charge sheet;
- (ii) personal data relating to the accused and of the character of the accused's prior service as reflected in the personnel records of the accused;
- (iii) evidence of prior convictions, military or civilian;
- (iv) evidence of aggravation; and
- (v) evidence of rehabilitative potential.

(B) Presentation by the defense of evidence in extenuation or mitigation or both.

*(C) Presentation by the victim, personally or through counsel, of a statement in aggravation or mitigation*

- (D) Rebuttal.
- (E) Argument by the trial counsel on sentence.
- (F) Argument by the defense counsel on sentence.
- (G) Rebuttal arguments in the discretion of the military judge.

(2) *Adjudging sentence.* (NO CHANGE)

(3) *Advice and inquiry.*

(A) The military judge shall personally inform the accused of the right to present matters in extenuation and mitigation, including the right to make a sworn or unsworn statement or to remain silent, and shall ask whether the accused chooses to exercise those rights.

*(B) The military judge shall personally, or through the victim's counsel, inform the victim of the right to make a sworn or unsworn statement, personally or through counsel, either written, oral, or both, and shall ask whether the victim chooses to exercise this right.*

(b) *Matter to be presented by the prosecution* (NO CHANGE)

(c) *Matter to be presented by the defense* (NO CHANGE)

*(d) Matter to be presented by the victim.*

*(1) In general. The victim may testify, make an unsworn statement, or both, in aggravation, in mitigation, to rebut matters presented by the defense, or for all three purposes whether or not the victim testified prior to findings. The victim must limit such testimony or statement to any one or more of the specifications of which the accused has been found guilty.*

*(2) Testimony of the victim. The victim may give sworn oral testimony and shall be subject to cross-examination concerning it by the trial or defense counsel or examination on it by the court-martial, or both.*

*(3) Unsworn statement. The victim, personally or through counsel, may make an unsworn statement and may not be cross-examined by the defense or trial counsel upon it or examined upon it by the court-martial. The prosecution or defense may, however, rebut any statements of facts therein. The unsworn statement may be oral, written, or both, and may be made by the victim, by counsel, or both. The written statement, sworn testimony, or unsworn oral presentation of the victim may contain any relevant information including*

*(A) an explanation of the nature and extent of physical, psychological, or emotional harm or trauma suffered by the victim;*

*(B) an explanation of the extent of economic loss or property damage suffered by the victim;*

*(C) a recommendation by the victim of an appropriate sentence.*

### ***Discussion***

*An unsworn statement ordinarily should not include what is properly argument, but inclusion of such matter by the victim or counsel when personally making an oral statement normally should not be grounds for stopping the statement. A victim, personally or through counsel, may submit*

*to the sentencing court a written statement that the victim believes is relevant to the sentencing decision and may give sworn testimony or make an unsworn oral presentation to the court at the sentencing hearing. If there are numerous victims, the court may reasonably limit the number of victims who may give sworn testimony or make an unsworn oral presentation during the hearing. When the victim does not submit a statement, give testimony, or make an oral presentation, the victim's counsel may submit a written statement or make an unsworn oral presentation at the sentencing hearing on behalf of the victim.*

*Only one victim impact statement may be made per victim, unless the court grants leave. No implication is to be drawn from the absence of a victim impact statement for a victim. All or part of a victim impact statement for a victim may be read to the court by or on behalf of the victim. A victim impact statement is not to be read to the court, or otherwise taken into account, to the extent that it is offensive, threatening, intimidating or harassing.*

### **Rule XXXX. Enforcement of Victims' Rights**

*(1) If a person fails to perform duties so that the rights of the victim under Article 6(b), UCMJ, are violated, the victim of a crime or representative of a victim of a crime, including any victims' attorney may:*

*(a) bring an action for declaratory relief or for a writ of mandamus defining or enforcing the rights of victims and the obligations of the government under Article 6(b), UCMJ;*

*(b) petition to file an amicus brief in any court in any case affecting crime victims; and*

*(c) after giving notice to the government and the defense, seek an appropriate remedy for a violation of a victim's right from the military judge assigned to the case involving the issue.*

*(2) Adverse rulings on these actions or on a motion or request brought by a victim of a crime or a representative of a victim of a crime may be appealed under the rules governing appellate actions.*

*(3) An appellate court shall review all properly presented issues, including issues that are capable of repetition but would otherwise evade review.*

### **MRE Suggestions**

#### **Rule 412. Sex offense cases; relevance of alleged victim's sexual behavior or sexual predisposition**

[...]

*(c) Procedure to determine admissibility.*

[...]

*(2) Before admitting evidence under this rule, the military judge must conduct a hearing, which shall be closed. At this hearing, the parties may call witnesses, including the alleged*

victim, and offer relevant evidence. The alleged victim must be afforded a reasonable opportunity to attend and be heard, *personally or through counsel, separate from any testimony the victim may give. The right to be heard shall include, but is not limited to: (1) the right to be represented by counsel; (2) the right to present evidence, including calling witnesses; and (3) the right to present oral and written argument personally, through counsel, or both.*<sup>1</sup> In a case before a court-martial...

#### **Rule 615. Exclusion of witnesses**

[...]

*(f) Before excluding any witness, a military judge shall make specific findings on the record as to the necessity for the exclusion. If the witness is the victim of an offense, the military judge must find by clear and convincing evidence that the victim's testimony would be materially altered if the victim heard other testimony.*

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<sup>1</sup> This language could be mirrored in MRE 513(substituting “patient” for “victim”) and MRE 514.