

JPP Staff Document Combining

- (1) The Department of Defense Joint Service Committee on Military Justice's (JSC) Proposed Amendments to Rule for Courts-Martial (R.C.M.) 1103A,
- (2) The Current Version of R.C.M. 1103A, and
- (3) The Service Courts of Criminal Appeals Rules Governing Access to Sealed Materials

**U.S. Department of Defense Joint Service Committee on Military Justice's
Proposed Amendments to Rule for Courts-Martial 1103A**

R.C.M. 1103A is amended to read as follows:

(a) *In general.* If the report of preliminary hearing or record of trial contains exhibits, proceedings, or other materials ordered sealed by the preliminary hearing officer or military judge, counsel for the government or trial counsel shall cause such materials to be sealed so as to prevent unauthorized examination or disclosure. Counsel for the government or trial counsel shall ensure that such materials are properly marked, including an annotation that the material was sealed by order of the preliminary hearing officer or military judge, and inserted at the appropriate place in the original record of trial. Copies of the report of preliminary hearing or record of trial shall contain appropriate annotations that materials were sealed by order of the preliminary hearing officer or military judge and have been inserted in the report of preliminary hearing or original record of trial. This Rule shall be implemented in a manner consistent with Executive Order 13526, concerning classified national security information.

(b) *Examination and disclosure of sealed materials.* Except as provided in the following subsections to this rule, sealed materials may not be examined or disclosed.

(1) *Prior to referral.* Prior to referral of charges, the following individuals may examine and disclose sealed materials only if necessary for proper fulfillment of their responsibilities under the Code, this Manual, governing directives, instructions, regulations, applicable rules for practice and procedure, or rules of professional responsibility: The judge advocate advising the convening authority who directed the Article 32 preliminary hearing; the convening authority who directed the Article 32 preliminary hearing; the staff judge advocate to the general court-martial convening authority; and the general court-martial convening authority.

(2) *Referral through authentication.* Prior to authentication of the record by the military judge, sealed materials may not be examined or disclosed in the absence of an order from the military judge based upon good cause.

(3) *Authentication through action.* After authentication and prior to disposition of the record of trial pursuant to R.C.M. 1111, sealed materials may not be examined or disclosed in the absence of an order from the military judge upon a showing of good cause at a post-trial Article 39(a) session directed by the convening authority.

(4) *After action.*

(A) *Examination by reviewing and appellate authorities.* Reviewing and appellate authorities may examine sealed materials when those authorities determine that examination is reasonably necessary to a proper fulfillment of their responsibilities under the Code, this Manual, governing directives, instructions, regulations, applicable rules for practice and procedure, or rules of professional responsibility.

(B) *Examination by appellate counsel.* Appellate counsel may examine sealed materials subject to the following procedures:

(i) *Sealed materials released to trial government or defense counsel.* Materials presented or reviewed at trial and subsequently sealed, as well as materials

reviewed *in camera*, released to trial government or defense counsel, and subsequently sealed, may be examined by appellate counsel upon a colorable showing to the reviewing or appellate authority that examination is reasonably necessary to a proper fulfillment of their responsibilities under the Code, this Manual, governing directives, instructions, regulations, applicable rules for practice and procedure, or rules of professional responsibility.

(ii) *Sealed materials reviewed in camera but not released to trial government or defense counsel.* Materials reviewed *in camera* by a military judge, not released to trial government or defense counsel, and subsequently sealed may be examined by reviewing or appellate authorities. After examination of said materials, the reviewing or appellate authority may permit examination by appellate counsel for good cause.

(C) *Disclosure.* Appellate counsel shall not disclose sealed material in the absence of:

(i) Prior authorization of the Judge Advocate General in the case of review under R.C.M. 1201(b) or 1112; or

(ii) Prior authorization of the appellate court before which a case is pending review under R.C.M. 1203 and 1204.

(D) For purposes of this rule, reviewing and appellate authorities are limited to:

(i) Judge advocates reviewing records pursuant to R.C.M. 1112;

(ii) Officers and attorneys in the office of the Judge Advocate General reviewing records pursuant to R.C.M. 1201(b);

(iii) Appellate judges of the Courts of Criminal Appeals and their professional staffs;

(iv) The judges of the United States Court of Appeals for the Armed Forces and their professional staffs;

(v) The Justices of the United States Supreme Court and their professional staffs; and

(vi) Any other court of competent jurisdiction.

(5) *Examination of sealed materials.* For purposes of this rule, “examination” includes reading, inspecting, and viewing.

(6) *Disclosure of sealed materials.* For purposes of this rule, “disclosure” includes photocopying, photographing, disseminating, releasing, manipulating, or communicating the contents of sealed materials in any way.”

Current Version of Rule for Courts-Martial 1103A

(a) *In general.* If the report of preliminary hearing or record of trial contains exhibits, proceedings, or other matter ordered sealed by the preliminary hearing officer or military judge, counsel for the government or trial counsel shall cause such materials to be sealed so as to prevent unauthorized viewing or disclosure. Counsel for the government or trial counsel shall ensure that such materials are properly marked, including an annotation that the material was sealed by order of the preliminary hearing officer or military judge, and inserted at the appropriate place in the original record of trial. Copies of the report of preliminary hearing or record of trial shall contain appropriate annotations that matters were sealed by order of the preliminary hearing officer or military judge and have been inserted in the report of preliminary hearing or original record of trial. This Rule shall be implemented in a manner consistent with Executive Order 13526, concerning classified national security information.

(b) *Examination of sealed exhibits and proceedings.* Except as provided in the following subsections to this rule, sealed exhibits may not be examined.

(1) *Prior to referral.* The following individuals may examine sealed materials only if necessary for proper fulfillment of their responsibilities under the UCMJ, the MCM, governing directives, instructions, regulations, applicable rules for practice and procedure, or rules of professional responsibility: the judge advocate advising the convening authority who directed the Article 32 preliminary hearing; the convening authority who directed the Article 32 preliminary hearing; the staff judge advocate to the general court-martial convening authority; and the general court-martial convening authority.

(2) *Prior to authentication.* Prior to authentication of the record by the military judge, sealed materials may not be examined in the absence of an order from the military judge based on good cause shown.

(3) *Authentication through action.* After authentication and prior to disposition of the record of trial pursuant to Rule for Courts-Martial 1111, sealed materials may not be examined in the absence of an order from the military judge upon a showing of good cause at a post-trial Article 39a session directed by the Convening Authority.

(4) *Reviewing and appellate authorities.*

(A) Reviewing and appellate authorities may examine sealed matters when those authorities determine that such action is reasonably necessary to a proper fulfillment of their responsibilities under the Uniform Code of Military Justice, the Manual for Courts-Martial, governing directives, instructions, regulations, applicable rules for practice and procedure, or rules of professional responsibility.

(B) Reviewing and appellate authorities shall not, however, disclose sealed matter or information in the absence of:

(i) Prior authorization of the Judge Advocate General in the case of review under Rule for Courts-Martial 1201(b); or

(ii) Prior authorization of the appellate court before which a case is pending review under Rules for Courts-Martial 1203 and 1204.

(C) In those cases in which review is sought or pending before the United States Supreme Court, authorization to disclose sealed materials or information shall be obtained under that Court's rules of practice and procedure.

(D) The authorizing officials in paragraph (B)(ii) above may place conditions on authorized disclosures in order to minimize the disclosure.

(E) For purposes of this rule, reviewing and appellate authorities are limited to:

(i) Judge advocates reviewing records pursuant to Rule for Courts-Martial 1112;

(ii) Officers and attorneys in the office of the Judge Advocate General reviewing records pursuant to Rule for Courts-Martial 1201(b);

(iii) Appellate government counsel;

(iv) Appellate defense counsel;

(v) Appellate judges of the Courts of Criminal Appeals and their professional staffs;

(vi) The judges of the United States Court of Appeals for the Armed Forces and their professional staffs;

(vii) The Justices of the United States Supreme Court and their professional staffs; and

(viii) Any other court of competent jurisdiction.

(5) *Examination of sealed matters.* For the purpose of this rule, "examination" includes reading, viewing, photocopying, photographing, disclosing, or manipulating the sealed matters in any way.

Service Courts of Criminal Appeals: Rules Governing Access to Sealed Materials

Army Court of Criminal Appeals

Rule 30.4: *Sealed Records*. Attorneys of record in appellate cases may access the sealed records of an original record of trial. Attorneys will request permission of the Clerk and coordinate review of sealed records with the Office of the Clerk of Court. Attorneys of record are responsible to return the sealed record matters, completely and without alteration, to the Clerk of Court's possession. Photocopies of sealed records are prohibited.

Navy-Marine Corps Court of Criminal Appeals

Rule 1.3(c): *Requests to Examine Records of Trial and Other Official Documents*. Requests by appellate counsel to examine unclassified original records of trial and other official documents (unprotected by judicial privilege) shall be made to the responsible panel secretary. Examination shall be done in the reception area in Suite 320 or space designated by the Court's staff. Removal of records of trial from the Court's chambers is discouraged. If removal is considered necessary, approval by the senior judge of the panel to which the case is assigned, or his/her designee, is required. Records of trial shall be logged out for no more than one workday.

Note: The Navy-Marine Corps Court of Criminal Appeals does not have a specific rule on appellate counsel review of sealed materials in the record of trial.

Air Force Court of Criminal Appeals

Rule 23.3(f): *Motion to Review Sealed Records*. Counsel shall submit a motion to the Court requesting authorization to review sealed exhibits. Counsel must show cause for such a request. A motion to review sealed records shall be presented as a consent motion whenever feasible. The Court's administrative and paralegal staff maintains responsibility for resealing all sealed exhibits.

Coast Guard Court of Criminal Appeals

The Coast Guard Court of Criminal Appeals does not have a specific rule on appellate counsel review of sealed materials in the record of trial.