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UNIFORM RULES OF PRACTICE
FOR
U.S. NAVY-MARINE CORPS TRIAL JUDICIARY

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PREAMBLE

These Uniform Rules govern courts-martial presided over by a military judge. They are an Appendix to the Navy-Marine Corps Trial Judiciary Standard Operating Procedures Manual 5813.4H and supersede all rules previously published as the Uniform Rules of Practice before Navy-Marine Corps Courts-Martial.

There may be local rules in each judicial circuit that further implement these Uniform Rules. Local rules must be consistent with these Uniform Rules.

Rule 1: APPLICABILITY

Rule 1.1: These Uniform rules apply to the trial of all general and special courts-martial in which the accused is a member of the naval service. Counsel, as officers of the court, court reporters, clerks of court, and bailiffs are required to follow these and any local rules.

Rule 1.2: All parties to the court-martial must comply with these Uniform Rules. In the case of noncompliance with these rules or local rules, or orders of the court, the military judge may, as appropriate, issue an admonishment on the record, issue appropriate court orders, issue a report to a military counsel's commanding officer or officer-in-charge, or forward information about the matter to a civilian or military counsel's bar. In addition, the court may forward a complaint for processing in accordance with R.C.M. 109, proceed with action for contempt under R.C.M. 809 and Article 48 of the Uniform Code of Military Justice, or fashion any other appropriate remedy.

Rule 2: PURPOSE

Rule 2: These Uniform Rules are intended to facilitate the orderly administration of military justice.

Rule 3: CONSTRUCTION

Rule 3.1: These Uniform Rules will be construed to ensure simplicity, fairness, and efficiency in the timely disposition of courts-martial.

Rule 3.2: If any rule herein conflicts with case law, statute, the Manual for Courts-Martial, any constitutional provision, or any service regulation, then that rule must be read in accordance with the law.

Rule 4: REFERRED CHARGES

Rule 4.1: After the referral of charges, the trial counsel must provide the responsible judicial circuit with a copy of those charges, along with the appropriate convening order, as soon as possible.

Rule 4.2: Trial counsel must immediately notify the Clerk of Court and the assigned military judge if referred charges have been withdrawn.

Rule 5: CIVILIAN COUNSEL

Rule 5.1: If an accused retains civilian counsel, detailed defense counsel must furnish civilian counsel with a copy of all pertinent rules of court. Prior to appearing in Court, civilian counsel must cause to be served on the clerk of court a written notice of appearance. This notice will be in the form of a pleading and must contain the following: name of the accused, counsel's name, office address, telephone numbers, and jurisdiction(s) where the counsel is presently admitted to practice. The filing of any pleading relative to a case that contains the signature of counsel constitutes notice of appearance of such counsel.

Rule 5.2: Detailed defense counsel must inform the civilian counsel of the rules of Professional Conduct of Attorneys Practicing Under The Cognizance and Supervision of the Judge Advocate General (JAGINST 5803.3 series).

Rule 5.3: Once civilian counsel notifies the clerk of court or the military judge of representation of the accused on the referred charges he or she may not withdraw from such representation, without the permission of the military judge.

Rule 6: DOCKETING

Rule 6.1: The circuit judge of each judicial circuit will

establish and promulgate docketing procedures for cases within their circuit. These procedures must contain features that ensure positive control over the docketing and processing of courts-martial.

Rule 6.2: The circuit military judge will publish, on a weekly basis, the circuit docket in accordance with OJAG standard operating procedures.

Rule 7: PERSONALLY IDENTIFYING INFORMATION (PII)

Rule 7.1: Use of Personally Identifying Information (PII) must be eliminated or minimized to the maximum extent possible in all pleadings and documents.

Rule 7.2: PII must be redacted in all documents, pleadings, discovery, etc. that are electronically transmitted. Unless encrypted, medical and psychiatric records must never be electronically transferred.

Rule 7.3: PII and the names of all alleged victim(s), must be minimized to the maximum extent possible in all pleadings. With the exception of the charge sheet, and during court proceedings, all alleged victim(s), will only be identified by their initials, and rank if a service-member.

Rule 7.4: All Marine judge advocates will comply with MARADMIN Active Number: 181/10 R 291951Z MAR 10 and all active duty Counsel will comply with SECNAVINST 5211.5E dtd 28 Dec 2005 (5211.5E series).

Rule 8: CONFERENCES & COMMUNICATIONS WITH THE MILITARY JUDGE

Rule 8.1: Conferences between the military judge and trial and defense counsel are authorized by R.C.M. 802. The presence of the accused is neither required nor prohibited. Such conferences will not be used to litigate or decide contested issues. The military judge must summarize all R.C.M. 802 conferences for the record at the next 39 (a) session of the court.

Rule 8.2: *Ex parte* communications with a military judge concerning a case that is pending before that military judge are prohibited, except for routine administrative matters or as provided by law.

Rule 8.3: Routine administrative matters include, but are not limited to, docketing and logistic matters (e.g. pleas, forum, and number of, or difficulty with, witnesses that affect the time, location, and length of court sessions).

Rule 8.4: Military judges may, at their discretion, conduct critiques or offer suggestions regarding counsels' performance in courts-martial to improve the administration of justice. At the discretion of the military judge, these sessions may be conducted *ex parte*, or jointly.

Rule 9: DISCOVERY

Rule 9.1: Counsel will promptly comply with military law regarding discovery. Counsel will not make a frivolous discovery request or fail to make a diligent effort to comply with a legal and proper discovery request by an opposing party.

Rule 9.2: Notwithstanding "open discovery" in the military, discovery requests should be as specific as possible to avoid misunderstanding and to assist in quickly obtaining the desired information.

Rule 10: MOTIONS

Rule 10.1: As early as possible, counsel will advise the military judge and opposing counsel of the general nature of any motions, along with applicable citations.

Rule 10.2: When necessary and not otherwise prohibited by the military judge, motions and other documents may be filed with the court and served on opposing counsel by facsimile (fax) or electronic transmission. Transmitting counsel will ensure that such documents are actually received. Moreover, whenever a facsimile or electronic mail transmission is used to communicate with the court or with opposing counsel, the original document or copy, as appropriate, must be maintained by the originator and provided to the court reporter for inclusion in the record of trial.

Rule 10.3.A: MOTIONS

- 10.3.A.1:** Each motion must include or be accompanied by a statement of the specific points of law and authority that support the motion, including where appropriate a concise statement of facts, which party bears the burden of production and persuasion and whether oral argument is requested.
- 10.3.A.2:** Within 7 days of the date of service or at such other time as the Court may direct, the opposing counsel must serve and file a memorandum of points and authorities in opposition to the motion. If such a response is not filed within the prescribed time, the Court may treat the motion as conceded.
- 10.3.A.3:** Each motion that requires an order must be accompanied by a proposed order.
- 10.3.A.4:** Within 5 days after service of the motion in Opposition, or at such other time as the Court may Direct, the moving party may serve and file a response.
- Rule 10.4:** When essential findings are required on a motion, the military judge must enter those findings on the record contemporaneously with the ruling.
- Rule 10.5:** If the military judge rules adversely to the government on a significant matter, and the government is contemplating an appeal, the military judge must state on the record the time of the ruling, the time the 72-hour period will run, and how and where the government may provide the military judge with written notice of appeal.
- Rule 10.6:** Unless good cause is shown, no motions will be considered on the day of trial.

Rule 11: CONTINUANCES

- Rule 11.1:** Continuance requests must be made by written motion outside of court or, if presented during an Article 39(a) session, they may be oral. The motion must state the specific reason for the request and the earliest possible trial date. Counsel must be prepared to fully justify each continuance request.
- Rule 11.2:** All motions to continue must include the number of

previous continuances and who sought the continuances, whether opposing counsel consents, the trial date, and dates counsel and witnesses are available for trial. The proposed order must contain language for both granting and denying the motion, a box to check if the motion is granted or denied, and a place for the new trial date. If the motion is made after the last Article 39a session before trial, the motion will not be granted except under extraordinary circumstances where there is no alternative means of preventing a substantial injustice.

Rule 11.3: If the accused is in pretrial confinement, defense motions for continuances and concurrences in government motions for continuances must be signed by the accused and defense counsel.

Rule 12: SITUS

Rule 12: Subject to R.C.M. 504(d)(1), the military judge will designate the situs of the trial.

Rule 13: COURTROOM SECURITY

Rule 13.1: The presiding military judge may prescribe rules in any case to establish courtroom security as necessary.

Rule 13.2: The government is responsible for ensuring that the courtroom facility is in compliance with all applicable orders and directives governing courtroom safety requirements. Notwithstanding such orders and directives, counsel must inform the military judge whenever they believe extra precautions and/or security measures should be implemented.

Rule 13.3: The circuit judge will annually review the security plan with the courtroom facilities within the circuit with the government representative responsible for courtroom security at each installation.

Rule 13.4: The wearing or carrying of weapons in the courtroom is prohibited, except when authorized by the detailed military judge.

Rule 14: UNIFORMS

Rule 14.1: The military judge will designate the proper uniform and civilian attire to be worn by all persons required to be present. However, when court is convened in a courtroom facility or non-operational setting, all parties, counsel, and the court will appear in the Uniform of the Day. Utility uniforms will not be designated as courtroom uniforms unless the court is convened at sea or in an operational setting.

Rule 14.2: The accused must wear the insignia of grade and may wear any decorations, emblems, or ribbons to which entitled. The accused and defense counsel are responsible for ensuring that the accused is properly attired; however, upon request, the accused's commander must render such assistance as may be necessary to ensure proper uniform. When the accused is in pretrial confinement, the Government is responsible for ensuring the accused is in the appropriate uniform. Confinement uniforms are not appropriate courtroom attire.

Rule 14.3: Physical restraints will not be imposed on the accused or any witness during open sessions of the court-martial unless prescribed by the military judge. No accused or witness in open court will wear any tag or symbol that identifies the as being in custody.

Rule 15: SPECTATORS

Rule 15.1: The military judge is responsible for the control of court-martial spectators and the courtroom security in general. The military judge may issue such orders as deemed just, to ensure a fair trial.

Rule 15.2: Spectators are encouraged to attend any sessions of the court-martial, unless otherwise determined by the military judge. See R.C.M. 806.

Rule 15.3: Counsel must ensure that the military judge is advised if there is a likelihood that any spectator is to be called as a witness.

Rule 15.4: Spectators are forbidden to demonstrate agreement or

disagreement, either verbally or by non-verbal conduct (e.g. shaking or nodding of head), with testimony or other trial procedures. Spectators who violate this rule may be excluded from the courtroom or, in aggravated cases, held in contempt. Counsel are responsible for advising their clients, their witnesses, and friends of the accused and counsel, of the decorum required in the courtroom.

Rule 16: PUNCTUALITY

Rule 16: Punctuality in all court matters is required of all parties and reflects preparation and professionalism. When a party is unavoidably late, or proceedings will be delayed, the judge will be notified immediately and provided an explanation.

Note: It is better to be 15 minutes early than one minute late.

Rule 17: BAILIFF

Rule 17: If practicable, a bailiff will be present at every court-martial. Trial counsel must ensure bailiffs are provided a copy of attachment (1) and are thoroughly briefed on their duties.

Rule 18: GUARDS

Rule 18: When appropriate, a guard or guards will be detailed to ensure proper custody of the accused and to assist the court in preserving order and decorum.

Rule 19: COURT REPORTERS

Rule 19.1: Trial counsel must ensure that the court reporter has been sworn.

Rule 19.2: Each time the court convenes or reconvenes, the reporter must note in the record the presence or absence of the parties and the time at which the court convenes or reconvenes. The court reporter must note the time at which recesses are taken and the time of adjournment.

Rule 19.3: Court reporters must ensure that the name and rank

of all military parties to the trial and the name and address of civilian counsel are properly noted in the record of trial.

Rule 19.4: Court reporters will maintain a complete list of all exhibits marked and those admitted.

Rule 20: ENTRY AND DEPARTURE OF MILITARY JUDGE

Rule 20: All persons in the courtroom, except the court reporter, without regard to rank or grade, must rise when the military judge enters or leaves the courtroom.

Rule 21: ENTRY AND DEPARTURE OF MEMBERS

Rule 21: All persons, other than the military judge and court reporter, must rise when the members enter and leave the courtroom.

Rule 22: VOIR DIRE

Rule 22.1: In accordance with R.C.M. 912(d), the military judge determines the procedure for conducting voir dire. Voir dire examination shall be limited to matters relevant to determining whether to remove a member for cause and to determine the member's fairness and impartiality. The military judge shall ensure that the privacy of the prospective members is reasonably protected. All group voir dire questions must be submitted in writing to the judge prior to trial.

Rule 22.2: The member's questionnaires shall be phrased and organized so as to facilitate an accurate screening and shall request only that information essential for: (1) determining whether a person meets the Article 25 criteria for eligibility and (2) providing basic background information ordinarily sought during voir dire examination.

Rule 22.3: Before voir dire, counsel will provide the military judge with a joint list of the full name and unit or city and state of residence of all witnesses. The list must include witnesses whose testimony will be presented by stipulation.

Rule 23: PROHIBITED ITEMS IN COURTROOM

Rule 23.1: Eating, chewing gum, or using tobacco products are not permitted in the courtroom. Weapons and objects that may be used as weapons, including potential exhibits, are not permitted in the courtroom without specific authorization of the military judge.

Rule 23.2: Unless specifically authorized by the military judge, and except for the equipment required by the court reporter, NO ELECTRONIC DEVICES CAPABLE OF video and/or audio recording (e.g. LAP TOPS/CELL PHONES/TABLETS/ etc...) are permitted in the courtroom.

Rule 23.3: Cellular or mobile telephones are not permitted in the courtroom unless otherwise permitted by the military judge.

Rule 24: COUNSEL DECORUM

Rule 24.1: Counsels' decorum in the courtroom must be conducive to a dignified judicial atmosphere.

Rule 24.2: Counsel must stand when addressing the bench or members and when examining a witness, unless otherwise authorized by the military judge.

Rule 24.3: Unless specifically authorized by the military judge, only one counsel per side may question a witness, address the court on a motion or issue, or make opening statements or closing arguments.

Rule 25: COUNSEL CONDUCT

Rule 25.1: Counsel must not, during trial, state or allude to any matter that counsel has no reasonable basis to believe is relevant to the case or that is not supported by admissible evidence.

Rule 25.2: Counsel must not, during trial, assert any personal knowledge of the facts in issue, except if testifying as a witness.

Rule 25.3: Counsel, in presenting a matter to the court-martial, must disclose legal authority in the controlling jurisdiction known to counsel to be directly contrary to their position and which is not disclosed by opposing counsel.

Rule 26: WITNESSES

- Rule 26.1:** Trial counsel must swear each witness called to testify and must ensure that the military witness' name, grade, and military organization, or civilian witness' name and city and state of residence are announced in court.
- Rule 26.2:** Counsel must ensure that their witnesses understand the physical arrangements of the courtroom, where they should go, and how they must conduct themselves.
- Rule 26.3:** Counsel must ensure that their witnesses will be immediately available when called to testify.
- Rule 26.4:** Counsel will question witnesses from a reasonable distance. Before approaching the witness, counsel must obtain permission of the military judge. Counsel should not position themselves so as to block the view of the military judge, members, or counsel.

Rule 27: OBJECTIONS

- Rule 27:** Counsel must succinctly state the nature and basis of an objection. After the military judge rules on an objection, counsel may only make comment or further argument with permission from the military judge.

Rule 28: STIPULATIONS

- Rule 28.1:** If a motion, or any other issue, involves only a dispute between the parties as to the law or any ultimate question of fact, and does not involve the underlying facts, counsel will consider entering into stipulations of fact or of testimony covering those matters.
- Rule 28.2:** Stipulations must be in writing, and will be prepared prior to trial. Oral stipulations, when permitted by the military judge, must be read into the record and agreed to by counsel and the accused.
- Rule 28.3:** Stipulations may be made for the limited purpose of

obtaining a ruling on a motion or other pleading.

Rule 28.4: Written stipulations of fact must be marked as a trial exhibit and, in a members trial, read to the members. Stipulations of fact may be taken into the deliberation room by the members. Written stipulations of expected testimony will be marked as appellate exhibits and, in a members trial, read to the members. Stipulations of testimony may not be taken into the deliberation room.

Rule 29: OFFERS OF PROOF

Rule 29.1: When offers of proof are expected to be presented on motions or objections, counsel should inform opposing counsel and attempt to reach agreement on the content of the offer of proof before presentation.

Rule 29.2: Absent a stipulation, an offer of proof is not evidence upon which a finding of fact may be based.

Rule 30: JUDICIAL NOTICE

Rule 30: Counsel will advise the military judge and opposing counsel, as soon as possible and preferably before trial, of any intended requests for judicial notice.

Rule 31: EXHIBITS

Rule 31.1: Prosecution exhibits will be identified by Arabic numerals. Defense exhibits will be identified by capital letters. Appellate exhibits will be identified by Roman numerals.

Rule 31.2: If an exhibit is not compatible for inclusion in the record of trial, counsel must prepare an appropriate substitute for inclusion in the record.

Rule 31.3: All audio recordings and video recordings that contain audio portions must be transcribed, before trial, by the party offering such a recording, unless authorized by the military judge. If a portion is inaudible, the transcript must so state. A copy of the transcript will be served on opposing counsel before trial in sufficient time to allow for ascertaining the accuracy of the transcript. The

recording or a copy thereof will be made available to opposing counsel upon request. The transcript and recording must be marked as exhibits.

Rule 31.4: For those circuits in which electronic media, or so-called "smart courtroom" technology, is installed, additional rules or protocols may be necessary for the handling and presentation of exhibits. Attachment 2 contains a proposed set of rules that may be used or modified by local circuits.

Rule 32: VTC REQUIREMENTS

Rule 32.1: Consistent with the Rules for Courts-Martial and applicable DoN instructions, Video Teleconferencing (VTC) may be used to conduct Article 39(a) sessions for arraignments, motions practice and any other administrative sessions.

Rule 32.2: The Government will ensure that all sites meet the necessary security requirements.

Rule 32.3: VTC sessions are open to the public at the site designated by the presiding military judge consistent with the 6th Amendment, R.C.M. 504(d) (1) and R.C.M. 804.

Rule 33: FINDINGS & SENTENCING INSTRUCTIONS

Rule 33: Trial and defense counsel will make appropriate recommendations as to specific instructions for the military judge to provide to the members. Requests for special instructions, modifications to standard instructions, or a summarization of the evidence, must be submitted in writing and in a timely manner to the military judge and opposing counsel.

Rule 34: RECORD OF TRIAL

Rule 34.1: A complete and accurate record of the proceedings is required to protect the rights of all parties. During the course of the trial, counsel must ensure that uncommon names, places, and things are spelled out on the record, that witnesses respond verbally, and that descriptions of size, distance, and location are clear.

- Rule 34.2:** At the conclusion of the trial, defense counsel will indicate whether civilian counsel or military counsel will examine the record, who will respond to the staff judge advocate's recommendations, and who will represent the accused in post-trial matters. The accused must include such decisions in the written acknowledgement of appellate rights.
- Rule 34.3:** Whenever practicable, trial counsel must read and make corrections to the record of trial. Corrections by trial counsel must be initialed and dated before submission to the military judge for authentication.
- Rule 34.4:** The trial counsel must ensure that the record of trial is prepared in a timely and accurate manner. Pursuant to R.C.M. 1103(i)(1)(B), the trial counsel must permit the defense to review record except when unreasonable delay will result, before it is submitted to the Judge for authentication.

Rule 35: DOCUMENTS AND PLEADINGS

- Rule 35.1:** All electronic filings must signed and filed in MS Word format. All documents and pleadings filed with the court will be on white 8.5 inch by 11 inch white paper.
- Rule 35.2:** All motions will be filed in the form attached as attachment (3) to these rules. Line numbers will be used on all pleadings.
- Rule 35.3:** All pleadings filed must have one inch margins and use Courier New or Times New Roman 12 point font.

THE BAILIFF'S HANDBOOK

The trial is a public proceeding dedicated to the propositions of equal justice under the law and protection of the community. A trial should be conducted so as to command the respect of the community it serves and to assure all that the law is functioning and will preserve order. Anything that distracts from respect for the law and the authority of the court must be avoided.

The trial should not be disturbed by small administrative matters. Every party to the trial should know what is expected of them. The military judge and trial counsel receive the assistance of a bailiff who has been instructed as to his or her responsibilities. The bailiff should be senior to the accused. A bailiff is disqualified if he or she is, or has been, in the same case, the accuser, a witness, an investigating officer, counsel, or has previously served as a member of the accused's court-martial. Trial counsel normally provides a briefing as to the bailiff's responsibilities.

The bailiff should receive specific instructions as to duties from trial counsel before and after each session of court. While the court is in session, the bailiff is under the supervision of the military judge and will assist the military judge and counsel in the conduct of an orderly trial. The bailiff should be familiar with the location of the principle offices and facilities, such as the library, within the law complex.

DUTIES OF THE BAILIFF

Prior to Trial

1. The bailiff will report in the uniform designated by the military judge to trial counsel at least 30 minutes before the beginning of each day's proceedings. Thereafter, the bailiff will report to the military judge 15 minutes before the reconvening of each of the day's proceedings.
2. The bailiff ensures that the courtroom spectator area and deliberation room for court members are neat and orderly. He or she will place the furniture in the proper arrangement as directed by the trial counsel or the court reporter.
3. The bailiff, with assistance of trial counsel or the court reporter will ensure that the military judge has the desired

desk supplies and that the court members have pencils and pads of papers in their deliberation room.

ENTRY AND DEPARTURE OF MILITARY JUDGE

4. When counsel for both sides, the accused, the reporter, and if applicable, court members, are present in the courtroom, the bailiff will notify the military judge and escort the judge to the courtroom. When the bailiff enters the courtroom with the military judge, he or she will announce: "All rise." When the military judge announces a recess or adjournment the bailiff will announce: "All rise." If need be, the bailiff will instruct the spectators to stand fast until the military judge has departed the courtroom. The military judge will advise the bailiff of any departure from this procedure.

ENTRY OF COURT MEMBERS

5. When the court members enter the courtroom and when the court members stand to be sworn, the bailiff will announce: "All rise" in a voice that can be heard by all, unless advised of different procedure by the military judge.

SPECTATORS AND MEMBERS OF THE NEWS MEDIA

6. Military trials are open to the public. Spectators and members of the news media are welcome in the courtroom to observe the trial proceedings, unless otherwise instructed by the military judge. The bailiff should see that they enter the courtroom, be seated, and leave quietly while the court is in session.

7. As the law does not permit picture taking or any type of broadcasting in or from the courtroom, the bailiff will not permit broadcasting-capable equipment to be taken into the courtroom. Any problems concerning this matter should be brought to the attention of the trial counsel immediately.

8. Courtroom rules do not permit spectators to eat, sleep, smoke, or engage in conversation while the court is in session. The bailiff should quietly and diplomatically inform offenders of these rules.

9. Anyone talking or making distracting noises in the areas outside of or adjacent to the courtroom while court is in

session will be informed by the bailiff that a court is in session and they can be heard in the courtroom.

10. Rowdiness and violence are not unknown in the courtroom. The bailiff must be alert and prepared to take immediate steps to suppress unruly behavior.

COURT MEMBERS - IN CLOSED SESSION

11. When the court members are in closed session, they are the only ones permitted in the deliberation room. Therefore, the bailiff will not enter that room or permit anyone else to enter during the closed session.

12. The bailiff is the only contact between the court members and the parties to the trial during the periods the court members are deliberating. The bailiff will be available to the court members outside their deliberation room and immediately notify counsel and the military judge when the court members are ready for the court to be reopened.

13. If the bailiff is instructed to deliver any item or message to the court members in closed session, he must first inform the military judge and obtain his or her approval.

MISCELLANEOUS DUTIES DURING TRIAL

14. The bailiff will be prepared to furnish the following services:

a. Summon the court members to the courtroom at the beginning of each session of court when directed to do so by the military judge or trial counsel.

b. While the court is in session, collect written questions from the court members upon the military judge's request and hand them to the court reporter, the military judge, and counsel as instructed.

c. Summon witnesses to the courtroom when requested by counsel.

d. While the court is in session, deliver findings and sentence worksheets to the president of the court when instructed to do so.

e. Deliver items of evidence to the deliberation room, if instructed to do so by the military judge, when the members retire to the deliberation room.

f. Perform administrative errands during the trial as requested by the military judge or counsel.

THE BAILIFF'S RELATION
TO THE ISSUES AND PARTIES OF THE TRIAL

The bailiff must remain neutral during the trial of a case. In other words, the bailiff should not take the side of prosecution or defense. The bailiff must never participate in any discussion of the merits of the case and should never attempt to predict the outcome of the trial. The bailiff must not make any comments on the performance of counsel or on the testimony of a witness. The bailiff shall not reveal to members the matters discussed during sessions of the trial held outside the presence of the members.

[DATE]

TECHNOLOGY SUPPLEMENT
[-----] JUDICIAL CIRCUIT RULES OF COURT
USE OF ELECTRONIC MEDIA

These rules supplement the Rules of Court, [-----] Judicial Circuit, to address the use of electronic media in courts-martial.

1. Introduction. "Electronic media" is any form of graphic or other data display, any image, picture, moving image or picture, sound, or any combination of these media, which is presented to a court-martial 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.

a. Properly used, electronic media can substantially enhance the ability of the prosecution to fairly represent the interests of the government and the defense to zealously represent anyone accused of a crime. Appropriate use facilitates both the quality of representation and the efficiency of courts-martial. As a result, the use of electronic media in the [-----] Circuit is encouraged. At the same time, however, electronic media must be acknowledged as a powerful tool, the use of which must be subject to procedural rules that encourage superlative advocacy through technology while ensuring the dignity, efficiency, and fairness of courts-martial.

b. For example, if used during opening statements, material displayed must satisfy R.C.M. 913 (i.e., referencing only evidence counsel expect to be offered, and in good faith believe to be admissible, and a brief statement of the issues anticipated in the case). See R.C.M. 913 (Discussion). During trial, any material to be introduced into evidence and published by electronic means must first be properly admitted under the Military Rules of Evidence. If used during closing arguments, any matter displayed electronically should either have been admitted into evidence, or be a fair comment on the evidence admitted, such as an accurate summary of data or other similar

demonstrative aid. Ultimately, use of electronic media will be subject to the objections of opposing counsel and will be within the discretion of the judge to admit or exclude consistent with applicable authority.

This supplement to the [-----] Circuit Rules of Court is to be construed consistently with the Rules for Courts-Martial, the Military Rules of Evidence, applicable case law, the Navy-Marine Corps Trial Judiciary Rules, and the other [-----] Circuit Rules of Court.

2. Pre-Trial Requirements. This rule is a rule of notice and, if required by the judge in the interests of justice, of disclosure. It is not a rule of discovery and it does not provide any substantive rights to either the prosecution or to the defense to obtain the content of any electronic media not otherwise subject to the rules governing discovery.

a. Notice.

(1) Prior to Docketing. To ensure facilities (i.e., a properly equipped courtroom) and equipment are available (e.g., where portable equipment is needed), counsel shall provide notice of the intent to use electronic media via [docketing] memo at the time counsel request a trial date. The [docketing] memo shall be addressed to the opposing counsel, [and] the judge, [and the Court Clerk,] and it shall describe generally the technology and purpose desired for use (e.g., electronic media to display evidence, the presentation of remote live testimony, or otherwise to bring matters before the court-martial). No further elaboration is necessary in the [docketing] memo.

(2) After Docketing. If a case has already been docketed for trial when counsel determine use of electronic media is necessary or desired, [notice] [an amended docketing memo] must immediately be filed with opposing counsel and the court [including the Clerk]. Counsel are cautioned that delay in submitting notice to the court could result in facilities or equipment, including remote access to witnesses, being unavailable.

b. Judge Alone Cases.

(1) In guilty plea cases before a military judge alone, use of electronic media shall be discussed with the judge at a conference under R.C.M. 802 sufficiently in advance of

trial to resolve logistics and other issues related to the use of electronic media, such as whether it consists of classified or contraband material.

(2) In cases contested before a military judge alone, in mixed plea cases where the electronic media relates to a plea of not guilty, in conditional guilty plea cases, or in the disposition of guilty pleas (military judge or members for sentencing) with the permission of the judge, counsel should follow the procedures for notice and disclosure in a contested members case.

c. Contested Members Cases.

(1) Notice. Unless previously provided by [docketing] memo, notice of intent to use electronic media must be provided to opposing counsel and to the presiding military judge at arraignment. Notice shall describe generally the technology and purpose desired for use of electronic media (such as ExhibitONE® or similar technology to display evidence, the presentation of remote live testimony, or otherwise to bring facts before the court-martial) and the notice shall indicate whether any exhibit is classified or of a contraband nature, such as pornography. No further elaboration is necessary at arraignment. Failure to provide notice at arraignment risks unavailability of needed facilities, equipment, or access to remote witnesses. Pretrial notice is not required for the use of electronic media for impeachment or in rebuttal; however, if notice of such an intention is not provided, counsel risk unavailability of necessary facilities, equipment, or access to remote witnesses unless already approved.

(2) Disclosure.

A. Where either party has provided notice of an intent to use electronic media, counsel should discuss the proposed use with the judge at a conference under R.C.M. 802. The judge shall, by entry of a Case Management Order (CMO) or otherwise, set the date on which disclosure, if any, of electronic media to the court or to opposing counsel is required. The judge may provide different disclosure dates in the CMO for different uses of electronic media 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 contraband or classified information.

B. Where electronic media are intended for use in opening statement or closing argument, proponent counsel shall discuss such use with the judge at an R.C.M. 802 conference. Counsel are cautioned that such use of electronic media must comply with the Rules for Courts-Martial, Military Rules of Evidence, and case law applicable to opening statements and closing arguments. Counsel are highly encouraged to disclose the content of such electronic media to opposing counsel. In addition, counsel should submit any media intended for use in opening statement or closing argument to their supervisory counsel for review prior to use. Disclosing the contents to supervisory counsel and to opposing counsel 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 and require an Article 39(a), UCMJ, session at a critical point in the presentation of the proponent's case. As a precondition to using electronic media in opening statements or closing arguments, the judge may require disclosure of the nature of the presentation, or the contents thereof, to the 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 the utmost consideration to protecting the value of the presentation from premature disclosure.

d. Motions. The content of electronic media proposed for use by either side during their respective cases in chief may be made the subject of a pretrial motion *in limine* by either counsel. Such a motion should be disposed of in accordance with the terms of the CMO setting the date for submission and hearing of pre-trial motions. Objections to electronic media that are not readily susceptible of resolution as a pre-trial matter, such as an objection to opening statements, refreshed recollection, impeachment, rebuttal, or closing argument, may be disposed of in the discretion of the judge.

e. 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 judge, using the docket or other notice procedures set forth in paragraph 2.a., b. or c. above.

(2) In a contested case, counsel requesting the use of remote live testimony during their case-in-chief must submit a written motion, at the time required by the applicable CMO, requesting such remote live testimony and setting out the justification therefor, pursuant to the governing case law and Rules for Court-Martial. See R.C.M. 914A (and 914B, when implemented). If opposed, counsel may submit briefs in support of their respective positions and request the matter be heard at an Article 39(a), UCMJ, session in accordance with the CMO. Counsel should carefully consider methods for ensuring the integrity of remote testimony. Such measures may include the appointment of an officer to be present at the site of the remote witness to administer the oath, and to ensure the integrity of the testimony from intrusion by other personnel or reference material not otherwise permitted.

(3) Counsel requesting remote live testimony shall annotate their witness list to indicate which witnesses are expected to testify remotely.

3. Trial Procedure.

a. Admission and Publishing of Exhibits.

(1) Loading Media.

A. Counsel are encouraged to reserve and use courtroom facilities and electronic equipment for training, familiarization, moot courts, and other similar exercises. However, 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 judge. Permission to preload any evidence into courtroom electronic devices, and to connect laptops to electronic display media, should be requested pre-trial at an R.C.M. 802 conference.

B. Classified information or exhibits of a contraband nature 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 judge at a pretrial conference under R.C.M. 802.

(2) Offering/Admitting Evidence Electronically.

The procedures for the use of electronic media in a members trial should be the subject of discussion with the judge at a conference under R.C.M. 802. The preferred method of admitting evidence electronically will ordinarily be to pre-admit the evidence, and the electronic media display thereof, at an Article 39(a), UCMJ, session.

(3) Publishing Pre-Admitted Evidence. Counsel may not

operate the electronic media control panel to activate the monitors of the court-martial members without the permission of the judge. When electronic exhibits have been admitted into evidence at an Article 39(a) session, counsel will ordinarily be given permission to publish/display those exhibits at counsel's discretion. Under these circumstances, once the court-martial is called to order, counsel should request permission to activate the members' monitors and publish/display the enumerated item of previously admitted evidence. Once authorized by the judge to do so, counsel may activate the members' monitors. 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 court-martial members without the permission of the judge.

B. When electronic exhibits have not been previously admitted into evidence outside the members' presence, such as when used to refresh recollection or to impeach, counsel shall use standard evidentiary procedures to use or offer that evidence at trial. Counsel should initially request to activate only the monitors of the witness and may do so only upon a grant of permission by the judge. If an exhibit is not admitted into evidence when use of the exhibit is completed, counsel shall turn off the monitors of the witness, orally informing the record.

C. If an electronic exhibit used to refresh or impeach is admitted into evidence, counsel should request to activate the members' monitors and to publish the item or items of evidence to the members.

(5) Electronic Imaging.

A. Counsel may publish documentary and other items of admitted evidence by use of visual presentation equipment (e.g., ELMO), after requesting and receiving permission from the judge.

B. In switching between items of evidence on the visual presentation equipment, counsel shall ensure the image being used is "frozen" on the monitors or that the members' monitors are turned off prior to removing a published item. Members' monitors should remain off, or the image of the last item of evidence published should remain frozen on their monitors, until the next item of admitted evidence is in place to be published electronically. This practice will result in a smooth transition from one item of evidence to the next and will minimize the potential for error in publishing the next item. As in the case of other electronic items of evidence, counsel may request and be granted permission to publish a series of admitted items without seeking permission for each item individually.

(6) Witness Monitors. Counsel may activate the monitor of a witness at the appropriate time in their questioning, after first requesting and being granted permission of the judge. Members' monitors may not be activated until the proponent counsel has requested and been granted permission by the judge to publish an item of evidence by electronic means.

b. Remote Live Testimony. Before beginning any remote live testimony, proponent counsel shall request an Article 39(a), UCMJ, 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.

c. If technical problems are encountered, such as loss of the phone connection or other transmission signal, proponent counsel should request a recess in order to resolve the problem.

4. Preservation of Evidence for the Record

a. Electronic Media Not Admitted as Evidence.

When electronic media are used at trial but are not admitted into evidence, such as a PowerPoint opening statement or closing argument, or an item used to refresh recollection, or otherwise, the media should 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 (e.g., ELMO), proponent counsel shall prepare an accurate color photograph of such exhibit and move to substitute that 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 shall 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. For example, if a map is admitted and marked as "PE-1," the annotated version should be marked as "PE-1(a) for ID." A subsequent annotation of the same exhibit should be marked "PE-1(b) for ID" (if it is intended to be a separate exhibit, such as when a later annotation would obliterate a previous one). The opposing counsel should use a similar marking convention. For example, if the defense counsel modifies PE-1(a) during cross examination, the modified version

should be marked DE-1 for ID. A second modification altering DE-1 for ID should be marked DE-1(a) for ID. Counsel need not mark and capture for the record each mark made on an exhibit as a new exhibit. However, counsel must take care that exhibits are separately captured and saved for the record each time a new mark would alter or obliterate a preceding marking and when control of the exhibit changes for purposes of moving the item into evidence (i.e., from prosecution [PE] to defense [DE] or the reverse).

C. Upon admission into evidence by the judge, the proponent counsel shall request that the electronic media exhibit be "saved" as annotated, marked as the appropriate exhibit number, and that a printed copy be substituted in the record of trial.

D. If the offered exhibit is not admitted into evidence, the court reporter shall save the exhibit electronically and print a copy to be appended to the record, marked as the exhibit numbered "for ID."

(3) Corrections. If a witness needs to make a correction to an annotation, counsel shall first request permission of the judge to make the necessary correction.

(4) "Clear All" Function. When counsel has completed questioning a witness using ExhibitONE or similar electronic media, 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 judge to activate the "clear all" function. Only the judge may authorize counsel to hit the "clear all" button to remove markings from the touch-screen monitor.

d. Audio-Video and Remote Live Testimony. Evidence published in an audio or audio-video medium, or remote live testimony, shall be recorded during its presentation in court and transcribed verbatim, subject to the requirements of R.C.M 1103 regarding verbatim transcripts. Proponent counsel will provide the court reporter any electronic file used, which shall be saved in the court reporter's electronic file of the case and forwarded with the printed record of trial. If cassettes (audio or video) or CDs are admitted into evidence, these must be labeled with the caption of the matter, the date,

the prosecution or defense exhibit number, and shall be forwarded as part of the original record of trial.

5. Use of Electronic Media in Deliberations.

a. When the court members retire to deliberate, a printed copy of all previously admitted and published exhibits will ordinarily be provided to the senior member to take into the deliberation room. If an original exhibit was admitted electronically, the printed copy shall be an exact duplicate of the original, including color.

b. If members of the court request to see or hear evidence admitted in an audio or audio-video medium, the judge will assemble the members in open court and replay the desired audio or audio-video evidence, if determined to be appropriate. Ordinarily, remote live testimony should be treated as any other witness testimony and, if replayed, only the audio track should be used. If testimony has been provided using a videotaped deposition, any replay of that testimony shall only be of the audio track, just as if the witness had testified personally in court. Any replay of audio or audio-video media is a matter subject to objection by either the government or the defense and it remains in the discretion of the judge.

6. Effective Date. These Rules are effective on the date listed on page 1.

[Name and Rank]
Circuit Military Judge

NAVY-MARINE CORPS TRIAL JUDICIARY
_____ JUDICIAL CIRCUIT
GENERAL COURT-MARTIAL

The United States of America) **U.S. / DEFENSE MOTION TO**
)
)
v.)
)
First MI Last)
Rank Service) **DATE**

1. Nature of the Motion: The United States / Defense moves the court to admit / exclude the evidence of X Y Z because

2. Issues:

- A. The first issue presented for the court to decide is
- B. The second issue presented for the court to decide is.....

3. Statement of Facts:

- A. The accused is charged with,
- B.
- C.

4. Statement of the Law:

A correct statement of the governing law with supporting citations

5. Analysis of Law:

- A.
- B.

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6. **Evidence.** (No evidence will be presented in support of this motion.) (The (accused) (United States) offers the following evidence to support this motion...).

7. **Burden of Proof.** (Moving party states which party has the burden of proof regarding any matter raised by the motion.)

8. **Oral Argument.** The (accused)(United States) (does)(does not) desire to make oral argument on this motion.

9. **Conclusions:** The Court should grant the motion to _____ because (WHY).

NAME OF COUNSEL
RANK OR ADDRESS OF COUNSEL
TRIAL / DEFENSE COUNSEL

CERTIFICATION OF SERVICE

A true copy of this motion was served _____(via)_____ on _____.

(date)

Signature of counsel or party

1 f. On DATE, the Trial Counsel (TC) submitted a motion for docketing and requested
2 DATE for arraignment/trial of this case. The Detailed Defense Counsel (DDC) did not
3 object to the arraignment date and case was docketed for DATE .

4 g. On DATE, the Detailed Defense Counsel on behalf of CDC moved for a continuance.
5 The U.S. is not opposing the continuance.

6 h. The Court finds by a preponderance of the evidence that the defense has made a factual
7 showing of reasonable cause to continue this case and that their ability to proceed on DATE
8 would be prejudiced.

9 **3. Ruling.** The U.S./Defense motion for a continuance is **GRANTED/ DENIED**. Further, the
10 follow deadlines are set:

11 **All discovery to be completed on: DATE**

12 **39(a) / status 802 conference on: DATE**

13 **Trial shall commence at 0600 hrs on: DATE**

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15 **So ordered this _____ Day of _____ 201____.**

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Military Judge