

§ 718.4

VA, or the Personal Effects Distribution Center at Oakland, CA, for a period of two years from the date of death of the member. At the expiration of the two-year period such effects will be sold.

(R.S. 161, sec. 5031, 70A Stat. 278, as amended; 5 U.S.C. 22, 10 U.S.C. 5031, 50 U.S.C. App. 1013-1015; Pub. L. 89-554, 80 Stat. 379 (5 U.S.C. 301))

[26 FR 12659, Dec. 29, 1961, as amended at 37 FR 6472, Mar. 30, 1972; 44 FR 22456, Apr. 16, 1979]

§ 718.4 Delegations.

The Secretary of the Navy has delegated to the Director, Personal Services Division, Bureau of Naval Personnel with respect to personnel in the Navy, and to the Head, Personal Affairs Branch Manpower Department (Code MSPA), United States Marine Corps, with respect to personnel in the Marine Corps, authority to make all determinations to administer the act.

(Pub. L. 89-554, 80 stat. 379 (5 U.S.C. 301))

[17 FR 5391, June 14, 1952, as amended at 19 FR 7959, Dec. 2, 1954; 44 FR 22456, Apr. 16, 1979]

PART 719—REGULATIONS SUPPLEMENTING THE MANUAL FOR COURTS-MARTIAL

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AUTHORITY: 3 U.S.C. 301; 5 U.S.C. 301; 10 U.S.C. 815, 5013, 5148; 32 CFR 700.206 and 700.1202.

Subparts A-B [Reserved]

Subpart C—Trial Matters

§ 719.112 Authority to grant immunity from prosecution.

(a) *General.* In certain cases involving more than one participant, the interests of justice may make it advisable to grant immunity, either transactional or testimonial, to one or more of the participants in the offense in consideration for their testifying for the Government or the defense in the investigation and/or the trial of the principal offender. Transactional immunity, as that term is used in this section, shall mean immunity from prosecution for any offense or offenses to which the compelled testimony relates. Testimonial immunity, as that term is used in this section, shall mean immunity from the use, in aid of future prosecution, of testimony or other information compelled under an order to testify (or any information directly or indirectly derived from such testimony or other information). The authority to grant either transactional or testimonial immunity to a witness is reserved to officers exercising general court-martial jurisdiction. This authority may be exercised in any case whether or not formal charges have been preferred and whether or not the matter has been referred for trial. The approval of the Attorney General of the United States on certain orders to testify may be required, as outlined below.

(b) *Procedure.* The written recommendation that a certain witness be granted either transactional or testimonial immunity in consideration for testimony deemed essential to the Government or to the defense shall be forwarded to an officer competent to convene a general court-martial for the witness for whom immunity is requested, *i.e.*, any officer exercising general court-martial jurisdiction. Such

recommendation will be forwarded by the trial counsel or defense counsel in cases referred for trial, the pretrial investigating officer conducting an investigation upon preferred charges, the counsel or recorder of any other fact-finding body, or the investigator when no charges have yet been preferred. The recommendation shall state in detail why the testimony of the witness is deemed so essential or material that the interests of justice cannot be served without the grant of immunity. The officer exercising general court-martial jurisdiction shall act upon such request after referring it to his staff judge advocate for consideration and advice. If approved, a copy of the written grant of immunity must be served upon the accused or his defense counsel within a reasonable time before the witness testifies. Additionally, if any witness is expected to testify in response to a promise of leniency, the terms of the promise of leniency must be reduced to writing and served upon the accused or his defense counsel in the same manner as a grant of immunity.

(c) *Civilian witnesses.* Pursuant to 18 U.S.C. 6002 and 6004, if the testimony or other information of a civilian witness at a court-martial may be necessary in the public interest, and if the civilian witness has refused or is likely to refuse to testify or provide other information on the basis of a privilege against self-incrimination, then the approval of the Attorney General of the United States, or his designee, must be obtained prior to the execution or issuance of an order to testify to such civilian witness. The cognizant officer exercising general court-martial jurisdiction may obtain the approval of the Attorney General in such a circumstance by directing a message or letter requesting the assistance of the Judge Advocate General (Code 20) in the form prescribed in paragraph (e) of this section.

(d) *Cases involving national security.* In all cases involving national security or foreign relations of the United States, the cognizant officer exercising general court-martial jurisdiction shall forward any proposed grant of immunity to the Judge Advocate General for the purpose of consultation with the De-

partment of Justice. See section 0126 of the Manual of the Judge Advocate General regarding relations between the Departments of Defense and Justice. The cognizant officer exercising general court-martial jurisdiction may obtain approval by the Attorney General of a proposed grant of immunity by directing a letter requesting the assistance of the Judge Advocate General (Code 20) in the form prescribed in paragraph (e) of this section.

(e) *Content of immunity requests.* In all cases in which approval of the Attorney General of the United States is required prior to the issuance of a grant of immunity, whether under paragraph (c) or (d) of this section, the cognizant officer exercising general court-martial jurisdiction shall forward by message or letter the proposed order to testify and grant of immunity to the Judge Advocate General (Code 20). The order to testify should be substantially in the form set forth in appendix A-1-i(3) of the Manual of the Judge Advocate General. Requests for assistance shall be in writing, should allow at least three weeks for consideration, and must contain the following information:

- (1) Name, citation, or other identifying information of the proceeding in which the order is to be used.
- (2) Name of the witness for whom the immunity is requested.
- (3) Name of the employer or company with which a witness is associated or the military unit or organization to which a witness is assigned.
- (4) Date and place of birth, if known, of the witness.
- (5) FBI or local police file number, if any, and if known.
- (6) Whether any State or Federal charges are pending against the witness and the nature of the charges.
- (7) Whether the witness is currently incarcerated, under what conditions, and for what length of time.
- (8) A brief resume of the background of the investigation or proceeding before the agency or department.
- (9) A concise statement of the reasons for the request, including:
 - (i) What testimony the witness is expected to give;
 - (ii) How this testimony will serve the public interest;

(iii) Whether the witness:

(A) Has invoked the privilege against self-incrimination; or

(B) Is likely to invoke the privilege;

(iv) If paragraph (e)(9)(iii)(B) of this section is applicable, then why it is anticipated that the prospective witness will invoke the privilege.

(10) An estimate as to whether the witness is likely to testify in the event immunity is granted.

(f) *Post-testimony procedure.* After a witness immunized in accordance with paragraphs (c) and (d) of this section has testified, the following information should be provided to the United States Department of Justice, Criminal Division, Immunity Unit, Washington, DC 20530, via the Judge Advocate General (Code 20).

(1) Name, citation, or other identifying information, of the proceeding in which the order was requested.

(2) Date of the examination of the witness.

(3) Name and residence address of the witness.

(4) Whether the witness invoked the privilege.

(5) Whether the immunity order was used.

(6) Whether the witness testified pursuant to the order.

(7) If the witness refused to comply with the order, whether contempt proceedings were instituted, or are contemplated, and the result of the contempt proceeding, if concluded. A verbatim transcript of the witness' testimony, authenticated by the military judge, should be provided to the Judge Advocate General at the conclusion of the trial. No testimony or other information given by a civilian witness pursuant to such an order to testify (or any information directly or indirectly derived from such testimony or other information) may be used against him in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order.

(g) *Review.* Under some circumstances, the officer granting immunity to a witness may be disqualified from taking reviewing action on the record of the trial before which the witness granted immunity testified. A successor in command not partici-

pating in the grant of immunity would not be so disqualified under those circumstances.

(h) *Form of grant.* In any case in which a military witness is granted transactional immunity, the general court-martial convening authority should execute a written grant, substantially in the form set forth in appendix section A-1-i(1) of the Manual of the Judge Advocate General. In any case in which a military witness is granted testimonial immunity, the general court-martial convening authority should execute a written grant substantially in the form set forth in appendix section A-1-i(2) of the Manual of the Judge Advocate General.

[56 FR 57803, Nov. 14, 1991]

§§ 719.113–719.114 [Reserved]

§ 719.115 Release of information pertaining to accused persons; spectators at judicial sessions.

(a) *Release of information—(1) General.* There are valid reasons for making information available to the public concerning the administration of military justice. The task of striking a fair balance among the protection of individuals accused of offenses, improper or unwarranted publicity pertaining to their cases, public understanding of the problems of controlling misconduct in the military service, and the workings of military justice requires the exercise of sound judgment by those responsible for administering military justice and by representatives of the press and other news media. At the heart of all guidelines pertaining to the furnishing of information concerning an accused or the allegations against him is the mandate that no statements or other information shall be furnished to news media for the purpose of influencing the outcome of an accused's trial, or which could reasonably be expected to have such an effect.

(2) *Applicability of regulations.* These regulations apply to all persons who may obtain information as the result of duties performed in connection with the processing of accused persons, the investigation of suspected offenses, the imposition of nonjudicial punishment, or the trial of persons by court-martial. These regulations are applicable

from the time of apprehension, the preferral of charges, or the commencement of an investigation directed to make recommendations concerning disciplinary action, until the imposition of nonjudicial punishment, completion of trial (court-martial sessions) or disposition of the case without trial. These regulations also prescribe guidelines for the release or dissemination of information to public news agencies, to other public news media, or to other persons or agencies for unofficial purposes.

(3) *Release of information.* (i) As a general matter, release of information pertaining to accused persons should not be initiated by persons in the naval service. Information of this nature should be released only upon specific request therefor, and, subject to the following guidelines, should not exceed the scope of the inquiry concerned.

(ii) Except in unusual circumstances, information which is subject to release under the regulation should be released by the cognizant public affairs officer; requests for information received from representatives of news media should be referred to the public affairs office for action. When an individual is suspected or accused of an offense, care should be taken to indicate that the individual is alleged to have committed or is suspected or accused of having committed an offense, as distinguished from stating or implying that the accused has committed the offense or offenses.

(4) *Information subject to release.* On inquiry, the following information concerning a person accused or suspected of an offense or offenses may generally be released except as provided in paragraph (6) of this section:

(i) The accused's name, grade, age, unit, regularly assigned duties, duty station, and sex.

(ii) The substance of the offenses of which the individual is accused or suspected.

(iii) The identity of the victim of any alleged or suspected offense, except the victim of a sexual offense.

(iv) The identity of the apprehending and investigative agency, and the identity of accused's counsel, if any.

(v) The factual circumstances immediately surrounding the apprehension

of the accused, including the time and place of apprehension, resistance, pursuit, and use of weapons.

(vi) The type and place of custody, if any.

(vii) Information which has become a part of the record of proceedings of the court-martial in open session.

(viii) The scheduling of any stage in the judicial process.

(ix) The denial by the accused of any offense or offenses of which he may be accused or suspected (when release of such information is approved by the counsel of the accused).

(5) *Prohibited information.* The following information concerning a person accused or suspected of an offense or offenses generally may not be released, except as provided in paragraph (a)(6) of this section.

(i) Subjective opinions, observations, or comments concerning the accused's character, demeanor at any time (except as authorized in paragraph (4)(v) of this section), or guilt of the offense or offenses involved.

(ii) The prior criminal record (including other apprehensions, charges or trials) or the character or reputation of the accused.

(iii) The existence or contents of any confession, admission, statement, or alibi given by the accused, or the refusal or failure of the accused to make any statement.

(iv) The performance of any examination or test, such as polygraph examinations, chemical tests, ballistics tests, etc., or the refusal or the failure of the accused to submit to an examination or test.

(v) The identity, testimony, or credibility of possible witnesses, except as authorized in paragraph (4)(iii), of this section.

(vi) The possibility of a plea of guilty to any offense charged or to a lesser offense and any negotiation or any offer to negotiate respecting a plea of guilty.

(vii) References to confidential sources or investigative techniques or procedures.

(viii) Any other matter when there is a reasonable likelihood that the dissemination of such matter will affect the deliberations of an investigative body or the findings or sentence of a court-martial or otherwise prejudice

the due administration of military justice either before, during, or after trial.

(6) *Exceptional cases.* The provisions of this section are not intended to restrict the release of information designed to enlist public assistance in apprehending an accused or suspect who is a fugitive from justice or to warn the public of any danger that a fugitive accused or suspect may present. Further, since the purpose of this section is to prescribe generally applicable guidelines, there may be exceptional circumstances which warrant the release of information prohibited under paragraph (a)(5) of this section or the non-release of information permitted under paragraph (a)(4) of this section. Attention should be given to the Secretary of the Navy instructions implementing the Freedom of Information Act (5720.42 series) and the Privacy Act (5211.5C series). Consultation with the command judge advocate, if one is assigned, or with the cognizant Naval Legal Service Office concerning interpretation and application of these instructions is encouraged.

(b) *Spectators.* (1) The sessions of courts-martial shall be open to the public, which includes members of both the military and civilian communities. In order to maintain the dignity and decorum of the proceedings or for other good cause, the military judge may reasonably limit the number of spectators in, and the means of access to, the courtroom, exclude specific persons from the courtroom, and close a session. Video and audio recording and taking of photographs, except for the purpose of preparing the record of trial, in the courtroom during the proceedings and radio or television broadcasting of proceedings from the courtroom shall not be permitted. The military judge may, as a matter of discretion, permit contemporaneous closed-circuit video or audio transmission to permit viewing or hearing by an accused removed from the courtroom or by spectators when courtroom facilities are inadequate to accommodate a reasonable number of spectators.

(2) *At pretrial investigations.* Consistent with Rules for Courts-Martial 405(h)(3), Manual for Courts-Martial, the Convening Authority or investigating officer may direct that all or

part of an Article 32 investigation under 10 U.S.C. 832 be held in closed session and that all persons not connected with the hearing be excluded therefrom. The decision to exclude spectators may be based on the need to protect classified information, to prevent disclosure of matters that will be inadmissible in evidence at a subsequent trial by Courts-Martial and are of such a nature as to interfere with a fair trial by an impartial tribunal, or consistent with appellate case law, for a reason deemed appropriate by the commander ordering the investigation or the investigating officer. The reasons for closing an Article 32 investigation, and any objections thereto, shall be memorialized and included as an attachment to the report of investigation. Ordinarily, the proceedings of a pretrial investigation should be open to spectators. In cases dealing with classified information, the investigating officer will ensure that any part of a pretrial investigation (e.g., rights advisement) that does not involve classified information will remain open to spectators.

[38 FR 5997, Mar. 6, 1973, as amended at 47 FR 49644, Nov. 2, 1982; 50 FR 23800, June 6, 1985; 69 FR 20540, Apr. 16, 2004]

Subpart D [Reserved]

Subpart E—Miscellaneous Matters

§ 719.138 Fees of civilian witnesses.

(a) *Method of Payment.* The fees and mileage of a civilian witness shall be paid by the disbursing officer of the command of a convening authority or appointing authority or by the disbursing officer at or near the place where the tribunal sits or where a deposition is taken when such disbursing officer is presented a properly completed public voucher for such fees and mileage, signed by the witness and certified by one of the following:

- (1) Trial counsel or assistant trial counsel of the court-martial;
- (2) Summary court officer;
- (3) Counsel for the court in a court of inquiry;
- (4) Recorder or junior member of a board to redress injuries to property, or

(5) Military or civil officer before whom a deposition is taken.

The public voucher must be accompanied by a subpoena or invitational orders (Joint Travel Regulations, vol. 2, chap. 6), and by a certified copy of the order appointing the court-martial, court of inquiry, or investigation. If, however, a deposition is taken before charges are referred for trial, the fees and mileage of the witness concerned shall be paid by the disbursing officer at or near the place where the deposition is taken upon presentation of a public voucher, properly completed as hereinbefore prescribed, and accompanied by an order from the officer who authorized the taking of the deposition, subscribed by him and directing the disbursing officer to pay to the witness the fees and mileage supported by the public voucher. When the civilian witness testifies outside the United States, its territories and possessions, the public voucher must be accompanied by a certified copy of the order appointing the court-martial, court of inquiry, or investigation, and by an order from the convening authority or appointing authority, subscribed by him and directing the disbursing officer to pay to the witness the fees and mileage supported by the public voucher.

(b) *Obtaining money for advance tender or payment.* Upon written request by one of the officers listed in paragraph (a) of this section, the disbursing officer under the command of the convening or appointing authority, or the disbursing officer nearest the place where the witness is found, will, at once, provide any of the persons listed in paragraph (a) of this section, or any other officer or person designated for the purpose, the required amount of money to be tendered or paid to the witness for mileage and fees for one day of attendance. The person so receiving the money for the purpose named shall furnish the disbursing officer concerned with a proper receipt.

(c) *Reimbursement.* If an officer charged with serving a subpoena pays from his personal funds the necessary fees and mileage to a witness, taking a receipt therefor, he is entitled to reimbursement upon submitting to the disbursing officer such receipt, together

with a certificate of the appropriate person named in paragraph (a) of this section, to the effect that the payment was necessary.

(d) *Certificate of person before whom deposition is taken.* The certificate of the person named in paragraph (a) of this section, before whom the witness gave his deposition, will be evidence of the fact and period of attendance of the witness and the place from which summoned.

(e) *Payment of accrued fees.* The witness may be paid accrued fees at his request at any time during the period of attendance. The disbursing officer will make such interim payment(s) upon receipt of properly executed certificate(s). Upon his discharge from attendance, the witness will be paid, upon the execution of a certificate, a final amount covering unpaid fees and travel, including an amount for return travel. Payment for return travel will be made upon the basis of the actual fees and mileage allowed for travel to the court, or place designated for taking a deposition.

(f) *Computation.* Travel expenses shall be determined on the basis of the shortest usually traveled route in accordance with official schedules. Reasonable allowance will be made for unavoidable detention.

(g) *Nontransferability of accounts.* Accounts of civilian witnesses may not be transferred or assigned.

(h) *Signatures.* Signatures of witnesses signed by mark must be witnessed by two persons.

(i) *Rates for civilian witnesses prescribed by law—(1) Civilian witnesses not in Government employ.* A civilian not in Government employ, who is compelled or required to testify as a witness before a Naval tribunal at a specified place or to appear at a place where his deposition is to be taken for use before a court or fact-finding body, will receive fees, subsistence, and mileage as provided in 28 U.S.C. 1821. Witness and subsistence fees are not prorated. Instead any fractional part of a calendar day expended in attendance or qualifying for subsistence entitles the witness to payment for a full day. Further, nothing in this paragraph shall be construed as authorizing the payment of attendance fees to witnesses for:

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(i) Attendance or travel which is not performed either as a direct result of being compelled to testify pursuant to a subpoena or as a direct result of invitational orders; or

(ii) For travel which is performed prior to being duly summoned as a witness; or

(iii) For travel returning to their places of residence if the travel from their places of residence does not qualify for payment under this paragraph.

(2) *Civilian witnesses in Government employ.* When summoned as a witness, a civilian in the employ of the Government shall be paid as authorized by Joint Travel Regulations.

(j) *Supplemental construction of section.* Nothing in this paragraph shall be construed as permitting or requiring the payment of fees to those witnesses not requested or whose testimony is determined not to meet the standards of relevancy and materiality set forth in accordance with MCM, 1984, R.C.M. 703.

(k) *Expert witnesses.* (1) The convening authority will authorize the employment of an expert witness and will fix the limit of compensation to be paid such expert on the basis of the normal compensation paid by United States attorneys for attendance of a witness of such standing in United States courts in the area involved. Information concerning such normal compensation may be obtained from the nearest officer exercising general court-martial jurisdiction having a judge advocate assigned in other than an additional duty, temporary duty, or temporary additional duty capacity. Convening authorities at overseas commands will adhere to fees paid such witnesses in the Hawaiian area and may obtain information as to the limit of such fees from the Commander, Naval Base, Pearl Harbor. See paragraph (1) of this section for fees payable to foreign nationals.

(2) The provisions of paragraph (i) of this section are applicable to expert witnesses. However, the expert witness fee prescribed by the convening authority will be paid in lieu of ordinary attendance fees on those days the witness is required to attend the court.

(3) An expert witness employed in strict accordance with MCM, 1984,

R.C.M. 703(d), may be paid compensation at the rate prescribed in advance by the official empowered to authorize his employment (11 Comp. Gen. 504). In the absence of such authorization, no fees other than ordinary witness fees may be paid for the employment of an individual as an expert witness. After an expert witness has testified pursuant to such employment, the certificate of one of the officers listed in subsection a above, when presented to the disbursing officer, shall also enclose a certified copy of the authorization of the convening authority.

(1) Payment of witness fees to foreign nationals: Officers exercising general court-martial jurisdiction in areas other than a State of the United States shall establish rates of compensation for payment of foreign nationals who testify as witnesses, including expert witnesses, at courts-martial convened in such areas.

[38 FR 5997, Mar 6, 1973, as amended at 47 FR 49644, Nov. 2, 1982; 50 FR 23801, June 6, 1985]

§§ 719.139-719.141 [Reserved]

§ 719.142 Suspension of counsel.

(a) *Report of Allegations of Misconduct or Disability.* When information comes to the attention of a member of a court-martial, a military judge, trial or defense counsel, staff judge advocate, member of the Navy-Marine Corps Court of Military Review or other directly interested or concerned party that a judge advocate or civilian who is acting or is about to act as counsel before a proceeding conducted under the UCMJ or MCM is or has been unable to discharge properly all the duties of his or her position by reason of mental or physical disability or has been engaged in professional or personal misconduct of such a serious nature as to demonstrate that he or she is lacking in integrity or is failing to meet the ethical standards of the profession or is otherwise unworthy or unqualified to perform the duties of a judge advocate or attorney, such information should be reported to the commanding officer of that judge advocate or, in the case of civilian counsel, to the officer exercising general court-martial jurisdiction over the command

convening the proceedings or to the Judge Advocate General.

(b) *Form of report.* The report shall:

(1) Be in writing, under oath or affirmation, and made and signed by the individual reporting the information.

(2) State that the individual reporting the information has personal knowledge or belief or has otherwise received reliable information indicating that:

(i) The counsel is, or has been, unable to discharge properly all the duties of his or her office by reason of mental or physical disability; or

(ii) The counsel is or has been engaged in professional or personal misconduct of such a serious nature as to demonstrate that he or she is lacking in integrity or is failing to meet the ethical standards of the profession; or

(iii) The counsel is unworthy or unqualified to perform his or her duties;

(3) Set forth the grounds of the allegation together with all relevant facts; and

(4) Be forwarded to the appropriate authority as set forth in paragraph (a).

(c) *Consideration of the Report*—(1) *Action by the Commanding Officer of a judge advocate.* Upon receipt of the report, the commanding officer:

(i) Shall dismiss any report relating to the performance of a judge advocate more properly appealed under law or any report that is frivolous, unfounded, or vague and return it to the reporting individual;

(ii) May make further inquiry into the report at his or her discretion to determine the merits of the report. The commanding officer may appoint an officer to investigate informally the allegations of the report to determine whether further action is warranted. Any officer so appointed should be a judge advocate senior in rank to the judge advocate being investigated;

(iii) May take appropriate action to address and dispose of the matter being mindful of such measures as warning, counseling, caution, instruction, proceedings in contempt, therapy, and other punitive or administrative action; or

(iv) Shall, if the commanding officer is of the opinion that evidence of disability or professional or personal misconduct exists, and that remedial

measures short of suspension or decertification are not appropriate or will not be effective, forward the original complaint, a written report of the inquiry or investigation, all other relevant information, and his or her comments and recommendations to the officer in the chain of command exercising general court-martial authority.

(2) *Action by officer exercising general court-martial authority.* (i) Upon receipt of a report of an allegation of misconduct or disability of a counsel, the officer exercising general court-martial convening authority:

(A) May take the action authorized by subsections (c)(1)(i), (ii) or (iii); or

(B) Shall, if he or she considers that evidence of disability or professional or personal misconduct exists and that other remedial measures short of suspension or decertification are not appropriate or will not be effective, appoint a board of officers to investigate the matter and to report its findings and its recommendations. This board shall be comprised of at least three officers, each an Article 27(b), Uniform Code of Military Justice, certified judge advocate. If practicable, each of the officers of the board should be senior to the judge advocate under investigation. If the counsel is a member of the Marine Corps, a majority of the members of the board should be Marine Corps judge advocates. The senior officer of the board shall cause notice to be given to the counsel, judge advocate or civilian (respondent), informing him or her of the misconduct or other disqualification alleged and affording him or her the opportunity to appear before the board for a hearing. The respondent shall be permitted at least ten (10) days' notice prior to the hearing. Failure to appear on a set date after notice shall constitute waiver of appearance, absent good cause shown. The respondent shall be generally afforded the rights of a party as set out in section 0304 of this Manual, except that, in the event the judge advocate respondent wishes to have military counsel appointed, he or she shall not have the right to select or identify a particular military counsel. A civilian respondent may not be represented by military counsel, but may be represented by civilian counsel at no expense to the

Government. Upon ascertaining the relevant facts after notice and hearing, a written report of the findings and recommendations of the board shall be made to the officer who convened the board. In all cases, a written copy of the board's findings and recommendations shall be provided to the respondent. The respondent shall be given an opportunity to comment on the report in writing.

(ii) Upon receipt of the report of the board of investigation, the officer exercising general court-martial authority shall:

(A) Return the report to the board for further investigation, if the investigation is determined to be incomplete; or

(B) Forward the report of the board of investigation to the Judge Advocate General together with comments and recommendations concerning suspension of the counsel involved.

(3) *Action by the Judge Advocate General.* (i) Upon receipt of a report of an allegation of misconduct or disability of a counsel, the Judge Advocate General:

(A) May take the action authorized by subsections (c)(1)(i), (ii), or (iii);

(B) May appoint a board of officers for investigation and hearing in accordance with subsections (c)(2)(i)(B) or

(C) May request the officer exercising general court-martial jurisdiction over the command of the respondent (if judge advocate counsel) or over the proceedings (if civilian counsel) to take the matter for investigation and hearing in accordance with subsection (c)(2)(i)(B).

(ii) Upon receipt of the report of the investigating board, the Judge Advocate General:

(A) May determine whether the respondent is to be suspended or decertified and, if so, whether for a stated term or indefinitely;

(B) May determine that the findings of the board do not warrant further action; or

(C) May return the report to the sending officer with appropriate instructions for further inquiry or action. The Judge Advocate General may, sua sponte, or upon petition of the respondent, modify or revoke any prior order of suspension or dismissal of a re-

port. Further, if the Judge Advocate General suspends counsel, the Judge Advocates General of the other armed forces will be notified.

(d) *Grounds justifying suspension of counsel or suspension or decertification of a Judge Advocate.* (1) Suspension or decertification is to be employed only after it has been established that a counsel has been unable to discharge properly all the duties of his or her office by reason of mental or physical disability or has been engaged in professional or personal misconduct of such a serious nature as to demonstrate that he or she is lacking in integrity or is failing to meet the ethical standards of the profession or is otherwise unworthy or unqualified to perform the duties of a counsel. Action to suspend or decertify should not be initiated because of personal prejudice or hostility toward counsel, nor should such action be initiated because counsel has initiated an aggressive, zealous or novel defense, or the apparent misconduct stems from inexperience or lack of instruction.

(2) Specific grounds for suspension or decertification include, but are not limited to, the following:

(i) Demonstrated incompetence while acting as counsel before, during or after a court-martial.

(ii) Preventing or obstructing justice, including the deliberate use of frivolous or unwarranted dilatory tactics.

(iii) Fabricating papers or other evidence.

(iv) Tampering with a witness.

(v) Abusive conduct toward the court-martial, the Navy-Marine Corps Court of Military Review, the military judge, or opposing counsel.

(vi) Flagrant or repeated violations of any specific rules of conduct prescribed for counsel in the Manual for Courts-Martial.

(vii) Conviction of an offense involving moral turpitude or conviction for violation of article 48, UCMJ.

(viii) Disbarment by a State Bar, Federal Court, or the United States Court of Military Appeals.

(ix) Suspension as counsel by the Judge Advocate General of the Navy, Army, or Air Force or the General Counsel of the Department of Transportation.

(x) Flagrant or repeated violations of the *Uniform Rules of Practice Before Navy-Marine Corps Courts-Martial* as outlined in appendix A-1-p(1) of the Manual of the Judge Advocate General.

(xi) Flagrant or repeated violations of the provisions of section 0134 of this Manual of the Judge Advocate General dealing with the *Release of Information Pertaining to Accused Persons; Spectators at Judicial Sessions*.

(xii) Failure to meet the rules set forth in the ABA Code of Professional Responsibility and the ABA Standards on *Fair Trial and Free Press* and *The Prosecution Function and the Defense Function*. In view of the unique mission and personal requirements of the military, many of the rules and principles of the ABA Code or Standards are not applicable to the military lawyer. Accordingly, the rules are to be used as a guide only, and a failure to comply with the specific wording of a rule is not to be construed as a violation of the rule where common sense would indicate to a reasonable person that there is a distinction between the civilian context, which the codes were drafted to embrace, and the unique concerns of the military setting, where the codes serve as a general guide.

[50 FR 23801, June 6, 1985]

§ 719.143 Petition for new trial under 10 U.S.C. 873.

(a) *Statutory provisions.* 10 U.S.C. 873, provides, "At any time within 2 years after approval by the convening authority of a court-martial sentence, the accused may petition the Judge Advocate General for a new trial on the grounds of newly discovered evidence or fraud on the court. If the accused's case is pending before a Court of Military Review or before the Court of Military Appeals, that Judge Advocate General shall refer the petition to the appropriate court for action. Otherwise the Judge Advocate General shall act upon the petition."

(b) *Submission procedures:* At any time within 2 years after approval by the convening authority of a court-martial sentence, the accused may petition the Judge Advocate General for a new trial on the ground of newly discovered evidence or fraud on the court-martial. The petition for new trial may be sub-

mitted by the accused personally, or by accused's counsel, regardless of whether the accused has been separated from the service. A petition may not be submitted after the death of the accused.

(c) *Contents of petitions:* The form and contents of petitions for new trial are specified in MCM, 1984, R.C.M. 1210(c). The petition for a new trial shall be written and shall be signed under oath or affirmation by the accused, by a person possessing the power of attorney of the accused for that purpose, or by a person with the authorization of an appropriate court to sign the petition as the representative of the accused. The petition shall contain the following information, or an explanation why such matters are not included:

(1) The name, service number, and current address of the accused;

(2) The date and location of the trial;

(3) The type of court-martial and the title or position of the convening authority;

(4) The request for the new trial;

(5) The sentence or a description thereof as approved or affirmed, with any later reduction thereof by clemency or otherwise,

(6) A brief description of any finding or sentence believed to be unjust;

(7) A full statement of the newly discovered evidence or fraud on the court-martial which is relied upon for the remedy sought;

(8) Affidavits pertinent to the matters in subsection (6)i; and

(9) Affidavit of each person whom the accused expects to present as a witness in the event of a new trial. Each affidavit should set forth briefly the relevant facts within the personal knowledge of the witness.

(d) *Who may act on petition.* If the accused's case is pending before a Court of Military Review or the Court of Military Appeals, the Judge Advocate General shall refer the petition to the appropriate court for action. Otherwise, the Judge Advocate shall act on the petition.

(e) *Ground for new trial.* A new trial may be granted only on grounds of newly discovered evidence or fraud on the court-martial.

(1) A new trial shall not be granted on the grounds of newly discovered evidence unless the petition shows that;

(i) The evidence was discovered after the trial,

(ii) The evidence is not such that it would have been discovered by the petitioner at the time of trial in the exercise of due diligence; and

(iii) The newly discovered evidence, if considered by a court-martial in the light of all other pertinent evidence, would probably produce a substantially more favorable result for the accused.

(2) No fraud on the court-martial warrants a new trial unless it had a substantial contributing effect on a finding of guilty or the sentence adjudged.

(f) *Action on the petition.* (1) The authority considering the petition may cause such additional investigation to be made and such additional information to be secured as that authority believes appropriate. Upon written request, and in his discretion, the authority considering the petition may permit oral argument on the matter.

(2) When a petition is considered by the Judge Advocate General, any hearing may be before the Judge Advocate General or before an officer or officers designated by the Judge Advocate General.

(3) If the Judge Advocate General believes meritorious grounds for relief under Article 74, Uniform Code of Military Justice have been established but that a new trial is not appropriate, the Judge Advocate General may act under article 74, Uniform Code of Military Justice, if authorized, or transmit the petition and related papers to the Secretary concerned with a recommendation.

(4) The Judge Advocate may also, in cases which have been finally reviewed but have not been reviewed by a Court of Military Review, act under article 69, Uniform Code of Military Justice.

[50 FR 23803, June 6, 1985]

§719.144 Application for relief under 10 U.S.C. 869, in cases which have been finally reviewed.

(a) *Statutory provisions.* 10 U.S.C. 869 provides in pertinent part, “The findings or sentence, or both, in a court-martial case not reviewed under subsection (a) or under section 866 of this title (article 66) may be modified or set aside, in whole or in part, by the Judge

Advocate General on the ground of newly discovered evidence, fraud on the court, lack of jurisdiction over the accused or the offense, error prejudicial to the substantial rights of the accused, or the appropriateness of the sentence. If such a case is considered upon application of the accused, the application must be filed in the Office of the Judge Advocate General by the accused on or before the last day of the two-year period beginning on the date the sentence is approved under section 860(c) of this title (article 60(c)), unless the accused establishes good cause for failure to file within that time.”

(b) *Time limitations.* In order to be considered by the Judge Advocate General, an application for relief must be placed in military channels if the applicant is on active duty, or be deposited in the mail if the applicant is no longer on active duty, on or before the last day of the two-year period beginning on the date the sentence is approved by the convening authority. An application not filed in compliance with these time limits may be considered if the Judge Advocate General determines, in his or her sole discretion, that “good cause” for failure to file within the time limits has been established by the applicant.

(c) *Submission procedures.* Applications for relief may be submitted to the Judge Advocate General by letter. If the accused is on active duty, the application shall be submitted via the applicant’s commanding officer, and the command that convened the court, and the command that reviewed the case under 10 U.S.C. 864(a) or (b). If the original record of trial is held by the command that reviewed the case under 10 U.S.C. 864(a) or (b), it shall be forwarded as an enclosure to the endorsement. If the original record of trial has been filed in the National Personnel Records Center, the endorsement will include all necessary retrieval data (accession number, box number, and shelf location) obtained from the receipt returned from the National Personnel Records Center to the sending activity. This endorsement shall also include information and specific comment on the grounds for relief asserted in the application, and an opinion on

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the merits of the application. If the applicant is no longer on active duty, the application may be submitted directly to the Judge Advocate General.

(d) *Contents of applications.* All applications for relief shall contain:

- (1) Full name of the applicant;
- (2) Social Security number and branch of service, if any;
- (3) Present grade if on active duty or retired, or "civilian" or "deceased" as applicable;
- (4) Address at time the application is forwarded;
- (5) Date of trial;
- (6) Place of trial;
- (7) Command title of the organization at which the court-martial was convened (convening authority);
- (8) Command title of the officer exercising review authority in accordance with 10 U.S.C. 864 over the applicant at the time of trial, if applicable;
- (9) Type of court-martial which convicted the applicant, and sentence adjudged;
- (10) General grounds for relief which must be one or more of the following:
 - (i) Newly discovered evidence;
 - (ii) Fraud on the court;
 - (iii) Lack of jurisdiction over the accused or the offense;
 - (iv) Error prejudicial to the substantial rights of the accused;
 - (v) Appropriateness of the sentence;
- (11) An elaboration of the specific prejudice resulting from any error cited. (Legal authorities to support the applicant's contentions may be included, and the format used may take the form of a legal brief if the applicant so desires.);
- (12) Any other matter which the applicant desires to submit;
- (13) Relief requested; and
- (14) Facts and circumstances to establish "good cause" for a failure to file the application within the time limits prescribed in paragraph (b) of this section, if applicable; and
- (15) If the application is signed by a person other than the applicant pursuant to subsection e, an explanation of the circumstances rendering the applicant incapable of making application. The applicant's copy of the record of trial will *not* be forwarded with the application for relief, unless specifically

requested by the Judge Advocate General.

(e) *Signatures on applications.* Unless incapable of making application, the applicant shall personally sign the application under oath before an official authorized to administer oaths. If the applicant is incapable of making application, the application may be signed under oath and submitted by the applicant's spouse, next of kin, executor, guardian or other person with a proper interest in the matter. In this regard, one is considered incapable of making application for purposes of this section when unable to sign the application under oath due to physical or mental incapacity.

[50 FR 23804, June 6, 1985]

§§ 719.145–719.150 [Reserved]

§ 719.151 **Furnishing of advice and counsel to accused placed in pre-trial confinement.**

The Department of the Navy Corrections Manual, SECNAVINST 1640.9, reiterates the requirement of Article 10, UCMJ, that, when a person is placed in pretrial confinement, immediate steps should be taken to inform the confinee of the specific wrong of which he is accused and try him or to dismiss the charges and release him. The Corrections Manual requires that this information normally will be provided within 48 hours along with advice as to the confinee's right to consult with lawyer counsel and his right to prepare for trial. Lawyer counsel may be either a civilian lawyer provided by the confinee at his own expense or a military lawyer provided by the Government. If a confinee requests to confer with a military lawyer, such lawyer should normally be made available for consultation within 48 hours after the request is made.

[39 FR 18437, May 28, 1974]

§ 719.155 **Application under 10 U.S.C. 874(b) for the substitution of an administrative form of discharge for a punitive discharge or dismissal.**

(a) *Statutory provisions.* 10 U.S.C. 874(b) provides that the "Secretary

concerned may, for good cause, substitute an administrative form of discharge for a discharge or dismissal executed in accordance with the sentence of a court-martial.’’

(b) *Submission procedures.* Applications for relief will be submitted to the Secretary using the following address: Secretary of the Navy (Judge Advocate General, Code 20), 200 Stovall Street, Alexandria, VA 22332-2400. Except in unusual circumstances, applications will not normally be considered if received within five (5) years of the execution of the punitive discharge or dismissal, or within five (5) years of disapproval of a prior request under 10 U.S.C. 874(b).

(c) *Contents of the application.* All applications shall contain:

- (1) Full name of the applicant;
- (2) Social Security Number, service number (if different), and branch of service of the applicant;
- (3) Present age and date of birth of the applicant;
- (4) Present residence of the applicant;
- (5) Date and place of the trial, and type of court-martial which resulted in the punitive discharge or dismissal;
- (6) Command title of the convening authority of the court-martial which resulted in the punitive discharge or dismissal;
- (7) Offense(s) of which the applicant was convicted, and sentence finally approved from the trial which resulted in the punitive discharge or dismissal;
- (8) Date the punitive discharge or dismissal was executed;
- (9) Applicant’s present marital status, and number and ages of dependents, if any;
- (10) Applicant’s civilian criminal record (arrest(s) with disposition, and conviction(s)), both prior and subsequent to the court-martial which resulted in the punitive discharge or dismissal;
- (11) Applicant’s entire court-martial record (offense(s) of which convicted and finally approved sentence(s)), and nonjudicial punishment record (including offense(s) and punishment(s) awarded);
- (12) Any military administrative discharge proceedings (circumstances and disposition) initiated against the applicant;

(13) Applicant’s full employment record since the punitive discharge or dismissal was executed;

(14) The specific type and character of administrative discharge requested pursuant to 10 U.S.C. 874(b) (a more favorable administrative discharge than that requested will not be approved);

(15) At least three but not more than six character affidavits, (The character affidavits must be notarized, must indicate the relationship of the affiant to the applicant, and must include the address of the affiant as well as specific reasons why the affiant believes the applicant to be of good character. The affidavits should discuss the applicant’s character primarily as reflected in the civilian community subsequent to the punitive discharge or dismissal which is the subject of the application);

(16) Any matters, other than the character affidavits, supporting the considerations described in subparagraph (18) below;

(17) Any other relief sought within the Department of the Navy and outside the Department of the Navy including dates of application and final dispositions;

(18) A statement by the applicant, setting forth the specific considerations which the applicant believes constitute “good cause,” so as to warrant the substitution of an administrative form of discharge for the punitive discharge or dismissal previously executed. (In this connection, 10 U.S.C. 874(b) does not provide another regular or extraordinary procedure for the review of a court-martial. Questions of guilt or innocence, or legal issues attendant to the court-martial which resulted in the punitive discharge or dismissal, are neither relevant nor appropriate for consideration under 10 U.S.C. 874(b). As used in the statute, “good cause” was envisioned by Congress to encompass only Secretarial exercise of clemency and ultimate control of sentence uniformity. Accordingly, in determining what constitutes “good cause” under 10 U.S.C. 874(b), the primary Secretarial concern will be with the applicant’s record in the civilian community subsequent to his or her punitive separation. Material submitted by the 10 U.S.C. 874(b) applicant

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should be consistent with the foregoing.)

(d) *Signature on application.* Unless incapable of making application himself or herself, the applicant shall personally sign the application, under oath, before a notary or other official authorized to administer oaths. If the applicant is incapable of executing the application, the application may be signed under oath and submitted by the applicant's spouse, next of kin, executor, guardian and other person recognized as a personal representative by the law of the applicant's domicile. One is considered incapable of executing an application for purposes of this paragraph only when the applicant is unable to sign the application under oath due to physical or mental incapacity. When an application is signed by a person other than the applicant, the circumstances rendering the applicant incapable of making sworn application shall be set forth in the application, with appropriate documentation.

(e) *Privacy Act Statement.* Disclosure of personal information requested by paragraph (c) of this section is voluntary; however, failure to accurately provide all requested information may result in the application being denied because of inadequate documentation of good cause.

[47 FR 49645, Nov. 2, 1982, as amended at 50 FR 23804, June 6, 1985]

PART 720—DELIVERY OF PERSONNEL; SERVICE OF PROCESS AND SUBPOENAS; PRODUCTION OF OFFICIAL RECORDS

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AUTHORITY: 5 U.S.C. 301; 10 U.S.C. 5031 and 5148; 32 CFR 700.206 and 700.1202.

Subpart A—Delivery of Personnel

SOURCE: 57 FR 5228, Feb. 13, 1992, unless otherwise noted.