

Strategies for Presenting Unavailable Witness Testimony in Courts-Martial

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I. Introduction

What should government counsel do when it appears likely that a government witness cannot (or will not) appear in person at the time and place set for a court-martial because of one of the reasons listed in Article 49, Uniform Code of Military Justice (UCMJ): poor health, military necessity, nonamenability to process, or other reasonable cause? This is a common, difficult problem. It has proven particularly common, and particularly difficult, in courts-martial involving offenses committed during the recent conflicts in Iraq and Afghanistan.¹ The problem was on display in the Staff Sergeant Robert Bales prosecution, in which Afghan witnesses were flown to Joint Base Lewis-McChord in preparation for trial.²

A solution to the problem of missing witnesses is to obtain and record the necessary testimony at a pre-trial Article 32 hearing or deposition and then play back the recording at trial, defeating any potential hearsay and Confrontation Clause defense objections by proving that the witness is unavailable for in-person testimony for one of the reasons listed in Article 49. The burden is on the government to prove that its witness is unavailable.³ But just what is the legal standard? What evidence, exactly,

must the government offer to prove that its witness is unavailable?⁴

II. Three Authorities on Unavailability: The Confrontation Clause, Article 49, and MRE 804

The standard for witness unavailability in courts-martial is found in three separate sources: the Sixth Amendment's Confrontation Clause; Article 49, UCMJ; and Military Rule of Evidence (MRE) 804(a).

A. Unavailability Under the Confrontation Clause: *Ohio v. Roberts*

The Sixth Amendment's Confrontation Clause states: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." The CAAF has held that this Clause, and the Supreme Court decisions interpreting it, apply in full to courts-martial.⁵ (Although the CAAF's reasoning on this point is hardly free from doubt,⁶ the doctrine appears settled.)

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¹ Compare Major Franklin D. Rosenblatt, *Non-Deployable: The Court-Martial System in Combat from 2001 to 2009*, ARMY LAW., Sept. 2010, at 12-34 (arguing that witness production difficulties contributed to making courts-martial "non-deployable"), with Major E. John Gregory, *The Deployed Court-Martial Experience in Iraq 2010: A Model for Success*, ARMY LAW., Jan. 2012, at 6-34 (rebutting Rosenblatt's conclusion but agreeing that witness production was difficult). See also Major John M. Hackel, *Planning for the "Strategic Case": A Proposal to Align the Handling of Marine Corps War Crimes Prosecutions with Counterinsurgency Doctrine*, 57 NAVAL L. REV. 239 (2009); Captain A. Jason Nef, *Getting to Court: Trial Practice in a Deployed Environment*, ARMY LAW., Jan. 2009, at 50; and Captain Eric Hanson, *Know Your Ground: The Military Justice Terrain of Afghanistan*, ARMY LAW., Nov. 2009, at 36.

² Adam Ashton, *Afghan Witnesses Visit Base to Prepare for Staff Sgt. Bales' Court-martial*, TACOMA NEWS TRIB., Mar. 13, 2013, <http://www.mcclatchydc.com/2013/03/13/185690/afghan-witnesses-visit-base-to.html#storylink=cpy> (last visited Sept. 26, 2013).

³ *United States v. Vanderwier*, 25 M.J. 263, 267 (C.M.A. 1987). The government must carry this burden by a "preponderance of the evidence." MANUAL FOR COURTS-MARTIAL, UNITED STATES, MIL. R. EVID. 104(a) (2012) [hereinafter MCM] (military judge's responsibility to determine "admissibility of evidence"); *id.* R.C.M. 801(e)(4) (rulings by military judge on interlocutory matters are based on preponderance of the evidence unless a specific provision of the Manual for Courts-Martial (MCM) provides otherwise).

⁴ There are two important limitations to note at the outset. First, this article does not include the issue of child victim-witnesses, who are in limited fact-specific instances permitted to testify by one-way closed-circuit television because of the traumatic effect that the accused's presence would have on them. That particular problem has already received extensive attention; the solution to it is (at least in theory) straightforward and well-established in the Rules for Courts-Martial (RCM). The procedures are found in Military Rules of Evidence (MRE) 611(d) and RCM 914A; the Court of Appeals for the Armed Forces (CAAF) has held that they comply with the Confrontation Clause. *United States v. Pack*, 65 M.J. 381 (C.A.A.F. 2007). See also Major Bradley M. Cowan, *Children in the Courtroom: Essential Strategies for Effective Testimony by Child Victims of Sexual Abuse*, ARMY LAW., Feb. 2013, at 4. This article instead focuses on adult witnesses who are capable of testifying but who are unavailable for other reasons. The second limitation is that this article's strategies should not be used in a capital case because depositions are not admissible in such cases. UCMJ art. 49 (2012).

⁵ See, e.g., *United States v. Blazier*, 68 M.J. 439 (C.A.A.F. 2010); *United States v. Magyari*, 63 M.J. 123 (C.A.A.F. 2006).

⁶ The CAAF's logic is far from self-evident because the Uniform Code of Military Justice (UCMJ) is an "[e]xercis[e]" of Congress's constitutional authority "[t]o make Rules for the Government and Regulation of the land and naval Forces." U.S. CONST. art. I, sec. 8, cl. 14; *Solorio v. United States*, 483 U.S. 435, 438 (1987). The UCMJ trumps at least some other guarantees of the Sixth Amendment, including the right to trial by a civilian petit jury. *Reid v. Covert*, 354 U.S. 1, 37 (1957); *Ex parte Quirin*, 317 U.S. 1, 40 (1942); *Ex parte Milligan*, 71 U.S. 2, 78 (1886). It is therefore at least arguable that, if the UCMJ were to conflict with the Supreme Court's interpretation of the Confrontation Clause, the UCMJ should control. Fortunately, as this article outlines, the Supreme Court's interpretation of the Confrontation Clause, set forth in *Ohio v. Roberts*, is not in direct conflict with the military's unavailability standard, but can instead be read in harmony with it.

The Supreme Court has held that this Clause bars the government from presenting any testimonial statement by an out-of-court witness, unless that witness is “unavailable to testify, and the defendant ha[s] had a prior opportunity for cross-examination.”⁷ In *Ohio v. Roberts*, the Court defined unavailable in terms of the prosecution’s good faith: “The ultimate question is whether the witness is unavailable despite good-faith efforts undertaken prior to trial to locate and present that witness.”⁸ *Roberts* held that this standard was met (i.e., the prosecution proved that the witness was unavailable) because the prosecutor in that case sent five subpoenas to the witness’s last known address—her parents’ home—and the witness’s parents testified that they had not heard from her in over a year. *Roberts* remains the leading case on the meaning of unavailability for purposes of the Confrontation Clause.⁹

B. Unavailability Under Article 49, UCMJ

The military’s unavailability standard is found in Article 49, UCMJ, which is located in Part VII of the code. Despite Part VII’s name—Trial Procedure—Congress has not, in fact, created very many trial procedures, choosing instead to leave that task to the President.¹⁰ Article 49 (entitled Depositions) is a rare exception to that general rule. The fact that Congress wrote a specific Article on the issue of unavailability is rather remarkable,¹¹ and indicates how important Congress considered the issue of unavailable witnesses in courts-martial.

⁷ *Crawford v. Washington*, 541 U.S. 36, 54 (2004).

⁸ *Ohio v. Roberts*, 448 U.S. 56, 74–75 (1980) (citing and quoting *Barber v. Page*, 390 U.S. 719 (1968)) (quotations and some punctuation omitted).

⁹ At issue in *Roberts* were two questions: (1) did the witness’s pretrial statement bear sufficient “indicia of reliability” that it could be admitted? and (2) was the witness really unavailable for trial? *Roberts*’s answer to the first question was later overruled by *Crawford v. Washington*, 541 U.S. 36, 54 (2004). But *Roberts* remains the controlling authority on the legal standard by which to judge whether a witness is truly unavailable. On this issue, *Crawford* had nothing to say and thus did not disturb the reasoning or the result in *Roberts*. See *Hardy v. Cross*, 132 S. Ct. 490 (2011) (per curiam) (quoting, analyzing, and applying *Roberts* to hold that the Illinois appellate court was not unreasonable in determining that the prosecution’s witness was unavailable); see also *United States v. Yida*, 498 F.3d 945 (9th Cir. 2007) (applying *Roberts* to hold that the witness’s pre-trial hearsay statements were inadmissible because “the government’s decision to deport [the witness] . . . was not reasonable”).

¹⁰ UCMJ art. 36 (President may prescribe rules).

¹¹ Congress has not made any similar rule for the federal civilian courts, but has instead relied on the Supreme Court, and the Judicial Conference of the United States, to “prescribe” the rules, which then take effect automatically, seven months later, unless Congress acts to prevent any particular rule from taking effect. 28 U.S.C. §§ 2071–2077 (2013) (Rules Enabling Act).

Article 49’s definition of unavailable is more specific than the Supreme Court’s general test of prosecutorial good faith. Paragraph (d) of Article 49 states:

A duly authenticated deposition . . . so far as otherwise admissible under the rules of evidence, may be read in evidence or, in the case of audiotape, videotape, or similar material, may be played in evidence . . . if it appears

(1) that the witness resides or is beyond the State, Commonwealth, or District of Columbia in which the court, commission, or board is ordered to sit, or beyond 100 miles from the place of trial or hearing;

(2) that the witness by reason of death, age, sickness, bodily infirmity, imprisonment, *military necessity*, *nonamenability to process*, or *other reasonable cause*, is unable or refuses to appear and testify in person at the place of trial or hearing; or

(3) that the present whereabouts of the witness is unknown.¹²

This article does not address the third subparagraph because missing witnesses are relatively uncommon in the military justice system. More common are courts-martial in which a witness is unavailable for a reason given in subparagraph (d)(1) or (d)(2).¹³

1. Subparagraph (d)(1)—Physical Distance from the Site of Trial

The plain meaning of subparagraph (d)(1) is that courts-martial should admit pre-trial depositions into evidence whenever the witness is physically located in another state or more than 100 miles from the site of trial. The subparagraph does not require the government to subpoena or even to invite the witness to participate. Distance alone decides the matter, according to the text of the statute. This plain

¹² UCMJ art. 49 (emphasis added).

¹³ The leading case on missing witnesses and the unavailability exception is *United States v. Burns*, 27 M.J. 92 (C.M.A. 1988). *Burns* has been cited twenty-two times by later military courts, and just one of those citations came from a case with a witness who could not be located: *United States v. Hubbard*, 28 M.J. 27, 31 (C.M.A. 1989) (witness, an active-duty Soldier, went AWOL two weeks before trial and could not be found despite widespread search). A search of the Westlaw database confirms the lack of appellate cases on this issue. The Boolean search string “unavail! /s miss!” turns up zero hits in the sixty years since *United States v. Woodworth*, 7 C.M.R. 582 (A.F.B.R. 1952). In *Woodworth*, the defense conceded that the witnesses were unavailable because they were listed as missing in action.

meaning has been ruled a violation of “military due process.”¹⁴ “[T]he appellate courts do not give this provision the credence it appears to demand,” writes Colonel Mark Allred, USAF.¹⁵ “Indeed, they have ganged up on the verbiage and beaten it pretty well into oblivion.”¹⁶

Just as the courts eliminated subparagraph (d)(1), so, too, did the President’s rules of evidence. The subparagraph survived in the Manuals for Courts-Martial promulgated by Presidents Truman (1951) and Nixon (1969),¹⁷ but then disappeared in President Carter’s rewrite of the Military Rules of Evidence (1980).¹⁸ This disappearance may have been a response to the military appellate courts’ treatment of the subparagraph,¹⁹ or it may have been an oversight due to the drafters’ heavy reliance on the Federal Rules of Evidence (which contain no such 100-mile rule for witness availability).²⁰ Whatever the reason for the initial decision

to eliminate subparagraph (d)(1) from the military rules of evidence, this elimination has persisted in every subsequent revision of the rules.

Despite this negative treatment of Congress’s plain meaning in subparagraph (d)(1), trial counsel may wish to raise and preserve the argument for appeal. Doing so should be easy and risk-free in many cases in which trial counsel is also seeking to have a witness declared unavailable for one of the reasons listed in subparagraph (d)(2), such as military necessity or nonamenability to process.²¹

2. Subparagraph (d)(2)—Other Reasons for Unavailability, Including Military Necessity and Nonamenability to Process

Subparagraph (d)(2) instructs a court-martial to admit a pre-trial deposition into evidence if two conditions are met: (1) the witness “is unable or refuses to appear”; and (2) the reason for the witness’s inability or refusal is poor health, “imprisonment, military necessity, nonamenability to process, or other reasonable cause.”²²

Unlike subparagraph (d)(1), which has been ignored by the military rules of evidence, subparagraph (d)(2) is implemented by Military Rule of Evidence 804(a).

C. Unavailability Under MRE 804

Rule 804(a) permits pre-trial testimony to be admitted if any of Article 49(d)(2)’s reasons for unavailability are met—that is, pre-trial testimony may be admitted under Rule 804(a) if the witness:

- (1) has a “physical or mental illness or infirmity,”
- (2) if “process” has not sufficed to “procure” the witness’s “attendance,” or
- (3) if the witness is otherwise “unavailable within the meaning of Article 49(d)(2).”

He instructed the Working Group that it was to adopt each Federal Rule of Evidence verbatim, making only the necessary wording changes needed to apply it to military procedure, unless a substantial articulated military necessity for its revision existed, or, put differently, unless the civilian rule would be unworkable within the armed forces without change.

Id. at 13. See also Colonel George R. Smawley, *A Life of Law and Public Service: United States District Court Judge and Brigadier General (Retired) Wayne E. Alley*, 208 MIL. L. REV. 213, 277–78 (2011).

²¹ Those witnesses who are unavailable by reason of military necessity are also likely to be located over 100 miles from the site of trial.

²² UCMJ art. 49(d)(2) (2012).

¹⁴ In 1970, the Court of Military Appeals ruled that subparagraph (d)(1) violates “the right of confrontation as embodied in military due process,” and that in addition to physical distance from trial, the government must also prove “actual unavailability.” *United States v. Davis*, 19 C.M.A. 217, 224 (C.M.A. 1970); see also *United States v. Dieter*, 42 M.J. 697, 700 (A. Ct. Crim. App. 1995) (“[T]he ‘hundred-mile’ rule of Article 49(d)(1), UCMJ, is not an acceptable excuse when it comes to military witnesses.”). These rulings are ripe for reconsideration now that the military due process doctrine has been discredited, most recently by *United States v. Vazquez*, in which the CAAF described the doctrine as “an amorphous concept . . . that appears to suggest that servicemembers enjoy due process protections above and beyond the panoply of rights provided to them by the plain text of the Constitution, the UCMJ, and the MCM. They do not.” 72 M.J. 13, 19 (C.A.A.F. 2013).

¹⁵ Colonel Mark L. Allred, *Depositions and a Case Called Savard*, 63 A.F. L. REV. 1, 12–13 (2009).

¹⁶ *Id.* See *Davis*, 19 C.M.A. at 224; *Dieter*, 42 M.J. at 700.

¹⁷ Both manuals were promulgated by executive order, and both contained a Chapter XXVII, entitled “Rules of Evidence”; this chapter, in turn, contained a Paragraph 145 entitled “DEPOSITIONS; FORMER TESTIMONY.” The first sentence of that paragraph read, in full: “See Article 49.” Nothing in the pages following that sentence suggested subparagraph (d)(1) was not to be seen along with the rest of the Article.

¹⁸ Exec. Order No. 12,198, 45 Fed. Reg. 16,932 (1980). This executive order was drafted by military lawyers from each armed force, working together as the Evidence Working Group of the Joint Service Committee on Military Justice. Their work was then reviewed and approved by others, including the General Counsel of the Department of Defense, prior to the President’s signature. MCM, *supra* note 3, Analysis of the Military Rules of Evidence, at A22-1. The 1980 executive order effected what the leading treatise on military evidence law describes as “a dramatic change.” I STEPHEN A. SALTZBURG, LEE D. SHINASI & DAVID A. SCHLUETER, *MILITARY RULES OF EVIDENCE MANUAL*, at xv (Matthew Bender & Co. 2006). A detailed description of the Evidence Working Group’s efforts may be found in an article written ten years later by a prominent member of that Group. Frederic L. Lederer, *The Military Rules of Evidence: Origin and Judicial Implementation*, 130 MIL. L. REV. 5 (1990).

¹⁹ See *supra* note 14 and cases cited therein.

²⁰ Lederer’s description of the Evidence Working Group does not mention Article 49 or depositions. See Lederer, *supra* note 18. But Lederer does describe the “marching orders” given to the group by its leader, Colonel Wayne Alley, U.S. Army.

Rule 804(a) also includes some additional reasons for unavailability, not expressly mentioned in Article 49(d):

- (1) if the witness is privileged from testifying;
- (2) if the witness is unable to remember the events in question; or
- (3) if the witness simply refuses the court's order to testify.

Just as Rule 804(a) adds to Article 49's list of reasons why a witness may be unavailable, so too does the Rule's next paragraph, 804(b), add to Article 49's list of what kinds of pre-trial testimony may be admitted. Although Article 49 mentions only pre-trial depositions, Rule 804(b) also includes in the list of acceptable substitutes for in-person testimony at trial, any pre-trial testimony at "the same or different proceeding," including the Article 32 hearing.²³ Because an Article 32 hearing must be conducted before any general court-martial, this hearing is the ideal time to capture testimony from witnesses who will be unavailable at trial for the reasons stated in Article 49(d) and Rule 804(a). The only question is—how can trial counsel prove that the witness is, in fact, unavailable at trial, even though the witness was available at a pre-trial deposition or an Article 32 hearing? That is the question addressed in the next Part of this article.

III. Three Dimensions of Unavailability in Courts-Martial: Good Faith, Timing, and Location

There are three dimensions of unavailability that trial counsel must prove. The first dimension is the government's good faith. Military courts have insisted that military prosecutors make good faith efforts to locate, invite, cajole, and (if necessary and possible) compel their witnesses to appear at the trial to testify in person—the same standard that the Supreme Court announced in *Ohio v. Roberts*.²⁴ But the precise requirements of good faith vary considerably depending on the reason for the witness's unavailability, as is described below in Part III.A.

The second dimension is the timing of trial. Military courts have examined the timing of trial and have asked why the trial must take place at the time set for it, rather than later, when the reason for unavailability has passed and the witness is again available. Delaying trial is a realistic option if the reason for unavailability is the witness's poor health or military necessity. The amount of delay required, and its costs and benefits, are estimated and weighed by the courts.

²³ If Article 32 testimony is read into evidence from a transcript, the transcript must be verbatim. MCM, *supra* note 3, MIL. R. EVID. 804(b)(1). As discussed further in Part IV, below, the better course is to obtain a high-quality video and audio recording.

²⁴ 448 U.S. 56, 74–75 (1980).

The third dimension of unavailability is the location of trial. Military courts have indicated that, in some cases, prosecutors must also show why the trial should occur in the place set for it, rather than in some other place, where the witness may be available. Moving a court-martial overseas, for example, could improve the availability of deployed and foreign witnesses.

A. The First Dimension of Witness Unavailability: The Government's Good Faith

The first dimension of unavailability in courts-martial is the government's good faith. This is the principle that *Ohio v. Roberts* announced,²⁵ but its application differs greatly depending on the reason for the witness's unavailability. This Section will consider this principle as applied to two of Article 49(d)(2)'s most common reasons for unavailability: military necessity and nonamenability to process.

1. Military Necessity: The Witness's Duties Must Be Important and Separate from Trial Considerations

When the reason for unavailability is military necessity, the first dimension the government must prove is the content and importance of the witness's military duty. Unfortunately, there is no opinion on this dimension from the highest military court, and the few opinions from the intermediate service courts of appeal do not give any explicit guidance as to what will and what will not be considered sufficient evidence.²⁶ The leading treatise is unhelpful.²⁷

Although the courts have not clearly explained their *theory*, it appears that in *practice* they have measured the government's actions by the standard of good faith. Specifically, the courts appear to have asked whether there is a legitimate and important military reason why the witness cannot be present—a reason that is separate from the

²⁵ *Id.*

²⁶ See *infra* notes 27–31 and cases cited therein.

²⁷ 2 SALTZBURG, SCHINASI & SCHLUETER, *supra* note 18, § 804.02[2][f]. This treatise cites, first, *United States v. Obligacion*, 37 C.M.R. 861 (A.F.C.M.R. 1967). But *Obligacion* concerned not the military necessity reason for unavailability, but rather the 100-mile physical distance reason, and even then, the court decided the case on an separate ground (namely, the court reversed because the defense did not, at the time of the pre-trial Article 32 testimony, have clear notice that the testimony was intended for use at trial). Second, this treatise cites *United States v. Chavez-Rey*, 49 C.M.R. 517 (A.F.C.M.R. 1974), *rev'd on other grounds* by 1 M.J. 34 (C.M.A. 1975). But *Chavez-Rey* concerns witnesses' absence from an Article 32 hearing, not from the trial itself. *Id.* at 519 (finding no error, in part, because the absent witnesses later "appeared at trial and were subjected to searching cross-examination"). Third, the treatise cites *United States v. Ledbetter*, 2 M.J. 37 (C.M.A. 1976). But *Ledbetter*, like *Chavez-Rey*, concerns the absence of a witness from an Article 32 hearing, not the absence from *trial itself*, and, as in *Chavez-Reyes*, there was no assertion of military necessity. *Id.* at 43–44.

prosecution's desires to achieve a conviction, to reduce travel costs, and to avoid personal inconvenience to witnesses.

The government has prevailed under this standard in every published opinion, of which there are three.²⁸ In 1993, the Army Court of Criminal Review upheld the military judge's ruling that "two policemen were unavailable" because they were "in a distant theater of operations [Saudi Arabia] with hostilities imminent."²⁹ In 1992, the Air Force Court of Criminal Review found that a witness "was unavailable due to military necessity in that he was performing an essential military mission as an aircraft flight engineer in support of Operation Desert Shield."³⁰ And in 1979, the Coast Guard Court of Criminal Review agreed that the Commanding Officer of an icebreaker was unavailable as a witness because of an unexpected "order for his vessel to [conduct] emergency ice-breaking operations."³¹

Contrary to those three published decisions, an unpublished (and therefore non-precedential) 2005 decision of the Army Court of Criminal Appeals, *United States v. Campbell*, found that the government had not demonstrated a military necessity for its witness to be absent from trial, even though, at the time of trial (in North Carolina), the witness was on overseas deployment (in Colombia).³² But *Campbell* is different from the three published cases discussed above because in *Campbell*, the military necessity had a firm, imminent end-date: the witness was due to return from deployment just six weeks after the trial occurred. Thus, *Campbell* is best read as a case about the second dimension of unavailability—the timing of trial.

The UCMJ's legislative history supports the courts' practice of requiring a good faith military reason for the witness's absence. The issue was mentioned just once in the volumes of committee reports and hearings that preceded the UCMJ.³³ The mention occurred at the end of Felix Larkin's

testimony before Subcommittee No. 1 of the House Armed Services Committee, on the afternoon of Saturday, 26 March 1949. The very last question about Article 49 came from Representative Overton Brooks, the Chairman of the Subcommittee:

MR. BROOKS: May I ask you this question, Mr. Larkin: Under small 2 subsection (d) [of Article 49] what is meant by "military necessity?"

MR. LARKIN: I take it that covers the situation where there is a witness subject to the code, or military personnel who are on such an important military mission, or by virtue of military operations, that it is impossible in performing their duty to also be at the place of the trial. In that case it is permitted that their deposition be read at the trial.

MR. BROOKS: Of course, that could be badly abused if they wanted to.

MR. LARKIN: I suppose it is a question of the good faith in operating or administering it.

In sum, then, the three military appellate courts to issue published opinions on this point have applied a good-faith standard to witness absence due to military necessity, and have asked whether the absence is due to a legitimate, important military duty that is separate from the particular interests of the prosecutors. This standard comports with the available legislative history on this point. Under this standard, the government has usually prevailed.

2. *Nonamenability to Process: The Government Must Make a Good-Faith Effort to Invite and, If Necessary, to Compel the Witness to Attend*

This section describes what trial counsel must do to establish that a civilian witness is unavailable by reason of nonamenability to process. The general legal standard is, once again, good faith. But in this context, good faith requires more effort from trial counsel than previously seen in the military-necessity cases discussed above. The meaning of good faith is set forth in the leading case of *United States v. Burns*, which held that trial counsel must "exhaust[] every reasonable means to secure" a civilian

²⁸ A search of the Westlaw military-justice database for all decisions in which the terms "military necessity" and "witness" appeared returned 155 decisions (both published and unpublished), of which only five addressed the question. The three published opinions, and the unpublished *United States v. Campbell*, are discussed above in the text. The fifth opinion is very old, brief, and based on numerous errors, not just the lack of proven military necessity to justify the witnesses' absence: *United States v. Mulvey*, 27 C.M.R. 316, 318 (C.M.A. 1956).

²⁹ *United States v. Boswell*, 36 M.J. 807, 811 (A.C.M.R. 1993).

³⁰ *United States v. Marsh*, 35 M.J. 505, 509 (A.F.C.M.R. 1992).

³¹ *United States v. Kincheloe*, 7 M.J. 873, 877–78 (C.G.C.M.R. 1979).

³² *United States v. Campbell*, 2005 WL 6520466 (A. Ct. Crim. App. June 28, 2005).

³³ See generally INDEX AND LEGISLATIVE HISTORY, UNIFORM CODE OF MILITARY JUSTICE 1950 (William K. Suter, ed., 1999). The House and Senate Committee Reports on the UCMJ described what Article 49 would accomplish, but did not specifically address the military necessity reason for unavailability. Instead, those reports simply stated that "[t]he admissibility

of a deposition is made dependent upon the need for its use at the time of trial." S. REP. NO. 486, at 22 (1949); H.R. REP. 491, at 25 (1949). Because a full discussion of the proper use of legislative history is beyond the scope of this article, this history is simply noted; left unaddressed is the question of precisely how binding or persuasive it is.

witness's "live testimony."³⁴ When the trial and the witness are both located in the United States, the *Burns* standard is relatively easy to understand because it is clear what means exist for trial counsel to exhaust. But when a trial or a witness is located overseas, the *Burns* standard becomes more difficult to understand because it is less clear what reasonable means are available to compel an unwilling witness.³⁵

Before claiming that a witness is unavailable by reason of nonamenability to process, trial counsel must first invite the witness to attend and offer to pay her expenses to do so.³⁶ If the witness is employed by the Department of Defense,³⁷ or even by another federal agency,³⁸ trial counsel should also ask the employer to compel the witness's attendance and should enlist the convening authority's personal assistance in this effort.³⁹

If the witness agrees to attend, then trial counsel must arrange travel. This can be difficult, especially if the witness is located abroad, is not a U.S. citizen, and the trial is set to occur in the United States. In that case, trial counsel must ensure that the witness is able to pass through customs or otherwise travel into the United States. These efforts may require high-level coordination between the Department of Defense and the Department of Homeland Security.⁴⁰

The sooner trial counsel makes these efforts to persuade and enable a witness to attend voluntarily, and the sooner trial counsel obtains the witness's refusal, the sooner trial counsel may turn to reasonable efforts to compel the witness.

³⁴ 27 M.J. 92, 97 (C.M.A. 1988).

³⁵ *Id.*

³⁶ *United States v. Crockett*, 21 M.J. 423, 427 (C.M.A. 1986) (citing *Mancusi v. Stubbs*, 408 U.S. 204 (1972); *Barber v. Page*, 390 U.S. 719 (1968)). "Often witnesses who cannot be compelled to appear can nonetheless be persuaded to do so." *Id.* at 427.

³⁷ MCM, *supra* note 3, R.C.M. 703(e)(2) (discussion) (civilian employees of the DoD "may be" directed by "appropriate authorities" to attend court-martial).

³⁸ In a recent case, the Food and Drug Administration (FDA) refused to compel one of its employees to travel from the United States to testify at a trial in Germany. The Army Court of Criminal Appeals held that the prosecutors' good-faith efforts to request agency cooperation were sufficient to render the witness unavailable. *United States v. Kitmanyen*, 2011 WL 5557420 (A. Ct. Crim. App. Oct. 31, 2011).

³⁹ *See id.* In *Kitmanyen*, the convening authority wrote a letter to the Commissioner of the FDA personally requesting assistance in compelling the witness's attendance. This level of effort likely played a role in the court's conclusion that trial counsel had satisfied the *Burns* standard of exhausting all reasonable means.

⁴⁰ In the *Bales* prosecution, the Army managed to fly six Afghan nationals directly to its base in Washington, not for the trial itself, but merely to prepare the witnesses for trial. *See Ashton, supra* note 2.

Here is the sequence of events if both the witness and the court-martial are located in the United States: If the witness refuses an invitation to attend the court-martial, then trial counsel must issue a subpoena and mail it to the witness. (This is as far as trial counsel got in *Burns*.) If mailing the subpoena fails, trial counsel must then cause the subpoena to be personally served on the witness.⁴¹ If the witness still refuses to comply with the personally served subpoena, trial counsel should bring the matter to the military judge's attention. The judge should then issue a warrant of attachment that authorizes law enforcement to seize, arrest, and transport the witness to the site of trial.⁴² With that warrant in hand, trial counsel may obtain the assistance of a law enforcement officer to execute the warrant, which means, in practical terms, to arrest the witness and bring him to the site of trial. Trial counsel may seek assistance from the U.S. Marshals Service,⁴³ the civilian agents of the Military Criminal Investigative Organizations, such as the Navy's Naval Criminal Investigative Service or the Army's Criminal Investigation Division,⁴⁴ agents of the service Inspector General,⁴⁵ or the local sheriff's office. If the witness still refuses to testify—even after he is arrested, brought to court, and placed on the witness stand—the military judge may then declare him unavailable.⁴⁶ All witnesses located in the United States are amenable to this process if the court-martial is also located in the United States.

⁴¹ MCM, *supra* note 3, R.C.M. 703(e)(2); *United States v. Burns*, 27 M.J. 92, 96–97 (C.M.A. 1988). The trial counsel in *Burns* failed to take this next step of causing the subpoena to be personally served on the witness.

⁴² MCM, *supra* note 3, R.C.M. 703(e)(2)(G)(i) (discussion). A warrant of attachment is the equivalent of an arrest warrant and must be issued by the military judge. Although the rule states that a warrant of attachment may be executed by any person who is at least 18 years old, by far the best practice is for trial counsel to arrange for someone with civilian arrest powers to execute the warrant.

⁴³ *See* 28 U.S.C. § 566 (2013) (U.S. Marshals "shall execute all lawful writs, process, and orders issued under the authority of the United States"). A 1981 letter from the Deputy U.S. Attorney General to the Director of the Marshal's Service stated that the U.S. Marshals are "authorized and obliged" to execute military warrants of attachment. Letter from Edward C. Schmults, Deputy U.S. Attorney General, to William E. Hall, Director, U.S. Marshals Service (Mar. 5, 1981) (on file with author).

⁴⁴ Congress has empowered the Service Secretaries to authorize the civilian agents of each service's investigative organization to "execute and serve warrants and other processes issued under the authority of the United States." 10 U.S.C. § 4027 (2013) (Army); *id.* § 7480 (Navy); *id.* § 9027 (Air Force). The Secretary of the Navy exercised this authority by issuing SECNAVINST 5430.107, which states: "[C]ivilian Special Agents are authorized to execute and serve any warrant or other process issued under the authority of the United States." U.S. DEP'T OF NAVY, SEC'Y OF NAVY INSTR. 5430.107, MISSION AND FUNCTIONS OF THE NAVAL CRIMINAL INVESTIGATIVE SERVICE para. 6f (28 Dec. 2005), available at http://www.fas.org/irp/doddir/navy/secnavinst/5430_107.pdf.

⁴⁵ *United States v. Harding*, 63 M.J. 65, 66 (C.A.A.F. 2006) (stating the Inspector General of the Air Force could seize psychotherapy documents held by a civilian social worker pursuant to a warrant of attachment).

⁴⁶ MCM, *supra* note 3, MIL. R. EVID. 804(a)(2).

If either the witness or the trial is located abroad, however, then process is much more difficult. A casual glance at the Manual for Courts-Martial suggests that process to compel witnesses exists only if both the witness and the trial are located in the United States.⁴⁷ There is one exception to this general rule: U.S. citizens located overseas may be compelled by a subpoena issued by a federal district court under Section 1783 of Title 28.⁴⁸ The Supreme Court upheld this process in *United States v. Blackmer*, a unanimous decision that required a U.S. citizen living in Paris to provide evidence in a civilian criminal prosecution in the District of Columbia.⁴⁹ The Court reasoned:

By virtue of the obligations of citizenship, the United States retained its authority over [the witness], and he was bound by its laws made applicable to him in a foreign country. . . . [T]he United States possesses the power inherent in sovereignty to require the return to this country of a citizen, resident elsewhere, whenever the public interest requires it, and to penalize him in case of refusal.⁵⁰

Although the Analysis section of the Manual claims that Section 1783 cannot be used in courts-martial, its reasoning is not persuasive.⁵¹

Trial counsel should—in keeping with *Burns*'s admonition to exhaust all reasonable means to secure the

witness's presence—apply to a U.S. district court to issue a subpoena to any uncooperative U.S. citizen witness located abroad. If the witness continues to resist, then trial counsel should attempt to effect lawful service of the subpoena,⁵² and once service is accomplished, should enforce the subpoena by moving the district court that issued the subpoena to seize the witness's assets in the United States.

To sum up, then, the first dimension of unavailability, good faith, requires trial counsel to make reasonable efforts to secure the witness's presence. If the reason for unavailability is military necessity, then the prosecution must establish that the witness's military duties are important and separate from trial considerations. If the reason for unavailability is nonamenability to process, then the prosecution must demonstrate, first, its efforts to invite and persuade the witness and then, second, its efforts to use all available process to compel the witness to attend.

B. The Second Dimension of Witness Unavailability: The Timing of Trial

The second dimension of unavailability is the date of trial. Even if a witness is unavailable on that date, a delay is always possible. Trial counsel must first estimate the length of the delay that would be necessary to produce the witness, and must then convince the court that the costs of that delay outweigh the benefits of the witness's in-court presence. Trial counsel must take these steps even if the defense has not requested a continuance for the purpose of obtaining the witness's in-court testimony.⁵³

The leading case on the timing dimension of unavailability is *United States v. Cokeley*, in which the civilian witness—the alleged victim of a rape—was unavailable for medical reasons: she was recovering from an emergency Caesarean section. The Court of Military Appeals reversed the conviction, holding that the military judge abused his discretion by admitting the civilian witness's pre-trial deposition into evidence. The military judge should have delayed the trial, the court held, until the witness's health improved so that she could travel to the

⁴⁷ Article 46 states, "Process issued in court-martial cases . . . shall run to any part of the United States, or the Territories, Commonwealths, and possessions." UCMJ art. 46 (2012) (emphasis added). The emphasized language suggests that a court-martial's "process" does not extend to any foreign country. See also MCM, *supra* note 3, R.C.M. 703(e)(2) (discussion); *id.* app. 21-38 ("[p]rocess in courts-martial does not extend abroad").

⁴⁸ The court may "order the issuance of a subpoena requiring the appearance as a witness before it, or before a person or body designated by it, of a national or resident of the United States who is in a foreign country." 28 U.S.C. § 1783 (2013) (emphasis added). The emphasized portion of Section 1783 gives a U.S. district court the authority to issue a subpoena requiring a U.S. citizen, located abroad, to appear before a court-martial that is "designated" by the court. If the foreign-located witness ignores the district court's subpoena, then the district court may use the enforcement mechanism set forth in Section 1784, which permits it to confiscate any U.S.-based assets of the recalcitrant witness in order to exact a criminal fine of up to \$100,000. *Id.* § 1784.

⁴⁹ 284 U.S. 421 (1932).

⁵⁰ *Id.* at 436–38.

⁵¹ MCM, *supra* note 3, app. 21-38 (2012). The Analysis's sole authority for the proposition that Section 1783 does not apply is *United States v. Daniels*, 48 C.M.R. 655 (C.M.A. 1974). But *Daniels* is no authority at all because in *Daniels*, neither the prosecution nor the defense attempted to use Section 1783. *Id.* at 656–57. The only invocation of Section 1783 came in Judge Quinn's concurring opinion, in which he argued that Section 1783 does authorize federal district courts to compel U.S. citizens abroad to testify in courts-martial. *Id.* at 658.

⁵² See generally, *Service of Legal Documents Abroad*, TRAVEL.STATE.GOV, http://travel.state.gov/law/judicial/judicial_680.html (last visited Sept. 30, 2013) (describing various methods of serving U.S. legal documents on persons located in foreign countries). The U.S. rules do not require any particular method of service, but rather cite each other in an unhelpfully recursive loop. Compare 28 U.S.C. § 1783(b) (rules of service are to be found in the "Federal Rules of Civil Procedure"), with FED. R. CIV. P. 45(b)(3) ("28 U.S.C. § 1783 governs issuing and serving a subpoena directed to a United States national or resident who is in a foreign country.").

⁵³ Although defense did request a continuance in *United States v. Cokeley*, 22 M.J. 225 (C.M.A. 1986), there is no indication that the defense did so in the leading military necessity case, *United States v. Vanderwier*, 25 M.J. 263, 267 (C.M.A. 1987).

court-martial to testify in person.⁵⁴ The most important fact to keep in mind about *Cokeley* is that the delay required was quite short: the victim's doctors estimated that she would be well enough to travel in just two or three weeks.⁵⁵ The *Cokeley* court stated a "preference for live testimony" and then gave a list of six factors that a military judge should consider in determining whether to delay the trial until a temporarily unavailable witness may testify in person:

The military judge must carefully weigh all facts and circumstances of the case, keeping in mind the preference for live testimony. Factors to be considered include [1] the importance of the testimony, [2] the amount of delay necessary to obtain the in-court testimony, [3] the trustworthiness of the alternative to live testimony, [4] the nature and extent of earlier cross-examination, [5] the prompt administration of justice, and [6] any special circumstances militating for or against delay.⁵⁶

One year after *Cokeley*, in *United States v. Vanderwier*, the Court of Military Appeals extended *Cokeley*'s six-factor test to the situation where a witness is unavailable because of military necessity.⁵⁷ In *Vanderwier*, the delay required was even shorter than the two or three weeks required in *Cokeley*; it appeared that a delay of just two days would have brought the witness back from training to testify in person; therefore, it was error for the military judge to find the witness unavailable and admit the witness's pre-trial deposition.⁵⁸

⁵⁴ 22 M.J. 225 (C.M.A. 1986). After giving a pre-trial deposition, the witness left South Carolina (where the alleged assault occurred and the court-martial was held) for Oregon, where she gave birth, by emergency Cesarean, on 1 November. Trial occurred on 12 December, after the military judge denied a defense request for continuance until the witness could travel.

⁵⁵ *Id.* at 227.

⁵⁶ *Id.* at 229.

⁵⁷ 25 M.J. 263 (C.M.A. 1987). In *Vanderwier*, the accused was the Commanding Officer of a frigate. He was convicted by a military judge, sitting as a general court-martial, of consensual sodomy with a Hospital Corpsman under his command.

⁵⁸ *Id.* The military witness at issue was the ship's Executive Officer, who was unavailable during three weeks in November while the ship was undergoing refresher training. The trial date was at first set for 14 November, during this training. But the trial was later continued at the defense's request until 28 November, and the deposition was admitted into evidence (over a defense hearsay objection) on 29 November. Although trial counsel represented to the military judge that the witness was still unavailable on 29 November (because the ship's training had taken longer than expected), the Court of Military Appeals found that the military judge abused his discretion by admitting the deposition into evidence. After reciting the *Cokeley* factors, the court noted: "Certainly, the record provides no explanation why trial could not have commenced earlier or concluded later so the temporary unavailability of the witness would not have necessitated resort to 'a weaker substitute for live testimony.'" *Id.* at

The appellate courts continue to cite the *Vanderwier/Cokeley* six-factor list, not only in medical-unavailability cases like *Cokeley*,⁵⁹ but also in military necessity cases. For example, in *United States v. Campbell*, the Army Court of Criminal Appeals found that the witness was not unavailable, even though the witness was on an overseas deployment in Colombia at the time of trial.⁶⁰ Here again, the delay required was relatively short: the witness was scheduled to return from deployment just six weeks after the trial took place.⁶¹

The *Cokeley/Vanderwier* standard can be met, especially if the delay is measured in months rather than in weeks. To meet this standard, trial counsel must do three things: (1) obtain and record high quality testimony; (2) develop evidence of the length of delay required to produce the witness for trial; and (3) develop evidence of the costs of that delay. Those three tasks will satisfy all six *Cokeley/Vanderwier* factors.

1. The Government Must Obtain High Quality Pre-Trial Testimony at the Article 32 Hearing or Deposition

High quality pre-trial testimony will satisfy three of the six *Cokeley/Vanderwier* factors: factor (1) "the importance of the testimony [at trial]"; factor (3), "the trustworthiness of the alternative to live testimony"; and factor (4), "the nature and extent of earlier cross-examination."⁶²

The term "high quality" refers not just to the quality of the audio and video recording (though that quality is important), but also to the quality of the defense's opportunity to cross-examine the witness. Counter-intuitively, a trial counsel is most effective in this regard when he is most solicitous of the defense. The defense should be given notice of who will testify; all relevant discovery needed to cross-examine these witnesses; and

267. The Court of Appeals affirmed the conviction despite the error, finding that the error caused no prejudice in the outcome of the judge-alone trial.

⁵⁹ See, e.g., *United States v. Cabrera-Frattini*, 65 M.J. 241, 245 (C.A.A.F. 2007). In *Cabrera-Frattini*, the court held that "the military judge did not abuse his discretion by concluding that the Government made good faith efforts to procure the [juvenile] witness's presence for trial, concluding that [the witness] was unavailable [for reasons of mental health], and admitting [the witness's] videotaped deposition testimony." See also *United States v. Dieter*, 42 M.J. 697 (A. Ct. Crim. App. 1995) (finding an abuse of discretion to admit military witness's deposition where the witness was prevented from being present at trial only because of the birth of his child; there was no good reason why the trial could not have been continued until the witness was available to testify in person).

⁶⁰ *United States v. Campbell*, 2005 WL 6520466 (A. Ct. Crim. App. June 28, 2005). See discussion *supra* note 32.

⁶¹ See *Campbell*, 2005 WL 6520466, at *6.

⁶² *United States v. Cokeley*, 22 M.J. 225, 229 (C.M.A. 1986).

notice that the government intends to play back their testimony at trial.

Trial counsel should also consider whether to increase the quality of the testimony by administering a different oath. For non-U.S. citizens, trial counsel should not only administer both the standard Manual oath, but should also research and consider administering the standard oath typically used in the witness's country of residence.⁶³

By showing early solicitude toward the defense, and by administering an effective oath, trial counsel will convince the military judge that the pre-recorded testimony satisfies the relevant *Cokeley/Vanderwier* factors: factor (1) is met because high-quality recorded testimony means that in-court testimony is not as important; factor (3) is met because high-quality recorded testimony is trustworthy; and factor (4) is met because the defense was given the time and notice required to prepare for cross-examination.

2. *The Government Must Prove That a Lengthy Delay Would Be Required Before the Witness Is Available*

In addition to obtaining high quality testimony, trial counsel should also develop evidence for *Cokeley/Vanderwier* factor (2)—the length of delay required. This factor weighed heavily in *Cokeley* (a delay of just two to three weeks would have sufficed to permit the witness to be present in person), *Vanderwier* (a delay of just a few days), and *Campbell* (only a six week delay).

3. *The Government Must Prove the Costs of the Required Delay*

Finally, and perhaps most importantly, trial counsel should develop evidence of the costs of delay. The fifth *Cokeley/Vanderwier* factor—the need for prompt administration of justice—is a fact that can be proved through evidence and is not just a point to be argued at a motions hearing. This proof can take various forms. Is the unit about to deploy? If so, then a delay would require witnesses to travel back to the site of trial, increasing costs. Is the pending court-martial affecting the unit's morale or performance? If so, then delay will continue those strains. Has the crime affected the military's standing at home or, even more important, in a COIN environment? If so, then delay may carry costs to the military's reputation—a concern that is especially important in strategic cases conducted during COIN efforts.⁶⁴

⁶³ Federal courts have relied on the use of an effective oath when admitting into evidence pre-trial depositions of foreign nationals. Matthew J. Tokson, Comment, *Virtual Confrontation: Is Videoconference Testimony by an Unavailable Witness Constitutional?*, 74 U. CHI. L. REV. 1581, 1607 & n.159 (2007) (listing cases).

⁶⁴ Hackel, *supra* note 1.

In sum, the second dimension of unavailability—the timing of trial—is satisfied if the government obtains high-quality pre-trial testimony, demonstrates the significant delay required for the witness to become available, and proves the detrimental costs (in terms of money, effort, or reputation) that delay would cause.

C. The Third Dimension of Witness Unavailability: The Location of Trial

The location of trial is the third dimension of unavailability. Even if a witness is unavailable at the place set for trial, that place could change because courts-martial, unlike civilian trials, are mobile. This third dimension of unavailability was illustrated in the recent, high-profile court-martial of Navy Special Warfare Operator 2 (SO2) Matthew McCabe, USN.⁶⁵ Navy SEAL McCabe was court-martialed (and acquitted) in Norfolk, Virginia, on the charge of maltreating an Iraqi detainee. The detainee was the key government witness, but the Iraqi government would not permit him to leave that country to testify in the United States. For that reason, the trials of SO2 McCabe's two co-accused took place in Fallujah, Iraq, so that the detainee could testify in person. McCabe's court-martial occurred in Norfolk, Virginia, after he waived his right to confront the detainee in person. Trial counsel left the location of the court-martial up to the defense: if the defense had wanted the detainee to testify in person, then the court-martial would have been held in Iraq; because the defense waived that right, the trial was instead held in Norfolk, Virginia.⁶⁶

The Rules for Courts-Martial contemplate that a trial may relocate. Although one provision of the rules authorizes the Convening Authority to “designate,” in his Convening Order, “where the court-martial will meet,”⁶⁷ another provision permits the military judge to change that location “to prevent prejudice to the rights of the accused.”⁶⁸

The typical defense request to relocate is not based on witness availability. Instead, the typical request is based on an accused's fear that pretrial publicity has created “so great a prejudice against [him] that [he] cannot obtain a fair and

⁶⁵ See, e.g., Steve Centanni, *Prosecution Rests in Navy SEAL Matthew McCabe's Court Martial*, LIVESHOTS, FOXNEWS.COM (May 5, 2010), <http://liveshots.blogs.foxnews.com/2010/05/05/prosecution-rests-in-navy-seal-matthew-mccabes-court-martial>.

⁶⁶ *Id.*

⁶⁷ MCM, *supra* note 3, R.C.M. 504(d). “A convening order for a general or special court-martial shall designate the type of court-martial and detail the members and may designate where the court-martial will meet.” *Id.* (emphasis added).

⁶⁸ *Id.* R.C.M. 906(b)(11). “The place of trial may be changed when necessary to prevent prejudice to the rights of the accused or for the convenience of the Government if the rights of the accused are prejudiced thereby.” *Id.*

impartial trial.”⁶⁹ But although this is the typical reason for requesting a change of venue, it is not the only reason for doing so. The CAAF has indicated that the venue-change provision is also available to an accused who seeks to bring the court-martial nearer to a witness to make that witness available to testify.⁷⁰

Because the location of trial appears to be the least litigated of the three dimensions, the legal standard—including the burden of proof—is not completely clear. On the one hand, as described above, the appellate courts have stated that the government bears the burden to prove the unavailability of its witnesses.⁷¹ On the other hand, the courts have also held that the defense bears the burden to show the need for relocation, at least in those cases where the reason for the move is pre-trial publicity.⁷² While the government has the burden to show that its witness is unavailable, this burden is relatively easy to meet when it comes to the third dimension of witness unavailability—the location of trial. The government may meet its burden simply by showing the high costs of relocation.

That standard is consistent with the leading case of *United States v. Crockett*, in which the Court of Military Appeals approved the military judge’s decision to admit pre-trial videotaped depositions of two government witnesses. The court-martial was convened in Germany, and these two witnesses were U.S. citizens living in Florida.⁷³ No subpoena power exists to compel U.S. citizens to travel from the United States to a court-martial overseas.⁷⁴ *Crockett* based its holding on the high costs of relocating the court-martial from Germany to Florida.⁷⁵

⁶⁹ *United States v. Loving*, 41 M.J. 213, 254 (C.A.A.F. 1994) (quoting discussion to RCM 906(b)(11)).

⁷⁰ *United States v. Sutton*, 42 M.J. 355, 356 (C.A.A.F. 1995). In *Sutton*, the court-martial was convened in Nevada and one government witness was located in Honduras. That witness refused to travel to the court-martial, and no process was available to compel him to attend. The military judge ruled him unavailable for the purpose of admitting his pre-trial statements against penal interest. The accused objected to admitting these pre-trial statements, but did not then specifically request that the trial be moved to Honduras. Rather than resolve the question of whether the witness’s pre-trial statement was inadmissible because the witness could have become available if the court-martial had moved, CAAF instead moved straight to a prejudice analysis, holding that any error was harmless. *Id.*

⁷¹ *United States v. Vanderwier*, 25 M.J. 263, 267 (C.M.A. 1987).

⁷² *E.g.*, *United States v. Cook*, 1996 WL 927694, at *2 (N-M. Ct. Crim. App. July 31, 1996). “The appellant had the burden of establishing by a preponderance of evidence that, without the change of venue, he could not get a fair trial.” *Id.*

⁷³ *United States v. Crockett*, 21 M.J. 423, 427–30 (C.M.A. 1986).

⁷⁴ *United States v. Bennett*, 12 M.J. 463 (C.M.A. 1982).

⁷⁵ *Id.*

[M]oving the court-martial to Florida would have required the expense, effort, inconvenience, and delay of transporting from Europe to the United

Crockett demonstrates that the third dimension of military necessity—the place of trial—should be relatively easy for the government to establish, at least when the necessary relocation is across national borders. Nevertheless, government counsel should still take at least two precautions. First, the Staff Judge Advocate should ensure that the Convening Authority exercises his authority to designate the place of trial (either in the referral block of the charge sheet or in the convening order).⁷⁶ Second, trial counsel should gather evidence of the costs of relocating the trial to be near the unavailable witnesses. Such evidence may vary considerably. In a strategic case, trial counsel may present testimony about how the court-martial’s designated location in theater would benefit counter-insurgency efforts. In other cases, as in *Crockett*, the evidence may simply be a calculation of the costs of moving other witnesses and trial personnel.

IV. Steps to Prepare for a Court-Martial in Which Government Witnesses Will Be Unavailable

This next part of the article distills the legal analysis above into a specific list of action items for the three officers who are likely to be involved in a prosecution involving witnesses who are unavailable because of military necessity: the Staff Judge Advocate (SJA); the Article 32 Investigating Officer (IO);⁷⁷ and the trial counsel (TC).

These officers should use the Article 32 investigation to (1) record high-quality testimony for use at trial, and (2) gather the evidence needed to prove the three dimensions of unavailability by reason of military necessity. These two purposes are appropriate under Article 32 and RCM 405.⁷⁸

States the court members, judge, counsel and supporting court personnel. Moreover, unless these same persons were transported back to Europe for the remainder of the trial, it also would have been necessary to take the other witnesses—eight civilian and three military—from Germany to Florida. The Government would have been obligated to feed and house everyone while they were enroute and in Florida. Because any military personnel transported to Florida would have been away from their regular duties for several additional days and would not have been available in Germany for any emergencies, even the mission of their military units might have been adversely affected.

Id.

⁷⁶ MCM, *supra* note 3, R.C.M. 504(d).

⁷⁷ Beginning 1 December 2013, the Secretary of Defense has ordered that all Article 32 investigating officers in cases of sexual offenses be judge advocates. Memorandum from Sec’y of Def. Chuck Hagel (Aug. 14, 2013), available at <http://www.defense.gov/home/features/2013/docs/FINAL-Directive-Memo-14-August-2013.pdf>.

⁷⁸ Rule 405 empowers the convening authority to “give procedural instructions” to the investigating officer, and also authorizes the investigating officer to “inquire into such other matters as may be necessary

The Article 32 investigation is a cheap, flexible, powerful tool to obtain evidence. The IO may obtain sworn testimony over as many days as he wishes, and in whatever location he wishes.

One important caution at the outset: although the IO and the SJA can and should play a leading role in obtaining the resources needed (including, most importantly, the space, personnel, and equipment needed to obtain a high-quality recording), these two officers should take care to remain impartial and independent on the issues of the accused's guilt and the unavailability of any witnesses. Failure to appear impartial on these issues could allow the accused to re-open the Article 32 investigation,⁷⁹ or could disqualify the SJA from later providing post-trial advice to the Convening Authority.⁸⁰

This article now turns to the specific actions that are required to put the Article 32 solution into practice. The basic "how to" of taking depositions is provided in RCM 702; that rule should be followed to the letter when obtaining any Article 32 testimony that is intended for later use at trial.⁸¹ Counsel should also read Colonel Allred's account of the *Savard* trial, in which he presided as military

to make a recommendation as to the disposition of the charges." MCM, *supra* note 3, R.C.M. 405(c). Article 32 itself provides, in paragraph (a), that the investigating officer may "include" a "recommendation as to the disposition which should be made of the case in the interest of justice and discipline." The phrase "recommendation as to the disposition," as used both in the statute and the rule, may be read to encompass not only the charges referred and the forum, but also the place and time that the court-martial should take place, and the witnesses available to take part in that place and time. All these concerns are central to "disposition" of the case in a particular court-martial. *Id.* R.C.M. 405(e).

⁷⁹ See, e.g., *United States v. Foley*, 37 M.J. 822, 831 n.9 (A.F.C.M.R. 1993) (collecting cases on the impartiality required of an Article 32 Investigating Officer).

⁸⁰ Article 6(c), UCMJ, forbids anyone who has acted as a trial counsel or investigating officer in any case from later serving as the SJA to any "reviewing authority" in that case. This provision has been interpreted to guarantee the accused the right to "a fair and impartial post-trial recommendation by one 'free from any connection with the controversy.'" *United States v. McCormick*, 34 M.J. 752, 755 (N.M.C.M.R. 1992) (quoting *United States v. Metz*, 36 C.M.R. 296, 297 (1966)). When giving pre-trial advice, the SJA has greater latitude to appear biased in favor of the prosecution, because pre-trial advice is given in a "prosecutorial context," subject only to Article 35(a)'s requirement that the advice be legally competent and accurate. *United States v. Hardin*, 7 M.J. 399, 404 (C.M.A. 1979); see also *United States v. Stirewalt*, 60 M.J. 297 (C.A.A.F. 2004) (re-affirming *Hardin*'s limitation of Article 6(c) to post-trial advice). However, the prudent course for the SJA is to avoid any action, pre-trial, that would create even the "perception of partiality." FRANCIS A. GILLIGAN & FREDERIC I. LEDERER, COURT-MARTIAL PROCEDURE § 10-23.00 (2006). By following that course, the SJA will avoid any action that may create an appearance of prosecutorial bias that would disqualify him from later giving post-trial advice when the convening authority reviews the case to take action.

⁸¹ MCM, *supra* note 3, MIL. R. EVID. 804(b)(2) permits depositions to be admitted into evidence at trial if they have been "taken in compliance with the law." The only relevant law appears to be RCM 702. See Allred, *supra* note 15.

judge, and in which the government obtained numerous video depositions, most of which later proved unusable because of poor recording technology.⁸² In addition to RCM 702's basics, here is a list of other tasks that the government should accomplish to obtain evidence that will be admissible at trial.

1. *Anticipate when and where the court-martial is likely to be held.* All three dimensions of unavailability depend on the date and location of trial, especially if there is any chance that the court-martial will be held overseas. A witness may be unavailable if the trial is held in California, but available if held in Naples, Italy, for example. Therefore, the SJA should, in consultation with the Convening Authority, decide on a tentative date and place. These decisions should be subject to reconsideration later, upon receipt of the IO's report. But it is essential to make a good first guess at the answer in order for TC to develop the necessary evidence of unavailability.

2. *In writing, request defense counsel be detailed as soon as possible; specifically request defense counsel with a schedule (and a security clearance) that can support the Article 32 solution.* Defense counsel may object to the Article 32 solution by claiming that they lacked sufficient time to prepare a cross-examination. The sooner the convening authority requests defense counsel, the less force this argument will have. Because some defense offices will not detail counsel until charges are preferred, prefer the charges as soon as possible, even if the charges may need to be amended later.⁸³

The request for defense counsel should go beyond the typical, bare-bones format of such requests, and should also describe the convening authority's intent to use the Article 32 hearing to obtain testimony for use at trial. The request should specifically ask for defense counsel whose schedule will permit the necessary preparation prior to the Article 32 hearing. If operational security concerns are one potential factor in military necessity arguments, be sure to request a defense counsel with the appropriate security clearance.

3. *Give the defense clear, early notice that the Article 32 testimony may be used at trial.* The case law on the unavailability exception makes clear that defense counsel must be given the same motive to cross-examine the witnesses at the Article 32 hearing as the defense counsel

⁸² Allred, *supra* note 15.

⁸³ The first charge sheet preferred need not charge every conceivable offense. If additional offenses are uncovered during the course of the Article 32 investigation, they may be added later, without the need for an additional Article 32 investigation, as long as they were investigated during that Article 32 hearing. UCMJ art. 32(d) (2012); see *United States v. Diaz*, 54 M.J. 880, 883 (N-M. Ct. Crim. App. 2000) (stating that even though charges were unsworn at the time of the Article 32 investigation, that error did not require a new investigation).

would have at trial.⁸⁴ Giving written notice to defense counsel well in advance of the Article 32 hearing will satisfy this requirement, despite the outdated and erroneous commentary to the contrary in the Manual for Courts-Martial's Analysis of the Military Rules of Evidence.⁸⁵ One logical place to give this notice to the defense is in the Article 32 Appointing Order. In the interests of basic fairness, the government should also provide the defense with an equivalent opportunity to use the Article 32 process to obtain and record trial-ready testimony from any defense witness who may be unavailable at trial.⁸⁶

4. *Provide defense discovery.* As soon as possible, trial counsel should provide the defense with (1) a list of all witnesses the government intends to call, and those witnesses' contact information,⁸⁷ and (2) all discovery that may be relevant to cross-examining the witnesses, especially any previous statements made by them.⁸⁸

5. *Plan for the accused to be present at all Article 32 hearings.* Unless he proves disruptive, the accused has a right to be physically present at any deposition or Article 32 hearing.⁸⁹ If the accused is in pre-trial confinement, plan to move him to the location(s) of the Article 32 hearing(s).

6. *Appoint a competent reporter with access to high-quality recording equipment.* The Convening Authority may appoint anyone as reporter of an Article 32 hearing,⁹⁰ so

long as the person is properly sworn and is not disqualified by prior involvement in the case.⁹¹ This appointment may be the single most important factor to the success of the Article 32 solution, because without high-quality video and audio footage, the exercise will be much less useful at trial. The SJA should take the lead in finding and appointing a member of Combat Camera or a similar organization with experience in obtaining professional video footage in unusual places. Previous experience as a court reporter is far less important than is familiarity with and access to the right equipment (including cameras, multiple microphones, and lighting). The IO should swear in the reporter at the beginning of the hearing.⁹²

7. *Appoint a flexible IO who can travel as needed.* The SJA should have many candidates to choose from: any officer with legal training, or any line officer in the grade of O-4 or higher, may serve as IO,⁹³ he may be appointed by any Convening Authority (even a Convening Authority who is only empowered to convene summary courts-martial).⁹⁴ There is nothing to prevent the SJA from selecting an IO on the basis of his or her availability to gather evidence for use at trial.

8. *Inform the witnesses of the plan as soon as possible and persuade civilians to participate.* The IO should immediately take ownership of the process of obtaining witnesses and scheduling the hearings. Witnesses may need time to prepare themselves and their schedules for travel.

Voluntary participation is much quicker and easier than compelling an unwilling witness, so the IO should use all powers of persuasion to convince civilians to participate

⁸⁴ MCM, *supra* note 3, MIL. R. EVID. 804(b)(1); United States v. Taplin, 954 F.2d 1256, 1259 (6th Cir. 1992) (testimony by witness at pre-trial hearing on motion to suppress not admissible at later trial because defendant did not have same motive to cross-examine at the pre-trial hearing as he would have had at trial).

⁸⁵ MCM, *supra* note 3, App. 22, at A22-58. The MCM's non-binding Analysis claims that if defense counsel, at the Article 32 hearing, announces that she is "limiting cross-examination" for some reason, then that announcement will cause the testimony to be inadmissible at a later trial under MRE 804(b)(1). It is this author's opinion that the MCM's Analysis is wrong. United States v. Connor, 27 M.J. 378, 388 (C.M.A. 1989) ("[A]s we interpret the requirement of 'similar motive,' if the defense counsel has been allowed to cross-examine the government witness without restriction on the scope of cross-examination, then the provisions of Mil. R. Evid. 804(b)(1) and of the Sixth Amendment are satisfied, even if that opportunity is not used, and the testimony can later be admitted at trial."). For an account of how the Analysis came to be drafted, see Lederer, *supra* note 18, at 24-26.

⁸⁶ Giving the defense an opportunity to use the Article 32 process to obtain and record the testimony of its witnesses will demonstrate fairness and good faith on the part of the government. *Cf.* United States v. Crockett, 21 M.J. 423, 430 (C.M.A. 1986) (finding no Sixth Amendment violation, in part, because the prosecutor's use of videotape showed good faith).

⁸⁷ MCM, *supra* note 3, R.C.M. 702(e).

⁸⁸ *Id.* R.C.M. 702(g)(1)(B).

⁸⁹ *Id.* R.C.M. 702(g); United States v. Jacoby, 11 C.M.A. 428, 433 (C.M.A. 1960) (holding that the accused has the right to be physically present at the taking of deposition).

⁹⁰ Rule for Court-Martial 502(e)(1) states that the qualifications for "reporter" may be prescribed by the Secretary. MCM, *supra* note 3, R.C.M.

502(e)(1). The Secretaries have done so for "court reporters." *E.g.*, U.S. DEP'T OF NAVY, JUDGE ADVOCATE GENERAL INSTR. 5700.7F, MANUAL OF THE JUDGE ADVOCATE GENERAL para.0130(d) (26 June 2012) [hereinafter JAGMAN]; U.S. DEP'T OF ARMY, REG. 27-10, MILITARY JUSTICE para. 25 (3 Oct. 2011). But the Secretaries have not done so for reporters of Article 32 hearings. *See* JAGMAN, *supra*, para. 0130 (describing qualifications for court reporter but not Article 32 reporter); U.S. DEP'T OF ARMY, PAM. 27-17, PROCEDURAL GUIDE FOR ARTICLE 32B INVESTIGATING OFFICER (16 Sept. 1990) (not prescribing qualifications for Article 32 reporter). In the absence of secretarial action, the Convening Authority may exercise his own judgment on this matter. MCM, *supra* note 3, R.C.M. 501(c) (reporters "may be detailed or employed as appropriate").

⁹¹ *See* MCM, *supra* note 3, R.C.M. 702(f)(4) (oath required); *id.* R.C.M. 807 (content of oath); *id.* R.C.M. 502(e)(2) (listing grounds for disqualification as reporter).

⁹² *Id.* R.C.M. 702(f)(4) (oath required); *id.* R.C.M. 807 (content of oath); *cf.* DD Form 456 (reporter's oath).

⁹³ Beginning 1 December 2013, the Secretary of Defense has ordered that all Article 32 investigating officers in cases of sexual offenses be judge advocates. Memorandum from Sec'y of Def. Chuck Hagel (Aug. 14, 2013), available at <http://www.defense.gov/home/features/2013/docs/FINAL-Directive-Memo-14-August-2013.pdf>.

⁹⁴ MCM, *supra* note 3, R.C.M. 405(c); JAGMAN, *supra* note 90, para.120(c).

voluntarily. The SJA should work with the IO to compensate these witnesses for their time and any travel costs, and, if necessary and possible, the IO should offer to relocate the hearing to minimize the need for reluctant witnesses to travel.

9. *Use process to compel unwilling witnesses to attend a pre-trial deposition.* If the unwilling witness is located in the United States, or is a U.S. citizen located abroad, then see the discussion above on the process to compel attendance at trial. That process is the same for a pre-trial deposition, with the important exception that the Convening Authority plays the part of the military judge and issues the subpoena and warrant of attachment, if those are necessary.⁹⁵

If the witness is a non-U.S. citizen located abroad, then the IO may use host-country process to compel attendance, if any such process is available. If the host country has signed a Mutual Legal Assistance in Criminal Matters Treaty (MLAT) with the United States, then the IO should consider sending a formal request for assistance to the host country. The request should be sent, via the Convening Authority, to the U.S. Central Authority for such matters.⁹⁶ U.S. civilian courts will admit into evidence the pre-trial depositions of foreign nationals, obtained using foreign court procedures and personnel, so long as those foreign procedures are similar to U.S. practice.⁹⁷

10. *Administer culturally specific oaths.* Trial counsel should always administer the standard oath provided in the Manual. But for foreign witnesses, trial counsel should research and administer a second, culturally specific oath that is tailored to the host country. Trial counsel should discuss the oath's significance with the witness on the record to provide further evidence of the testimony's reliability.⁹⁸

11. *Prove all three dimensions of unavailability.* With an eye on the case law analyzed above, TC should obtain evidence, from the witnesses and from their chains of command, of all three dimensions of unavailability.

⁹⁵ Article 49 authorizes the CA to issue a subpoena to compel the witness's attendance at a pre-referral deposition. UCMJ art. 49(a); MCM, *supra* note 3, R.C.M. 702(b). The Investigating Officer then takes the steps required to serve the subpoena on the witness. *Id.* R.C.M. 702(f)(2). If the witness still refuses, the Convening Authority may issue a warrant of attachment. *Id.* R.C.M. 703(e)(2)(G).

⁹⁶ The U.S. Central Authority is currently the U.S. Department of Justice, Criminal Division, Office of International Affairs. See 7 U.S. DEP'T OF STATE, FOREIGN AFFAIRS MANUAL § 962.1 (2012), available at <http://www.state.gov/documents/organization/86744.pdf>.

⁹⁷ "If the defendant had a previous opportunity to question the witness . . . through the assistance of foreign courts with similar procedures, no violation of the Confrontation Clause results when that hearsay testimony is admitted at the defendant's trial." *Sixth Amendment at Trial*, 40 GEO. L.J. ANN. REV. CRIM. PROC. 663, 684, n.2032 (2011) (collecting cases).

⁹⁸ See Tokson, *supra* note 63, at 1607.

If the reason for unavailability is military necessity, then TC should obtain evidence of: (1) the content and importance of the witness's military duties at the anticipated time of trial; (2) the length of delay until those duties cease; (3) the costs of delaying trial for that amount of time; and (4) the costs of relocating the trial to be closer to the witness.

If the reason for unavailability is the witness's nonamenability to process, then trial counsel should elicit the witness's testimony regarding trial counsel's efforts to persuade the witness to attend the court-martial voluntarily, and the witness's refusal to do so. Separately, trial counsel should also present evidence of the costs of re-locating the court-martial to a place where the witness would be willing to attend or be subjected to compulsory process.

In obtaining this evidence of unavailability, the military rules of evidence need not be followed.⁹⁹ Evidence relating to unavailability will be used by the military judge and appellate courts.

12. *Plan for evidentiary rulings that the Military Judge will later have to make.* Most of the rules of evidence do not apply during the Article 32 hearing. The IO should not exclude evidence based on these inapplicable rules, but he and the trial counsel should prepare for the military judge to do so later, before the testimony is admitted at trial. In particular, counsel should anticipate a pre-trial Article 39(a) hearing, in which the military judge will rule on which parts of the Article 32 recording are admissible and which are not. After that ruling, counsel will have to edit the recording to remove the inadmissible parts, a task which can quickly become a "nightmare."¹⁰⁰

To avoid the nightmare, counsel should plan, at the Article 32 stage, for the likely areas to which one party may later object. These areas of testimony should be obtained in separate, stand-alone segments that may be cut out of the videotape without making the rest of the testimony impossible to follow.

For example, suppose a witness heard the victim talking excitedly about the assault he had just suffered. Trial counsel will want to obtain the witness's testimony as to what the victim said, and introduce it at trial using the excited utterance exception to the hearsay rule.¹⁰¹ But it is possible that the military judge will rule that the victim's statement was not, in fact, an excited utterance. Trial counsel should prepare for this possibility at the Article 32

⁹⁹ MCM, *supra* note 3, MIL. R. EVID. 104(a) (military judge's responsibility to determine admissibility of evidence); *id.* R.C.M. 801(e)(4) (rulings by military judge on interlocutory matters are based on preponderance of the evidence unless a specific provision of the MCM provides otherwise).

¹⁰⁰ Allred, *supra* note 15, at 16 (quoting *United States v. Vanderwier*, 25 M.J. 263, 264 (C.M.A. 1987)).

¹⁰¹ MCM, *supra* note 3, MIL. R. EVID. 803(2).

stage by planning the witness's direct examination in such a way that, if the judge later rules this part of the testimony inadmissible, it can be easily edited out, and what remains will still make sense to the court-martial panel who hears it at trial.

13. *Prepare a verbatim transcript.* A transcript will enable the military judge to rule clearly on any objections to portions of the Article 32 testimony, and will allow TC to edit the recordings in keeping with the judge's ruling.¹⁰² If any portions of the audio are hard for the court-martial members to understand, then a verbatim transcript may be read into evidence.¹⁰³

14. *Authenticate the recording and the transcript.* The investigating officer and the reporter should review the video and audio recordings, the transcript, and should authenticate them using the language provided in DD Form 456.

15. *Include the Investigating Officer's conclusions in the Article 32 report.* The Investigating Officer should describe the evidence presented regarding the three dimensions of unavailability for each witness.¹⁰⁴

16. *Give the IO clear instructions in the Appointing Order.* The Appointing Order is an ideal place to summarize the foregoing objectives, and to give all parties (including, if necessary, any reluctant witnesses and host-country authorities) clear notice of what is happening and why. Include language in the Appointing Order along the following lines:

It is anticipated that trial in this case will occur on [date], at [location]. Your investigation should evaluate whether any relevant witnesses, for the prosecution or the defense, will be unavailable for in-person testimony at that time and place. In making this evaluation, you should gather evidence related to the reasons for unavailability. If the reason for unavailability is military necessity, then you may gather evidence of the witness's military duties, and the timing of those duties, from both the witness and from relevant members of the witness's chain of command. (If operational security concerns are present, this portion of your

¹⁰² Allred, *supra* note 15.

¹⁰³ MCM, *supra* note 3, R.C.M. 804(b)(1) (hearsay exceptions, former testimony); UCMJ art. 49 (2012) ("A duly authenticated deposition . . . may be read in evidence or, in the case of audiotape, videotape, or similar material, may be played in evidence. . ."). *See also* MCM, *supra* note 3, R.C.M. 901–903 (authentication and identification).

¹⁰⁴ *See* MCM, *supra* note 3, R.C.M. 405(j) (report of investigation).

report may be classified at the appropriate level, in coordination with the Staff Judge Advocate, ____.)

If it appears that any witness will be unavailable at the date and location specified, then you should also gather evidence of the benefits (in terms of good order and discipline, the credit of good service, and the fairness of the court-martial process) that would accrue as a result of conducting a trial at the anticipated date and location, and evidence of the costs of any delay or relocation of the trial that would be required to render the witness available for in-person testimony.

Finally, if it appears that any relevant witness (whether for the prosecution or the defense) will be unavailable at trial, you should obtain a high-quality video and audio recording of that witness's testimony for use at trial, in which both parties are afforded a full and fair opportunity to examine the witness.

If witnesses decline to participate in your investigation voluntarily, and if their testimony appears relevant, you are authorized to use any lawful process to compel these witnesses' participation. If a declining witness is a U.S. citizen, you may apply to me for a subpoena, pursuant to my authority under Article 49 and RCM 702(b). If a declining witness is a foreign national, you are authorized to seek the cooperation of host-country authorities, and to work as closely as possible within host-country procedures, to obtain the witness's testimony. Should you need to request assistance through a Mutual Legal Assistance in Criminal Matters Treaty (MLAT), your request to the U.S. Central Authority shall be sent via the SJA's and my office.

In addition to the standard oath prescribed in the Manual for Courts-Martial, you are also authorized to administer to foreign nationals any other oath appropriate to their nationality, culture, or religion.

You may take testimony in as many hearings, and in as many different locations, as you determine to be necessary. You must give the accused and his counsel reasonable written notice of the time and place of each hearing.

The hearings should be completed no later than ____, and your report provided to me no later than _____. Authority to extend those dates is not delegated. If an extension is necessary, a request should be submitted to me in writing at the earliest possible time.

17. *Have the Convening Authority direct the time and place of the court-martial.* Once informed by the Investigating Officer's report, the Convening Authority should consider giving specific instructions to the court-martial in his convening order and the referral block of the charge sheet.¹⁰⁵

Specifically, the Convening Authority should consider: (1) directing that the trial be held within a particular time-frame, and giving his reasons why; (2) directing that the trial be held in a particular place, giving his reasons why; and (3) determining that certain government witnesses will be unavailable at that place and time, giving his reasons why.

V. Conclusion

When it appears that a government witness cannot (or will not) appear in person at the time and place set for a court-martial, then the SJA, IO, and TC should use the Article 32 hearing or deposition to obtain the witness's testimony and to gather evidence to prove the three dimensions of the witness's later unavailability at the time and place of trial. This strategy is constitutional, practical, and in keeping with the flexible nature of the military justice system.

¹⁰⁵ Rule for Courts-Martial 504(d) authorizes the convening authority to "designate" in his convening order "where the court-martial will meet." Rule for Courts-Martial 601(e) permits the convening authority, in his order referring charges, to include "proper instructions in the order." *Id.* R.C.M. 504, 601.