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Pamphlet 27-17

Legal Services

Procedural Guide for Article 32 Preliminary Hearing Officer

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SUMMARY of CHANGE

DA PAM 27-17

Procedural Guide for Article 32 Preliminary Hearing Officer

This administrative revision, dated 15 July 2015--

- o Supersedes Army Directive 2015-09 (throughout).

This major revision, dated 18 June 2015--

- o Changes the title of the pamphlet from Procedural Guide for Article 32(B) Investigating Officer to Procedural Guide for Article 32 Preliminary Hearing Officer (cover).
- o Updates the purpose paragraph (para 1-1).
- o Updates guidance on the production of military and civilian witnesses and the process of securing the attendance of witnesses (para 2-3).
- o Updates guidance on the production of "other" evidence (para 2-4).
- o Updates the formal preliminary hearing process (chap 3).
- o Revises the completion of the new DD Form 457 (Preliminary Hearing Officer's Report) (chap 4).
- o Adds checklist for Article 32 preliminary hearing officer (app B).
- o Adds a list of common mistakes made by Article 32 preliminary hearing officers (app C).

Legal Services

Procedural Guide for Article 32 Preliminary Hearing Officer

By Order of the Secretary of the Army:

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History. This publication is an administrative revision. The portions affected by this administrative revision are listed in the summary of change.

Summary. This pamphlet is intended to provide information and reference material for the Article 32 preliminary hearing officer. While it may suggest workable solutions to legal problems, it does not purport to promulgate Department of the Army policy. Comments concerning laws, regulations, cases, or other matters represent the opinions of individual specialists in military justice. Laws, regulations, and

court decisions published prior to 26 December 2014 have generally been considered and included in this text.

Applicability. This pamphlet applies to the Active Army, the Army National Guard/Army National Guard of the United States, and the U.S. Army Reserve, unless otherwise stated. It also applies to Department of the Army Civilians who are involved in any matter that falls under the responsibility and authority of The Judge Advocate General, regardless of whether such person is a member of the Judge Advocate Legal Services. This publication is applicable during mobilization.

Proponent and exception authority. The proponent of this pamphlet is The Judge Advocate General. The proponent has the authority to approve exceptions or waivers to this regulation that are consistent with controlling law and regulations. The proponent may delegate this approval authority, in writing, to a division chief within the proponent agency or its direct reporting unit or field operating agency, in the grade of colonel or the civilian equivalent. Activities may request a waiver to this regulation by providing justification that includes a full analysis of the expected benefits and must include formal

review by the activity's senior legal officer. All waiver requests will be endorsed by the commander or senior leader of the requesting activity and forwarded through their higher headquarters to the policy proponent. Refer to AR 25-30 for specific guidance.

Suggested improvements. Users are invited to send comments and suggested improvements on DA Form 2028 (Recommended Changes to Publications and Blank Forms) directly to Office of The Judge Advocate General, Criminal Law Division (DAJA-CL), 2200 Army Pentagon, Room 3D548, Washington, DC 20310.

Distribution. This pamphlet is available in electronic media only and is intended for command levels C, D, and E for the Active Army; D and E for the Army National Guard/Army National Guard of the United States; and C, D, and E for the U.S. Army Reserve.

Contents (Listed by paragraph and page number)

Chapter 1

Introduction, page 1

Purpose • 1-1, page 1

References • 1-2, page 1

Explanations of abbreviations and terms • 1-3, page 1

Key personnel • 1-4, page 1

Chapter 2

Preparing for the preliminary hearing, page 2

General considerations • 2-1, page 2

Sequence of preparation • 2-2, page 3

Production of military and civilian witnesses • 2-3, page 4

Production of "other" evidence • 2-4, page 5

*This regulation supersedes DA Pam 27-17, dated 24 July 2014.

Contents—Continued

Consultation with counsel for the accused • 2–5, *page 5*

Chapter 3

The Formal Preliminary Hearing, *page 10*

General • 3–1, *page 10*

Procedure for opening session • 3–2, *page 10*

Procedures for taking testimony and examining evidence • 3–3, *page 10*

Chapter 4

Completion of the Preliminary Hearing Officer’s Report, *page 17*

Report preparation • 4–1, *page 17*

Distribution of the report • 4–2, *page 17*

Appendixes

A. References, *page 18*

B. Checklist for Article 32 Preliminary Hearing Officer, *page 18*

C. Common Mistakes, *page 20*

Figure List

Figure 2–1: Preliminary advice to the accused, *page 6*

Figure 2–2: Notification to the accused, *page 7*

Figure 2–2: Notification to the accused—continued, *page 8*

Figure 2–3: Response of the accused, *page 9*

Figure 3–1: Arrangement of room for preliminary hearing, *page 12*

Figure 3–2: Procedure for opening session of the formal preliminary hearing, *page 13*

Figure 3–3: Oaths, *page 14*

Figure 3–4: Examination of witnesses, *page 15*

Figure 3–4: Examination of witnesses—continued, *page 16*

Figure 3–5: Examination of evidence, *page 16*

Glossary

Chapter 1 Introduction

1–1. Purpose

This guide is published for use by officers who have been appointed as preliminary hearing officers (PHOs) under Article 32 of the Uniform Code of Military Justice (UCMJ). Congress amended Article 32 in the National Defense Authorization Act for Fiscal Year 2014 and modeled it on Rule 5.1 of the Federal Rules of Criminal Procedure pertaining to Federal preliminary hearings. The purpose of the preliminary hearing is to determine whether probable cause exists to believe an offense was committed under the UCMJ, whether the accused committed it, whether the convening authority has court-martial jurisdiction over the offense and the accused, and whether the charges are in proper form. The hearing officer will also make a recommendation as to disposition of the matter.

1–2. References

See appendix A.

1–3. Explanations of abbreviations and terms

See the glossary.

1–4. Key personnel

a. Preliminary hearing officer. An Article 32 preliminary hearing shall be conducted by an impartial judge advocate certified under Article 27(b) whenever practicable, or in exceptional circumstances in which the interests of justice warrant, by an impartial hearing officer who is not a judge advocate. Whenever practicable, the PHO shall be equal or senior in grade to the military counsel detailed to represent the accused and to the counsel representing the Government at the preliminary hearing. As the PHO, you will conduct a preliminary hearing in order to determine whether there is probable cause to believe that an offense has been committed and the accused committed the offense; to determine whether the convening authority has court-martial jurisdiction over the offense and the accused; to consider the form of the charges; and to make a recommendation as to the disposition of the charges. Your assignment as an Article 32 PHO must take priority over other duties. As an officer detailed to conduct an impartial hearing, you will be performing a quasi-judicial function. The law requires that you make an individual determination of the matters at issue without reliance upon the opinions or recommendations of any other person. You must avoid *ex parte* inquiries by, or discussions with, judge advocates who might be perceived as lacking impartiality in the case (for example, defense counsel or Government counsel). Such discussions often give the appearance of partiality toward one side regardless of the motivation or real interest of the PHO.

b. Sexual assault offenses. In cases where the accused has been charged with a sexual assault-related offense, the convening authority must appoint a judge advocate PHO without exception. Sexual assault-related offenses include, but are not limited to, violations of: Article 120(a) (Rape) and (b) (Sexual assault), Article 120b (Rape and sexual assault of a child), and Article 125 (Forcible sodomy), UCMJ, and attempts to commit such offenses under Article 80, UCMJ.

c. Legal advisor. Upon initial appointment and throughout the hearing, a non-judge advocate PHO who is appointed by the convening authority due to exceptional circumstances in which the interests of justice warrant it, shall seek legal advice from a legal advisor made available by the Staff Judge Advocate (SJA). When a judge advocate PHO has been appointed, a legal advisor may be made available by the SJA upon request. It is imperative that advice come from a legal advisor who has no direct interest in the outcome of the proceedings. The legal advisor will answer questions of law or procedure which arise. For example, the legal advisor may provide information regarding which lesser offenses are included in an offense charged, or concerning what defenses may be applicable. You must not ask for nor accept advice from the legal advisor or any other person concerning what factual conclusions should be drawn from the evidence in the case or concerning your disposition recommendation. The determination of these matters is solely your responsibility.

d. Accused. The accused has a right to waive an Article 32 preliminary hearing. If the hearing is not waived, the accused is entitled to be present throughout the duration of the proceeding. The accused has the right to be represented by detailed military defense counsel or may request an individual military defense counsel by name and/or may hire a civilian attorney at no expense to the Government. The accused also has the right to cross-examine witnesses who testify at the preliminary hearing; to present additional evidence in defense and mitigation relevant to the limited scope and purpose of the hearing; and to make a statement, although he or she cannot be compelled to do so. Whenever the accused requests representation by an individual military counsel, you should forward the request to the convening authority who directed the preliminary hearing. The commander shall follow the procedures set forth in Rules for Courts-Martial (RCM) 506(b) and in AR 27–10.

e. Counsel for the accused. The accused may be represented during the hearing by a civilian lawyer of the accused's choice at no expense to the United States; by individual military counsel of the accused's selection (if reasonably available); or by military counsel certified under Article 27(b) and detailed for that purpose by competent authority. The accused may sometimes be represented by more than one defense counsel. The defense counsel will ensure that the procedural and substantive rights of the accused are protected. The defense counsel will be allowed to present

evidence on behalf of the accused that is relevant to the limited purposes of the preliminary hearing; to cross-examine witnesses who testify at the hearing; to argue for a disposition of the matter appropriate to the interests of the accused; and to protect the rights of the accused afforded him or her under Article 32, UCMJ; RCM 404A; and RCM 405.

f. Counsel for the Government. Although not required by regulation, trial counsel will normally be assigned to participate in an Article 32 preliminary hearing as the Government's representative. The Government counsel is not an impartial legal advisor to the hearing officer, but instead, represents the Government in a prosecutorial role as an adversarial party to the hearing. Accordingly, you must not seek legal advice from the Government counsel. The Government counsel will be allowed to present evidence, cross-examine witnesses, and argue for a disposition of the matter appropriate to the interest of the Government. If Government counsel is not assigned, consult with your legal advisor, if assigned.

g. Reporter. A reporter will usually be detailed to provide clerical support. The reporter will normally be the paralegal specialist assigned to the accused's unit. The reporter will assist you by coordinating the attendance of witnesses; coordinating the use of facilities and audio/visual support equipment; preparing and furnishing all correspondence to the accused, defense counsel, Government counsel, and other persons as required per your direction; preparing summarized transcripts of the testimony of witnesses and the conduct of the hearing; assisting with the final preparation of your report; and recording the preliminary hearing and maintaining such recordings. You should keep in mind that although this paralegal specialist provides valuable logistical support, you are ultimately responsible for the outcome of the proceeding. Additionally, the assigned paralegal usually works for the Government counsel. As such, you should take care to avoid having discussions that might compromise your ability to remain impartial.

Chapter 2

Preparing for the preliminary hearing

2-1. General considerations

a. Case file. The case file shall include a copy of the charge sheet; Article 32 appointment order; documents accompanying the charge sheet on which the preferral decision was based; documents provided to the convening authority when deciding to direct the preliminary hearing; documents the Government counsel intends to present at the hearing; and access to tangible objects the Government counsel intends to present at the hearing. The file should also include a letter of instruction from the convening authority who directed the preliminary hearing and for non-judge advocate PHOs, it should also contain instructions to arrange for a briefing with the legal advisor designated to assist you. If these documents are not in the file, you should coordinate with the detailed paralegal specialist or legal advisor assigned to you. You must keep in mind that the entire file should only be used for background information. You cannot use the documents contained in the file to make your recommendation, unless the documents have been admitted into evidence during the Article 32 preliminary hearing.

b. Quasi-judicial proceeding. The Article 32 preliminary hearing is a quasi-judicial proceeding and plays a necessary role in the due process of law in military justice. If the case is referred to court-martial, the preliminary hearing is subject to subsequent review at the trial and on appeal. The ultimate posture of the case may depend upon whether you properly performed your duties and whether you ensured the accused was fully informed of and afforded all applicable rights in connection with the preliminary hearing.

c. Timeliness. It is important to conduct the preliminary hearing expeditiously. Usually, the convening authority who directed the hearing will set a date for completion of the report. If you anticipate failing to meet that suspense, promptly report this fact in writing to the convening authority who directed the preliminary hearing and explain the cause of the delay in detail. Unnecessary delay on your part could result in prejudice to the accused and possibly dismissal of the charges.

d. Delays. The appointment order should specify whether you have been delegated the authority to grant a delay in the proceedings. If not, you should follow the procedure in the following discussion to consider delays, then make a recommendation to the convening authority who directed the preliminary hearing regarding whether or not to grant such requests.

(1) *Requests for delay by the accused/defense.* Such requests must be in writing or be provided via email message and must be attached to the report of preliminary hearing. The Government counsel should be afforded an opportunity to respond to the defense-requested delay. You should ensure there are no ambiguities in the request. Reasonable requests for delay by the accused should be granted. However, if the requested delay is beyond the scope of your authority as dictated in your appointment letter, you should refer the request to the convening authority who directed the preliminary hearing.

(2) *Requests for delay by the Government counsel.* The Government representative may ask you to approve a delay in the preliminary hearing. The Government counsel will also normally ask that you exclude the period of delay from Government speedy-trial accountability. You should require the Government counsel to put the request for delay *and* reasons for the request in writing or in an email message. When these requests are made, you should review RCM 707 and consult with your legal advisor, if assigned. Typically the convening authority will approve such delay, unless he

or she has delegated such responsibility to you (See RCM 707 discussion section). The Government must always establish that its request is for a “reasonable” period of delay. If you grant the delay, the defense counsel may ask the military judge to review your decision. You must therefore ensure that you gather sufficient evidence to support your decision and that you clearly explain your reasons for granting the delay. You may deny the Government’s request or approve a shorter period of delay than that requested. In short, you must hear evidence and arguments from both sides, approve only reasonable delays, have a proper basis for granting the delay, explain your basis for the decision, and include this information in your report.

e. Chronology. You should complete a chronology sheet documenting the dates of all your actions in conducting the preliminary hearing and the reasons for any delays in the hearing. You should attach this chronology sheet to your report.

2–2. Sequence of preparation

After receipt of the case file, you should read Article 32, UCMJ; RCM 404A; RCM 405; and this guide, then study the file and take action in the sequence indicated below (*see* app B).

a. Consult with the legal advisor. If you are not a judge advocate, you should report to your designated legal advisor for an initial briefing on your duties as soon as possible, usually within two (2) business days of being appointed. You may consult with the legal advisor as often as necessary throughout the preliminary hearing for advice and assistance. While it is preferable to meet with the legal advisor in person, operational requirements may make this impossible. If you are unable to meet with the legal advisor in person, you should contact the legal advisor either telephonically or via email. You should avoid any discussions with any legal personnel performing adversarial roles in the case. You should inform counsel for the accused and the Government counsel of all substantive matters discussed with the legal advisor, give them advance notice of such discussions when practicable, and keep a record of all such discussions. In cases that are particularly complex, the legal advisor, at his or her discretion, may be present during the proceedings. This paragraph also applies to judge advocate PHOs who have been assigned a legal advisor by the servicing SJA.

b. Examine the file.

(1) You should examine the charge sheet and all other documents in the file.

(2) Additionally, you should ascertain whether the charges were sworn before a commissioned officer who is authorized to administer oaths. *See* Article 136, UCMJ; RCM 307. If they were not, confer with the accuser to determine whether he or she desires to swear to the charges. You should not, however, administer the oath for this purpose. If the accuser does not want to swear to the charges, or if it is impracticable to do so without unnecessary delay, you should consult with the convening authority who appointed you or your legal advisor for guidance on the matter.

c. Determine whether you cannot be impartial. If there is any reason you cannot conduct a fair and impartial preliminary hearing, you should promptly notify the convening authority who appointed you of this fact. Prior knowledge about the case should not disqualify you from acting as the PHO, provided you have not drawn conclusions about the guilt or innocence of the accused and have not assisted in perfecting a case against the accused.

d. Determine the applicable law.

(1) You should be familiar with the elements (essential facts) of the offense(s) charged. You should read the discussion of the offense or offenses in Part IV of the Manual for Courts-Martial (MCM). If the offense is charged as a violation of Article 134, UCMJ, and no discussion of the specific elements appears in the MCM or DA Pam 27–9, consult your legal advisor, if assigned, regarding the elements.

(2) You should ensure that each specification actually alleges an offense (*see* RCM 307(c)) and that each offense is charged as a violation of the proper article of the UCMJ. If you conclude that the wording of a specification departs so materially from an applicable form specification (*see* MCM, Part IV or DA Pam 27–9) that no offense is alleged consult with your legal advisor, if assigned, and note the deficiencies in your final report to the appointing authority.

(3) If the accused is charged with failure to obey a regulation or written order and a copy of the directive is not in the file, you should obtain copies of the directive for the report and familiarize yourself with its provisions.

e. Establish a timeline for requests for the production of witnesses and other evidence. You should establish a timeline to receive requests from both sides to produce witnesses and other evidence that permits you sufficient time to conduct the preliminary hearing and write the report in order to meet the suspense of the convening authority who appointed you. Setting a reasonable time prior to the hearing will help you avoid causing any unnecessary delay in the proceedings.

f. Ensure that victims get timely notice of the hearing. The victim(s) of an offense under the UCMJ has the right to reasonable, accurate, and timely notice of a preliminary hearing relating to the alleged offense. A “victim” is a person who is alleged to have suffered a direct, physical, emotional, or pecuniary harm as a result of the matters set forth in a charge or specification under consideration and is named in one of the specifications under consideration. You should ensure that the Government counsel has notified any qualifying victims of the time, date, and place of the preliminary hearing. If the victim is represented by counsel, communication with the victim should only be through his or her counsel.

g. *Arrange for a place to conduct the hearing.* You should coordinate with the detailed paralegal specialist to reserve a suitable site for conducting the preliminary hearing.

2–3. Production of military and civilian witnesses

a. *Military witnesses.* In accordance with the timeline you established for producing witnesses and other evidence, the defense counsel shall provide to the Government counsel the names of proposed military witnesses whom the accused requests testify at the hearing and the requested form of the testimony. The defense counsel will include a synopsis of expected testimony sufficient to show that it is relevant, not cumulative, and based on the limited scope and purpose of the hearing.

(1) If the Government counsel agrees that the testimony of the proposed defense military witness is relevant, not cumulative, and necessary based on the limited scope and purpose of the hearing, the Government counsel shall request that the commanding officer of that proposed military witness make that person available to provide testimony at the hearing. If a military witness's commanding officer has determined that the witness will testify, but not in person, the witness may testify by video teleconference, telephone, or similar means of remote testimony. No one means of communications is required over another, though the most efficient and least costly means is preferred. If the commanding officer determines that the military witness is unavailable altogether, you must obtain from the commander the reasons for that decision and you will note it in the hearing report.

(2) If the Government counsel objects to the proposed defense military witness, the defense counsel may request that you determine that the witness is relevant, not cumulative, and necessary based on the limited scope and purpose of the hearing. If you make such a determination, the Government counsel shall request that the commanding officer make the proposed military witness available to provide testimony at the hearing. If the military witness's commanding officer has determined that the witness will testify, but not in person, the witness may testify by video teleconference, by telephone, or similar means of remote testimony. If the commanding officer determines that the military witness is unavailable to testify altogether, you must obtain from the commander the reasons for that decision and you will note it in the hearing report.

b. *Civilian witnesses.* In accordance with the timeline you established, the defense counsel shall provide to the Government counsel the names of proposed civilian witnesses whom the accused requests testify at the hearing and the requested form of the testimony. The defense counsel will include a synopsis of expected testimony sufficient to show its relevance and necessity based on the limited scope and purpose of the hearing.

(1) If the Government counsel agrees that the testimony of the proposed civilian defense witness is relevant, not cumulative, and necessary based on the limited scope and purpose of the hearing, the Government counsel shall invite the civilian witness to provide testimony, and if the individual agrees, shall make arrangements for that witness's testimony. If expense to the Government is to be incurred, the convening authority who directed the preliminary hearing shall determine whether the witness testifies in person, by video teleconference, by telephone, or by other means of remote testimony. You are not authorized to obligate funds on behalf of the convening authority for witness travel. Government counsel will arrange with appropriate personnel within the command to obligate funds for travel expenditures.

(2) If the Government counsel objects to the proposed civilian defense witness, defense counsel may request that you determine if the witness is relevant, not cumulative, and necessary based on the limited scope and purpose of the hearing. If you make such a determination, the Government counsel shall invite the civilian witness to provide testimony, and if the individual agrees, shall make arrangements for that witness's testimony. If expense to the Government is to be incurred, the convening authority who directed the preliminary hearing shall determine whether the witness testifies in person, by video teleconference, by telephone, or by other means of remote testimony. You are not authorized to obligate funds on behalf of the convening authority for witness travel. Government counsel will arrange with appropriate personnel within the command to obligate funds for travel expenditures.

c. *Victim witnesses.*

(1) A victim of an offense under consideration at the preliminary hearing is not required to testify at the hearing. A victim who declines to testify shall be deemed to be not available for purposes of the preliminary hearing.

(2) Coordinate with your detailed paralegal specialist to contact the victim or his or her counsel to determine whether the victim chooses to be a witness during the preliminary hearing. Advise counsel of the proposed date, time, and place of the preliminary hearing. If counsel requests additional time for preparation, the request must be in writing and directed to you. You should not have contact with the victim outside the presence of his or her counsel; however, you can make arrangements to have the detailed paralegal specialist serve a copy of the written notice of the date, time, and place of the preliminary hearing on counsel for the victim.

d. *Delay due to inability to secure a witness.* You need *not* delay proceeding with the initial session of the preliminary hearing until *all* the witnesses or evidence requested by the accused is produced. Sound discretion on your part is essential. For example, if all witnesses requested by the accused are readily available but certain requested documentary evidence will not be available until several days later, you may proceed with the preliminary hearing. Keep in mind that your ability to conduct a proper preliminary hearing is not dependent upon having all of the evidence available at the same time, but only upon the ultimate examination of all of the witnesses and evidence you

deem to be relevant, not cumulative, and necessary for the limited scope and purpose of the hearing, in a manner that is as orderly as possible.

2-4. Production of “other” evidence

a. Evidence under the control of the Government. In accordance with the timeline you established for producing witnesses and other evidence, the defense counsel shall provide to Government counsel a list of evidence under the control of the Government that the accused requests the Government produce to the defense for introduction at the preliminary hearing.

(1) If the Government counsel agrees that the proposed evidence is relevant, not cumulative, and necessary to the limited scope and purpose of the hearing, the Government counsel shall obtain the evidence.

(2) If the Government counsel objects to production of the evidence, the defense counsel may request that you determine that the evidence is relevant, not cumulative, and necessary based on the limited scope and purpose of the hearing. If you make such a determination and direct that the evidence be produced, Government counsel shall obtain the evidence.

b. Evidence not under the control of the Government.

(1) Evidence not under the control of the Government may be obtained through noncompulsory means or by *subpoena duces tecum* issued by the Government counsel in accordance with the process established by RCM 703.

(2) In accordance with the timeline you established for producing witnesses and other evidence, the defense counsel shall provide to the Government counsel a list of evidence not under the control of the Government that the accused requests that the Government obtain.

(a) If the Government counsel agrees that the evidence is relevant, not cumulative, and necessary for the limited scope and purpose of the hearing, the Government counsel shall issue a *subpoena duces tecum* for the evidence.

(b) If the Government counsel objects to production of the evidence, the defense counsel may request that you determine whether the evidence is relevant, not cumulative, and necessary for the limited scope and purpose of the hearing. If you make such a determination and also determine that issuance of a *subpoena duces tecum* would not cause undue delay to the hearing, you may direct Government counsel to issue a *subpoena duces tecum* for the evidence. Failure of the Government counsel to issue a *subpoena duces tecum* after directed by you to do so shall be noted in the hearing report.

2-5. Consultation with counsel for the accused

Coordinate with your detailed paralegal specialist to contact the defense counsel to ensure they have received the disclosures they are entitled to pursuant to RCM 404A and RCM 405. At this time, advise counsel of the proposed date, time, and place of the preliminary hearing and allow the defense counsel reasonable time for preparation of the case (*see* fig 2-2). It is not required, but it is preferable to make this notification in writing. If counsel requests additional time for preparation, the request must be in writing and directed to you *see* para 2-1). You should not have contact with the accused outside the presence of defense counsel; however, you can make arrangements to have the detailed paralegal specialist serve a copy of the written notice of the date, time, and place of the preliminary hearing on the accused.

The following procedure provides guidance for an introductory session with the accused.

PHO (to accused): I am (rank and name). By order of (rank and name of convening authority), I have been appointed preliminary hearing officer under Article 32 of the Uniform Code of Military Justice to inquire into (a) certain charge(s) against you. The charge(s) allege(s) in general, the offense(s) of (name of offense(s) and description(s) of conduct). The name of the accuser is (rank and name of accuser). The names of the witnesses thus far known to me are (name all known witnesses).

I am now going to advise you of your rights at this preliminary hearing. You have the right to be present throughout the taking of evidence so long as your conduct is not disruptive. You will have the right at the proper time to cross-examine the witnesses who testify against you at the hearing; to present evidence in defense and mitigation on your own behalf; to make a statement in any form at the proper time, to remain silent, or to refuse to make any statement regarding any offense that you are accused or suspected of committing. In addition, you are advised that any statement made by you might be used as evidence against you in a trial by court-martial. Do you understand?

As the preliminary hearing officer, it is my duty to ascertain and impartially weigh evidence presented in support of the charge(s) against you that are relevant to the limited scope and purpose of the hearing. This preliminary hearing shall include inquiries as to whether there is probable cause to believe an offense(s) has been committed under the UCMJ and whether you committed the offense(s), whether the convening authority has court-martial jurisdiction over the offense and you, the form of the charge(s), and an appropriate disposition which should be made of the case. You and your counsel will be given full opportunity to cross-examine witnesses who testify against you at the preliminary hearing and to present additional evidence either in defense or mitigation that is relevant to the limited scope and purpose of the hearing. I can recommend that the charge(s) against you be referred for trial to a general court-martial or to a different type of court-martial or that the charge(s) be dismissed or disposed of other than by trial by court-martial. It is not my purpose during this preliminary hearing to act as a prosecutor, but only as an impartial fact finder. Do you understand?

Note. If the accused is charged with rape or sexual assault under Article 120(a) or 120(b), rape or sexual assault of a child under 120b(a) or 120b(b), forcible sodomy under Article 125, or an attempt to commit such an offense under Article 80, UCMJ, and you recommend that any of those offenses be referred to court-martial, you should inform the accused that only a general court-martial has jurisdiction over those offenses and your recommendation must reflect that.

Before I begin the preliminary hearing and examination of any of the witnesses in this case, I must inform you that you have the right to be represented at all times by legally qualified counsel. This means that you have the right to be represented by a civilian lawyer of your choice, but at no expense to the United States; by military counsel of your own selection if that counsel is reasonably available; or by counsel detailed by the Trial Defense Service to represent you during the preliminary hearing. There is no cost to you for military counsel. Do you wish to be represented by counsel? If so, state the type of counsel you want to represent you.

Note. If the accused is hesitant about whether to ask for counsel, the preliminary hearing officer should encourage the accused to obtain legally qualified counsel. If the accused requests counsel other than a lawyer, you must advise the accused that such non-lawyer counsel cannot serve as defense counsel before a general court-martial or a special court-martial that can adjudge a bad-conduct discharge.

Figure 2-1. Preliminary advice to the accused



DEPARTMENT OF THE ARMY
ORGANIZATION NAME/TITLE
STANDARDIZED STREET ADDRESS
CITY, STATE, AND ZIP +4 CODE

REPLY TO
ATTENTION OF

OFFICE SYMBOL

MEMORANDUM FOR (name and address of accused)

SUBJECT: Article 32 Preliminary Hearing

1. On (date), at (time) in (building number),(room number), I will conduct a preliminary hearing pursuant to Article 32, UCMJ, to inquire into the facts and circumstances concerning (a) charge(s) preferred against you by (rank and name of person who preferred charge(s)). The charge(s) is/are (general nature of the charge(s)), in violation of (UCMJ article(s)).

2. You have the right to be present during the entire preliminary hearing. Additionally, you have the right to be represented at all times during the hearing by legally qualified counsel. Counsel may be a civilian lawyer of your choice provided at no expense to the United States; a qualified military lawyer of your selection, if reasonably available; or a qualified military counsel detailed by the Trial Defense Service. There is no cost to you for military counsel. You also have the right to waive representation by counsel. Send your decision to me by (suspense date).

3. The names of witnesses known to me, who will be asked to testify at the hearing are:

- (Name of witness).

Additionally, I have been asked to examine and consider the following evidence:

- (Describe evidence and its location).
- (Describe evidence and its location).
- (Describe evidence and its location).

4. As preliminary hearing officer, I will try to arrange for the appearance of the witnesses you want to testify at the hearing so long as those witnesses are relevant, not cumulative, and necessary to the limited scope and purpose of the preliminary hearing. Send names, addresses, and synopses of expected testimony of such witnesses to me by (suspense date for witness notification). If, at a later time, you identify additional witnesses, inform me of their names and addresses.

Figure 2-2. Notification to the accused

OFFICE SYMBOL
SUBJECT: Article 32 Preliminary Hearing

5. You may contact me by writing to: (hearing officer's rank, name, and military address).

(Name)
(Rank, Branch)
Preliminary Hearing Officer

Figure 2-2. Notification to the accused—continued



REPLY TO
ATTENTION OF

DEPARTMENT OF THE ARMY
ORGANIZATION NAME/TITLE
STANDARDIZED STREET ADDRESS
CITY, STATE, AND ZIP +4 CODE

OFFICE SYMBOL

MEMORANDUM FOR (name and military address of preliminary hearing officer)

SUBJECT: Article 32 Preliminary Hearing

1. Receipt of basic communication is acknowledged.
2. I want to be represented by (select one of the six options):
 - a. Civilian counsel, who is (name and address).
 - b. An individual military counsel, who is (rank, name, and military address), if he or she is reasonably available.
 - c. A legally qualified military counsel detailed by the Trial Defense Service.
 - d. A civilian counsel, who is (name and address), and individually requested military counsel, who is (rank, name, and military address).
 - e. Detailed military counsel and civilian counsel, who is (name and address).
 - f. I do not want to be represented by counsel.
3. I understand that the Government will not cover the cost of a civilian attorney, but military attorneys will be furnished at no cost to me.
4. I want the following witnesses and/or evidence present at the hearing.
 - a. (Name and address of witness or description and location of evidence).
 - b. (Name and address of witness or description and location of evidence).

(Include information on where they can be contacted.)

(Accused)
(Rank), U.S. Army

Figure 2-3. Response of the accused

Chapter 3 The Formal Preliminary Hearing

3–1. General

The Article 32 preliminary hearing should be conducted in a formal and dignified manner. You should attempt to hold the preliminary hearing under conditions of relative quiet and without interruption. Whenever practicable, the hearing room should be arranged in the manner illustrated in figure 3–1. You will designate a time and place to begin the formal taking of evidence in the preliminary hearing and the actual interrogation of witnesses and examination of real evidence. You should use a copy of DD Form 457, the checklist provided at appendix B, and the provisions of this guide to assist you with the preliminary hearing.

3–2. Procedure for opening session

Figure 3–2 sets forth the suggested procedure for the opening session with the accused, the accused’s counsel, and the Government counsel. These procedures may be changed to account for special circumstances.

3–3. Procedures for taking testimony and examining evidence

a. Procedure.

(1) *Form of testimony.* All testimony shall be taken under oath, except that the accused may make an unsworn statement.

(2) *Record of testimony.* You are required to include a summary of the substance of all testimony in the preliminary hearing report.

(a) The preliminary hearing must be recorded by a suitable recording device. The accused, a victim, or both, may request the recording and shall have access to the recording as prescribed by the MCM and Army regulations. When such recordings of testimony are made, you should ensure that they are preserved until final disposition of the case occurs, either by court-martial or through the withdrawal and dismissal of the charges. Ensure to have a copy of the recording available in the event the victim or the accused requests to have a copy of the recorded proceedings. A summarized transcript shall be prepared by the reporter.

(b) Ordinarily it is not necessary to give Article 31(b), UCMJ, warnings to witnesses who are not accused or suspected of a crime; however, if during the taking of testimony, it appears that a *witness subject to the UCMJ* might be suspected of committing any offense, stop and advise the witness of Article 31(b) rights and of the right to counsel (see DA Form 3881 (Rights Warning Procedure/Waiver Certificate)).

(c) If during the taking of testimony it appears that a civilian witness might be suspected of committing any offense, stop and advise the witness of the right against self-incrimination and of the right to consult with civilian counsel at their own expense.

(d) You should use DA Form 3881 when advising military and civilian witnesses of these rights. If the witness initially waives these rights, you may proceed with questioning. If the witness remains silent or requests to speak to an attorney, stop all questioning and note this fact on DA Form 3881. You should not initiate further questioning of this witness until the witness has consulted with counsel and has consented to further questioning after re-advisement of all rights (again use DA Form 3881). You should consult your legal advisor, if assigned, before determining if it is again permissible to question the witness. Some victims will request the presence of a special victim counsel (SVC) at the preliminary hearing. The victim has a right to have the SVC present at all stages of the preliminary hearing. Consult with the SVC if questions arise about the victim testifying at the preliminary hearing.

b. Military Rules of Evidence. The Military Rules of Evidence (MRE) do not apply at the preliminary hearing except as follows:

(1) Military Rules of Evidence 301, 302, 303, and 305 shall apply in their entirety.

(2) Military Rule of Evidence 412 shall apply in any case that includes a charge defined as a sexual offense in MRE 412(d), except that MRE 412(b)(1)(C) shall not apply.

(3) Military Rules of Evidence, Section V (Privileges), shall apply, except that MRE 505(f) through (h) and (j); 506 (f) through (h), (j), (k), and (m); and 514(d)(6) shall not apply.

(4) Failure to meet the procedural requirements of the applicable MREs shall result in exclusion of that evidence from the preliminary hearing, unless good cause is shown. If you have questions about the application of MREs during the preliminary hearing, consult with your legal advisor, if assigned.

c. Refusal to testify. If a witness, other than a victim witness described in paragraph 2–3c, above, who is a member of the military refuses to make a sworn statement and it does not appear that the statement is incriminating or otherwise privileged, allow the witness to consult with a legal assistance attorney or an attorney from the Trial Defense Service concerning the witness’s rights and duty to testify. If the witness persists in refusing to testify, you may give an order for them to do so. Failure to comply with this order could result in disciplinary action. If a witness has previously

made a sworn written statement and now refuses to testify, you should show the witness the previous statement and inquire into the reasons for which he or she now refuses to make a sworn statement regarding the same subject matter. If you determine that the witness has a privilege not to testify or if you have determined that there is no privilege and ordered the witness to testify but the witness persists in refusing to do so, you may consider the prior sworn statement if it is relevant, not cumulative, and necessary to the limited scope and purpose of the hearing. If it appears that any witness who is apparently essential to subsequent proceedings is subject to early discharge, transfer, temporary duty, or other personnel action that might prevent his or her availability at a later proceeding, you should note this fact on DD Form 457, items 16 and 21.

d. Spectators. The accused, the press, and the public have an interest in being informed of the workings of the entire court-martial process. Therefore, the preliminary hearing is normally open to the public. Indeed, proceedings that are open to the public tend to ensure that all parties perform their functions more responsibly, encourage witnesses to come forward in a truthful manner, and discourage perjury. Although RCM 405(h)(4) provides you with the authority to restrict spectator access to all or part of the proceeding, you should only do so after consultation with your legal advisor, if assigned.

(1) If you conclude that closing the preliminary hearing may be appropriate, you must proceed on a case-by-case, witness-by-witness, and circumstance-by-circumstance basis. Therefore, you may not close the proceeding without carefully articulating and documenting the reasons why the preliminary hearing should be closed, whose access will be restricted, how long the hearing will be closed, and why you decided to close that portion of the proceeding. Protecting the privacy of victims or guarding court members against potential tainting by outside influences alone are insufficient to warrant closing the entire proceeding. In addition, prospective witnesses in the case should not be permitted to hear or examine the testimony or statements of other witnesses. Witnesses should remain available outside the hearing room and should be called one at a time to testify. You should instruct witnesses not to discuss their testimony with other witnesses or other personnel. Remember that MRE 412 hearings shall be closed and that a victim has a right to not be excluded during an MRE 412 closed hearing. Counsel for the victim should be permitted to attend the closed hearing too.

(2) A victim of an offense under consideration at the preliminary hearing has the right not to be excluded from any portion of the hearing unless you determine, after receiving clear and convincing evidence, that the testimony by the victim would be materially altered if the victim heard other testimony at the proceeding.

e. Oaths. The procedure for administering the oath to a witness is set forth in figure 3–3.

f. Examination of witnesses. A procedure for examining witnesses is set forth in figure 3–4.

g. Examination of evidence. The procedure for examining evidence is set forth in figure 3–5.

h. Inquiry into mental responsibility or capacity. If, in your opinion, grounds exist for inquiring into the mental condition of the accused to determine whether the accused was mentally responsible at the time of the acts charged or has sufficient mental capacity to understand the nature of the Article 32 preliminary hearing and to conduct or cooperate intelligently in his or her defense, you should promptly notify the convening authority who appointed you. The appointing authority will take appropriate action. In addition, you should complete DD Form 457, item 14, as appropriate.

i. Objections. If either party objects to any of your decisions or otherwise objects to alleged defects in the preliminary hearing, you are not required to rule on those objections. You may, however, take corrective action in response to an objection if you believe such action is appropriate. If an objection raises a substantial question about the propriety of your conduct during the hearing (such as challenging your impartiality), you should consult with your legal advisor, if assigned, and inform the convening authority who directed the preliminary hearing before deciding whether any corrective action should be taken. You may require a party to file any objection in writing. You must note a party's objection in your report, if requested to do so.

j. Uncharged misconduct. If evidence introduced during the preliminary hearing indicates that the accused may have committed an uncharged offense(s), you may examine the evidence and hear the witnesses presented to you by the Government counsel relating to the subject matter of such offense(s), and make findings and recommendations without the accused first having been charged with the offense(s). The accused's rights are the same with regard to both charged and uncharged offenses. When considering uncharged offenses identified during the preliminary hearing, you shall inform the accused of the general nature of each uncharged offense(s) considered, and otherwise afford the accused the same opportunity for representation, cross-examination, and presentation afforded during the preliminary hearing of any charged offense. Much like for any charged offense(s), you may consider witnesses and other evidence requested by the parties pertaining to uncharged misconduct so long as it is relevant, not cumulative, and necessary to the limited scope and purpose of the hearing.

k. Concluding the preliminary hearing.

(1) After you receive all the evidence presented by the parties, and the accused and counsel have indicated that they have no further evidence to offer, you should declare the taking of evidence closed.

(2) After the evidentiary portion is closed, you should afford the accused or the defense counsel the opportunity to make a statement of what they consider an appropriate recommendation concerning the disposition of the charges in the case. You should consider their comments in deciding what disposition you will recommend to the convening

authority who directed the preliminary hearing. You should explain to the accused and counsel that your recommendation in the case is advisory only and is not binding upon the convening authority who directed the hearing or upon any superior authorities. You should also afford the Government counsel the opportunity to make a statement regarding an appropriate recommendation for disposition of the original charges and on any uncharged misconduct that was examined during the Article 32 preliminary hearing.

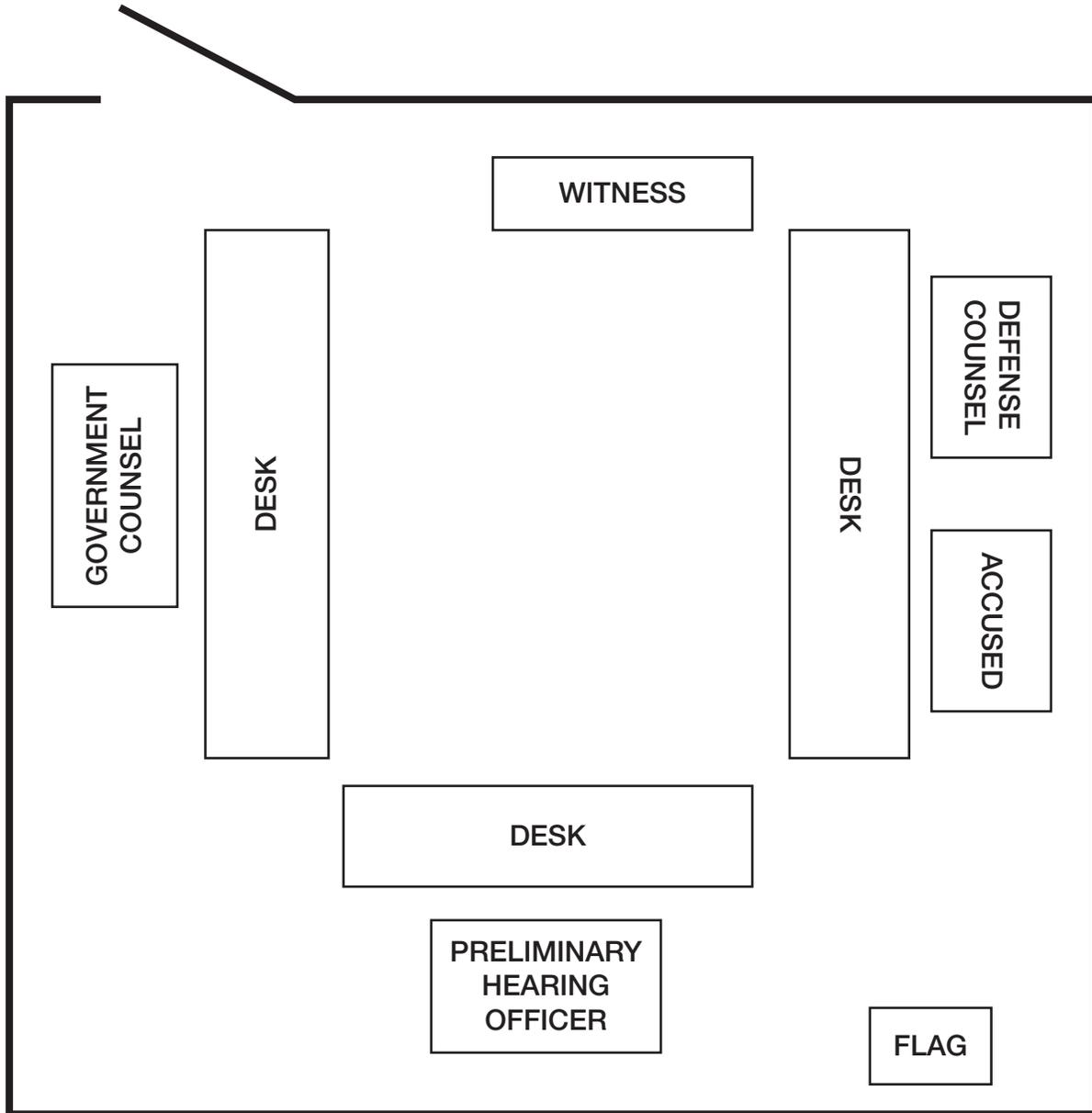


Figure 3-1. Arrangement of room for preliminary hearing

PHO (To accused-counsel): This is a formal preliminary hearing into (a)certain charge(s) against (*rank and name of accused*) ordered pursuant to Article 32, UCMJ, by (*rank and name of appointing authority*). On (*date of notification*), I informed you of your right to be represented by civilian counsel at no expense to the United States, military counsel of your own selection if reasonably available, or military counsel detailed by the Trial Defense Service. You informed me that you (*did not desire to be represented by counsel/desired to be represented by (name of civilian counsel)/desired to be represented by (rank and name of individually requested counsel)/desired to be represented by (rank and name of detailed military counsel)*).

Let the record show that (*name of civilian counsel/rank and name of individually requested military counsel who was available/rank and name of detailed counsel*) is here present with you.

(*Name of civilian counsel*), I ask you to step forward and enter your appearance by filling out item 7a on the official Preliminary Hearing officer's Report, DD Form 457).

PHO (To accused-counsel): I want to remind you that my sole function as the Article 32 preliminary hearing officer in this case is to determine the relevant facts of this case, to weigh and evaluate those facts and determine whether an offense under the UCMJ has been committed and whether you committed it. I shall also consider whether a court-martial would have jurisdiction over the offense(s), the form of the charge(s), and make a recommendation concerning the disposition of the charge(s) that has/have been preferred against you. I will now read to you the charge(s). (At this point, the defense may waive reading of the charge(s).) It/They is/are as follows:

Charge (I): Violation of the Uniform Code of Military Justice, (*article number*).

Specification (1): (*the specification*).

Specification (2): (*the specification*).

(Charge (II):(Additional Charge): Violation of the Uniform Code of Military Justice, (*article number*).

Specification (1): (*the specification*).

I will now show you the charge(s) and specification(s).

I advise you that you do not have to make any statement regarding the offense(s) of which you are accused and that any statement you do make may be used as evidence against you in a trial by court-martial. You have the right to remain silent concerning the offense(s) with which you are charged. You may, however, make a statement either sworn or unsworn and present evidence in defense and mitigation so long as it is relevant to the limited scope and purpose of this hearing. If you do make a statement, whatever you say will be considered and weighed as evidence by me just like the testimony of other witnesses.

You have previously been given a copy of the investigation file that has been compiled in your case. It contains (*list all documents contained in the case file*). I will not consider any of this material in making my decisions, unless I give you an opportunity to object to it and I decide on the record to admit it into evidence for this preliminary hearing. It is my intention to hear as Government witnesses during this preliminary hearing (*list all witnesses who will be called to testify at the hearing*). After these witnesses testify, you or your counsel will have the right to cross-examine them. You also have the right to produce other evidence in your behalf in defense and mitigation for the limited scope and purpose of the hearing. I have coordinated through the Government counsel for the appearance of those witnesses previously requested by you that I have determined to be relevant, not cumulative, and necessary to the limited scope and purpose of the hearing. I do not intend to consider as a witness (*name of witness*) (because it has been determined that the witness is unavailable or because the witness's commander has determined that they are unavailable). I therefore intend to consider the sworn statement of the witness in my recommendations as it is contained in the file.)

PHO (To accused-counsel): Before proceeding further I now ask you whether you have any questions concerning your right to remain silent, concerning the offense(s) of which you are accused, your right to make a statement either sworn or unsworn, the use that can be made of any statement you may make, your right to cross-examine witnesses against you, or your right to present evidence in your own behalf in defense or mitigation.

(Counsel-Accused): (*Yes/no*).

Note. At this point, answer any questions that the accused may have with respect to rights or as to procedural or other matters concerning the preliminary hearing. You should not proceed further until convinced that the accused understands these rights. If the accused is represented by counsel, however, the latter will generally indicate that he or she has explained these matters to the accused and that they are understood.

Figure 3–2. Procedure for opening session of the formal preliminary hearing

Note. The word “oath” as used in this appendix includes the word “affirmation.” All oaths and affirmations should be made in the presence of the accused. Generally, only witnesses need be sworn at an article 32 preliminary hearing. There is no requirement that you as the hearing officer or counsel be sworn. Interpreters must also be sworn before beginning their duties. The oath may be administered by you in the following manner: You should raise your right hand and have the person being sworn stand with right hand raised. You should then read or recite the appropriate oath and receive the appropriate response.

Oath for Witnesses

PHO: Do you swear that the evidence you shall give in the case now in hearing shall be the truth, the whole truth, and nothing but the truth, so help you God?

Affirmation

PHO: Do you affirm that the evidence you shall give in the case now in hearing shall be the truth, the whole truth, and nothing but the truth?

Note. The “affirmation” is used when administering the oath to persons who have conscientious concerns against taking an oath or to persons who do not believe in the existence of a supreme being. *See RCM 807.* Persons who recognize special forms or rites as obligatory, and persons who do not believe in a supreme being may be sworn in their own manner or according to the ceremonies of the religion they profess and declare to be binding.

Oath for Interpreter

PHO: Do you (swear) (affirm) that in the case now in hearing you will interpret truly the testimony you are called upon to interpret (, so help you God).

Note. When testimony is given through an interpreter, the interpreter must first be sworn. *See RCM 807. The interpreter must translate questions and answers in verbatim form.*

Figure 3–3. Oaths

Introductory questions to witnesses

(Swear witness) *See* figure 3–3.

PHO: State your full name and (for military witnesses: grade, organization, and armed force) (for civilian witnesses: residence address and occupation).

WITNESS: *(Complete response)*.

PHO: Do you know the accused in this case?

WITNESS: *(Yes/no)*.

Note. If the identification of the accused is not an essential part of the expected testimony of the witness, this question may be omitted. If the witness identifies the accused, the witness should normally be asked to state the accused's name and organization if known. If the identity of the accused is particularly relevant in a case, and the identity of the accused as the perpetrator of the offense depends upon the ability of the witness to identify the accused, the accused's counsel may request that the witness be required to identify the accused from a nonsuggestive lineup of persons similar in appearance to the accused. This request should be granted whenever possible. Otherwise the ability of the witness to identify the accused as the offender may be based on the fact that the accused is the only person whose conduct is being investigated. In any event in this situation, you should inquire into the basis for the witness's identification of the accused.

Government Witness

Note. Government counsel will examine Government witnesses, followed by cross-examination by the accused or defense counsel, then followed by questioning by you only if you determine further clarification is necessary.

Cross-Examination of Government Witness

Note. When Government counsel has completed an examination of a witness, you should advise the accused and counsel (if the accused is represented by counsel) substantially as follows:

PHO (To accused-counsel): You may now cross-examine this witness concerning any of his/her testimony, any knowledge possessed of the offense(s), or concerning the witness's worthiness of belief. (Since you are not represented by counsel, I will do this for you, if you wish, if you will inform me in a general way of the matters about which you want me to question the witness.) Do you wish to cross-examine this witness?

(Counsel) (Accused): *(Yes/no)*.

Note. If the accused or counsel desires to cross-examine the witness proceed substantially as follows:

(Counsel) (Accused) (to the witness): Did you hear the subject of the argument between the accused and Sergeant Smith?

WITNESS: No sir, they were arguing at the time I came into the dayroom, and I did not hear what was said before I got there.

(Counsel) (Accused): Did you see any gestures made during the argument by Sergeant Smith?

WITNESS: I am not exactly sure what you mean, but . . . (witness continues to describe details of the incident).

PHO (to accused-counsel): Do you have any further questions you want this witness to answer?

(Counsel) (Accused): *(Yes/no)*.

PHO: The witness is excused.

Figure 3–4. Examination of witnesses

Calling Defense Witnesses

PHO (to accused-counsel): All of the witnesses for the Government have been called and have revealed to you the evidence I intend to consider during the preliminary portion of this hearing. As I have previously advised you, you may now present evidence in defense or mitigation so long as it is relevant to the limited scope and purpose of this preliminary hearing. Do you have any witnesses to testify in your defense or mitigation? If so, you may call them at this time.

(Counsel) (Accused): *(No/yes, with name(s) and address(es)).*

Note. If witnesses are to be called to testify on the accused's behalf, you should advise the accused substantially as follows:

PHO (to accused-counsel): You or your counsel may question each of the witnesses who are to testify for you.

Note. If the accused is represented by counsel, you should assume that counsel will conduct the examination of the witness and present evidence in a planned procedure. If the accused has elected not to have counsel at the preliminary hearing, you should permit the accused to examine or cross-examine witnesses personally if desired. The procedure for administering the oath (fig 3-3) and for introductory questioning of the witness set forth above should be followed for defense witnesses. After the accused or counsel has completed examination of the defense witness, the Government counsel may cross-examine the witness.

Explanation of Accused's Rights as a Witness

Note. After all the witnesses have testified and the accused or his counsel indicate that they have no further evidence to present, you should inquire of accused and counsel, if the accused has not previously made a statement, substantially as follows:

PHO (to accused): Earlier in this preliminary hearing, I advised you of your rights to make a statement or to remain silent. Do you want me to repeat this advice?

(Counsel) (Accused): *(Yes/no).*

PHO (to accused): Do you desire to make a statement in any form?

(Counsel) (Accused): *(Yes/no).*

Figure 3-4. Examination of witnesses—continued

Real Evidence (Physical Objects)

PHO (To witness): This is a knife which the Government has introduced into evidence and I have designated as *(exhibit number)*.

PHO (To accused-counsel after questioning the witness further as to the circumstances under which the knife was found, and after cross-examination, if any, of the witness): Do you have any objection to my considering this exhibit as evidence?

(Counsel) (Accused): *(Yes, stating reason(s)/no).*

Documentary Evidence Authenticated Official Record

PHO (to accused-counsel): I have SIDPERS document of *(unit designation)*, for *(inclusive dates)*, which the Government has introduced into evidence and I have designated *(exhibit number)*. It appears to be certified as a true copy by *(rank, name, organization, and duty position of authenticating official)*. I now hand you this exhibit for your examination.

PHO (to accused-counsel after permitting him to examine the document): Do you have any objection to my considering this exhibit as evidence?

(Counsel) (Accused): *(Yes, stating reason(s)/no).*

Figure 3-5. Examination of evidence

Chapter 4 Completion of the Preliminary Hearing Officer's Report

4-1. Report preparation

a. Use the notes that you took during the hearing, the audio/visual recordings or transcribed testimony, the evidence collected during the hearing, and DD Form 457 (see fig 4-1) to assist you in preparing the report for the convening authority who directed the preliminary hearing. The detailed paralegal specialist will assist you with compiling the report. The preliminary hearing report shall include—

- (1) The names and organizations or addresses of defense counsel and whether the defense counsel was present throughout the taking of evidence, or if not present, the reason(s) why;
- (2) The substance of the testimony taken on both sides, including any stipulated testimony;
- (3) Any other statements, documents, or matters you considered. If it is not possible to include these items, you must discuss the nature of the evidence;
- (4) A statement that an essential witness may not be available for trial;
- (5) An explanation of any delays in the preliminary hearing;
- (6) A notation if counsel for the government failed to issue a *subpoena duces tecum* that was directed by the preliminary hearing officer;
- (7) Your determination as to whether there is probable cause to believe the offense(s) listed on the charge sheet or otherwise considered at the preliminary hearing occurred;
- (8) Your determination as to whether there is probable cause to believe the accused committed the offense(s) listed on the charge sheet or otherwise considered at the preliminary hearing;
- (9) Your determination as to whether a court-martial has jurisdiction over the offense(s) and the accused;
- (10) Your determination as to whether the charge(s) and specification(s) are in proper form; and
- (11) Your recommendations regarding disposition of the charge(s).

b. Additionally, some reports may include—

- (1) A statement of any reasonable grounds for belief that the accused was not mentally responsible for the offense or was not competent to participate in the defense during the preliminary hearing (*see* RCM 909 and RCM 916(k)); or
- (2) A statement of any additional uncharged misconduct that was considered and your recommendation as to disposition.

4-2. Distribution of the report

a. Attach all papers furnished to you, together with all evidence produced at the preliminary hearing, to the DD Form 457. Provide the original report to the convening authority who directed the preliminary hearing as expeditiously as possible after you obtain a legal review by the legal advisor, if assigned. Refer to the appointment memorandum for guidance as to the appropriate timelines.

b. After providing the original report to the convening authority who directed the preliminary hearing, ensure the detailed paralegal specialist also provides a copy to the accused, the government counsel, and the defense counsel.

Appendix A References

Section I Required Publications

DA Pam 27-9

Military Judge's Benchbook (Cited in para 2-2d(1).)

MCM 2012

Manual for Courts Martial (Cited in para 1-1.)

Section II Related Publications

A related publication is a source of additional information. The user does not have to read it to understand this publication.

AR 25-30

The Army Publishing Program

AR 27-10

Military Justice

DFAS-IN Regulation 37-1

Finance and Accounting Policy Implementation

Federal Rules of Criminal Procedure

Rule 5.1: Preliminary Hearing

National Defense Authorization Act for Fiscal Year 2014

Public Law 113-66

Section III Prescribed Forms

Unless otherwise indicated, DD forms are available on the Office of the Secretary of Defense (OSD) Web site (<http://www.dtic.mil/whs/directives/infomgt/forms/index.htm>).

DD Form 457

Preliminary Hearing Officer's Report (Prescribed in para 3-1.)

Section IV Referenced Forms

Unless otherwise indicated, DA forms are available on the Army Publishing Directorate (APD) Web site (<http://www.apd.army.mil>).

DA Form 2028

Recommended Changes to Publications and Blank Forms

DA Form 2823

Sworn Statement

DA Form 3881

Rights Warning Procedure/Waiver Certificate

Appendix B Checklist for Article 32 Preliminary Hearing Officer

This checklist is intended as a resource that will help you meet the legal requirements for an Article 32 preliminary hearing. This checklist is not a comprehensive list of all the tasks you must accomplish for the hearing.

B-1. Review the file

- a.* Verify there is an appointment memorandum.
- b.* Ensure the charge sheet is properly completed.
- c.* Ensure the charge(s) and specification(s) contain the elements of the offense(s) as specified in the UCMJ.
- d.* Ensure that you can be fair and impartial.
- e.* Verify whether the file contains all necessary documentary evidence.
- f.* Determine if further evidence is required in order to complete the proceedings. (If so, see your legal advisor, if assigned.)
- g.* Plan a preliminary timeline for completion of the preliminary hearing.
- h.* Plan a preliminary timeline for requests for the production of witnesses and other evidence.
- i.* Determine whether the appointment memorandum gives you the authority to grant delays. If so, for how long?
- j.* Determine what procedure is required if the requested delay is longer than the period authorized in the appointment memorandum.
- k.* Start a detailed chronology to note all actions and delays in the preliminary hearing.

B-2. Initial contacts

- a.* Complete initial briefing with the legal advisor, if assigned.
- b.* Make initial contact with the detailed paralegal specialist (reporter).
- c.* Contact the counsel for both sides to inform them of the preliminary hearing and the timeline. If the accused does not have a counsel, the paralegal specialist can contact the accused on your behalf regarding initial administrative matters.
- d.* Ensure that the victim(s) is notified of the time, date, and location of the hearing. Either you or the Government counsel may provide notice. If the victim is represented by counsel, you must communicate through their counsel.

B-3. Case preparation

- a.* Ensure the list of witnesses and evidence includes those submitted by the accused or the defense counsel. Ensure that the witnesses and/or evidence requested by the accused is evidence in defense or mitigation and is also relevant to the limited scope and purpose of the hearing.
- b.* Ensure that the commander of any proposed military witness has made a determination whether or not the witness will be made available to testify and by what means. If not, determine by what other remote means the witness will testify.
- c.* Ensure that qualifying victims understand that they have the right not to testify at the preliminary hearing and note in the hearing report that they were made aware of and understood this right.
- d.* Coordinate for the set up of all necessary equipment and a site at which to hold the hearing.

B-4. Hearing

- a.* Provide the opportunity for both the Government and defense counsel to deliver opening statements.
- b.* Receive all real and documentary evidence at the hearing that is relevant to the limited scope and purpose of the preliminary hearing.
- c.* Ensure that each party has contacted their witnesses and informed them of the time, date, and place of the hearing in order to avoid unnecessary delay.
- d.* Determine whether all appropriate defense witnesses have been called.
- e.* Give the accused the opportunity to make a sworn or unsworn statement.
- f.* Close the taking of evidence.
- g.* Provide the opportunity to both the Government and defense counsel to make closing arguments.

B-5. Report

- a.* Ensure the chronology contains sufficient detail to identify causes for unusual delays and that the delays are reflected in the DD Form 457.
- b.* Detail the facts, findings, and recommendations in a logical sequence.
- c.* Ensure that the recommendation is supported by evidence showing probable cause to believe an offense has been committed and the accused committed it and that the convening authority has jurisdiction over the offense and the accused.
- d.* Assemble the evidence in a logical and coherent fashion, with the exhibits and enclosures marked in the order that they are discussed.
- e.* Ensure the recommendation is responsive to the tasking in the appointment memorandum.
- f.* Ensure the report contains all objections made by counsel.
- g.* Provide an explanation for any evidence that was requested by the defense but was not considered by you at the hearing.

- h. Discuss all admissibility issues with the evidence.
- i. Ensure the DD Form 457 is completed properly.

B-6. Recording

- a. Record the hearing with a suitable recording device.
- b. Make copies of the recording in the event a victim or the accused, makes a request for such a copy.

Appendix C Common Mistakes

C-1. Failing to maintain impartiality

Your duties are similar to those of a judicial officer. As such, you should avoid any appearance of partiality to either side. You should express no opinions and should avoid all outside discussion with the command about the substance of the preliminary hearing. If you have prior knowledge of the facts of the case that would endanger your impartiality, you should contact your legal advisor, if assigned, immediately.

C-2. Legal advice

If you reach a point when you are unsure of how to proceed, you should consult with your legal advisor, if assigned. If you are not assigned a legal advisor but wish to consult with one at any stage during the proceeding, make a request through the convening authority to have a legal advisor appointed to you. Your legal advisor is the only person with whom you may discuss your questions concerning the case. The legal advisor is there to help you make sense of any procedural or substantive questions you may have throughout the course of the hearing. However, your legal advisor may not give you any advice on how you should dispose of the case, or what you should recommend. Finally, if you meet with your legal advisor to discuss substantive issues, you must notify both sides about the substantive areas that you discussed, and the advice that you received.

C-3. Failing to properly account for delays

You are responsible for conducting the preliminary hearing in a timely manner, while protecting the rights of the accused. If a party requests a delay and it is for good cause, you may grant the delay if you are authorized to do so in your appointment orders. However, you must account for all such delays in your final report to the appointing authority. Therefore, you should keep a detailed chronology showing all delays and the reasons for them. Keep in mind that most appointment orders limit the amount of days of delay that you are authorized to grant, and provide procedures if the requested delay is for longer than that authorization. If you are unsure about whether to grant a delay, you should consult your legal advisor, if assigned.

C-4. Improper admission of evidence

You often will be given the investigative file and other information when you are appointed as the PHO. This information is to be used as background information only. When making your recommendation, you may only consider evidence that has properly been admitted during the hearing. This means that you may only consider information in the packet that you officially admit into evidence during the hearing. If you fail to admit evidence during the preliminary hearing, you may not consider that evidence in making your recommendation, even if the evidence was contained in the original case packet you received upon your appointment.

C-5. Mishandling witnesses

Ensure witnesses waiting to testify remain outside of the hearing room to prevent their testimony from being tainted. Finally, after a witness is excused, make sure you properly admonish the witness not to discuss his or her testimony with anyone other than counsel until after the case has concluded.

C-6. Assuming too high a standard of proof

You are not at trial; you need not try to prove or disprove the case beyond a reasonable doubt. Your job is to determine whether **probable cause exists to believe that an offense was committed under the UCMJ and whether the accused committed the offense charged** and to make recommendations to the appointing authority on that basis. This is a preliminary hearing, not a rehearsal for the trial. Remember to tailor the hearing accordingly.

C-7. Failing to find evidence of each element of the offenses

Familiarize yourself with each element of every offense, then determine whether the evidence shows probable cause to believe the accused committed *each element of the offense*. Character is irrelevant unless it is a defense to an element of an offense, or it is provided as evidence in mitigation that is relevant to the specific purposes of the preliminary hearing. The military character of an accused may not be considered as a factor in deciding how to dispose of the case.

C-8. Not understanding available dispositions

A recommendation may depend on assumptions concerning the availability of dispositions in a case. Ensure that you understand the levels of court-martial and other available dispositions.

Glossary

Section I Abbreviations

AR

Army regulation

DA

Department of the Army

DA Pam

Department of the Army Pamphlet

GCM

general courts-martial

MCM

Manual for Courts-Martial

MRE

Military Rules of Evidence (found in the MCM)

RCM

Rules for Courts-Martial

UCMJ

Uniform Code of Military Justice

Section II Terms

Active duty

Full-time duty in the active military service of the United States including full time training duty, annual training duty, and attendance, while in the active military Service, at a school designated as a Service school by law or by the Secretary of the Army.

Counsel

Judge advocates or civilian attorneys certified under Article 27(b) of the UCMJ.

Deposition

A legal proceeding in which a witnesses' testimony is recorded verbatim and both Government counsel and defense counsel are provided the opportunity to question and cross-examine the witness.

Elements

The specific actions necessary to complete an offense under the UCMJ. All elements of a charged offense must be supported by evidence.

Evidence

Anything (item, document, or testimony) that tends to prove or disprove a fact in issue.

Military judge

A judge advocate officer who has been certified by The Judge Advocate General as qualified to preside over GCM and/or special courts-martial (SPCM).

Mitigation

Any evidence that supports a lower level of punishment for an offense.

Probable cause

A reasonable belief that an offense was committed and the accused committed it.

Staff Judge Advocate (SJA)

A judge advocate so designated by The Judge Advocate General of the Army.

Section III

Special Abbreviations and Terms

PHO

Preliminary hearing officer

SVC

Special victim counsel

UNCLASSIFIED

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