

CHAPTER 1

Litigation of Classified Information Cases – An Overview

"What has puzzled us before seems less mysterious, and the crooked paths look straighter as we approach the end."

Jean Paul Richter
German novelist and humorist, 1763-1825

The goal of this Primer is to provide all judge advocates with a basic understanding of the evidentiary rules, courtroom closure process, and coordination principles applicable to all investigations and courts-martial involving classified information. This is especially important in today's operationally oriented environment that has resulted in an increase in the number of courts-martial involving classified information.

From an evidentiary standpoint, Military Rule of Evidence (M.R.E) 505 is the center of gravity for any case with classified information issues. M.R.E. 505 is primarily an evidentiary procedure that focuses on what classified information is relevant and necessary, and, if relevant and necessary, what form of discovery is most appropriate. It is the fundamental building block for the pieces of the court-martial puzzle that involve classified information. M.R.E. 505 is a very unique rule that adds an additional layer of complexity to the court-martial. It provides a host of issues and opportunities for both trial and defense counsel to explore and litigate in pursuant of their client's interests. Judge advocates must fully appreciate the quantity and quality of relevant classified information as early in the court-martial process as possible.

For the courtroom closure process, Rule for Court-Martial (R.C.M.) 806 codifies the procedures found in U.S. v Grunden, 2 M.J. 116 (C.M.A. 1977). If closure is an issue, either at an Article 32 investigation or trial, R.C.M. 806(b)(2) provides the resolution framework. In any case involving classified information, judge advocates, especially staff judge advocates and trial counsel, should start thinking about closure issues early in the process.

The Primer's chapters on M.R.E. 505 and courtroom closure process, Chapters 9 and 10 respectively, represent the core chapters of the Primer. A good understanding of the issues discussed in these two chapters, and perhaps most importantly the interplay between M.R.E. 505 and R.C.M. 806, represent the foundation of a judge advocate's successful involvement with any case with classified information issues. Judge advocates should view M.R.E. 505 as a first step that determines what, if any, classified information is relevant and necessary to any given case. The relevance of the courtroom closure process only begins if M.R.E. 505 determines that certain classified information is relevant and necessary. If so, litigants must address courtroom closure issues. These two issues are the two primary differences between a court-martial with classified information

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and a court-martial without classified information. Judge advocates should fully understand the different issues at stake in M.R.E. 505 and R.C.M. 806 and appreciate important overlapping issues, most importantly, the requirement to consider alternatives to classified information, e.g., redactions, substitutions or “gists,” and stipulations.

Finally, these types of cases include unique coordination requirements. The intelligence community (IC) has equities in most courts-martial involving classified information. Whoever owns the classified information will have considerable interest in the case. Coordination with IC members must occur at all stages of the process: investigation, trial, and post-trial. Judge advocates involved in classified information cases should view this coordination requirement as significant as the host of laws and regulations associated with the handling of classified information. Neglecting either requirement may not only raise questions regarding professional competence, but also adversely affect, perhaps fatally, the court-martial process. Like security related requirements, IC coordination must start upon a case’s inception and continue until the conclusion of the court-martial process.

In the ideal world, all judge advocates would become intimately familiar with the issues and answers found in this Primer. It is much more probable that judge advocates will take this Primer “off the shelf” when first confronted with a classified information issue. In either case, Code 17 hopes that the Primer will serve a significant purpose and prompt additional interaction with Code 17 personnel. Ultimately, the intent of the Primer is to afford judge advocates the necessary foundation to both zealously represent their clients and protect the interests of national security.