

**R.C.M. 405(k)**

under this rule. In addition, failure to make a timely objection under this rule, including an objection to the report, shall constitute waiver of the objection. Relief from the waiver may be granted by the investigating officer, the commander who directed the investigation, the convening authority, or the military judge, as appropriate, for good cause shown.

**Discussion**

*See also* R.C.M. 905(b)(1); 906(b)(3).

If the report fails to include reference to objections which were made under subsection (h)(2) of this rule, failure to object to the report will constitute waiver of such objections in the absence of good cause for relief from the waiver.

The commander who receives an objection may direct that the investigation be reopened or take other action, as appropriate.

Even if the accused made a timely objection to failure to produce a witness, a defense request for a deposition may be necessary to preserve the issue for later review.

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**Rule 406. Pretrial advice**

(a) *In general.* Before any charge may be referred for trial by a general court-martial, it shall be referred to the staff judge advocate of the convening authority for consideration and advice.

**Discussion**

A pretrial advice need not be prepared in cases referred to special or summary courts-martial. A convening authority may, however, seek the advice of a lawyer before referring charges to such a court-martial. When charges have been withdrawn from a general court-martial (*see* R.C.M. 604) or when a mistrial has been declared in a general court-martial (*see* R.C.M. 915), supplementary advice is necessary before the charges may be referred to another general court-martial.

The staff judge advocate may make changes in the charges and specifications in accordance with R.C.M. 603.

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(b) *Contents.* The advice of the staff judge advocate shall include a written and signed statement which sets forth that person's:

(1) Conclusion with respect to whether each specification alleges an offense under the code;

(2) Conclusion with respect to whether the allegation of each offense is warranted by the evidence indicated in the report of investigation (if there is such a report);

(3) Conclusion with respect to whether a court-martial would have jurisdiction over the accused and the offense; and

(4) Recommendation of the action to be taken by the convening authority.

**Discussion**

The staff judge advocate is personally responsible for the pretrial advice and must make an independent and informed appraisal of the charges and evidence in order to render the advice. Another person may prepare the advice, but the staff judge advocate is, unless disqualified, responsible for it and must sign it personally. Grounds for disqualification in a case include previous action in that case as investigating officer, military judge, trial counsel, defense counsel, or member.

The advice need not set forth the underlying analysis or rationale for its conclusions. Ordinarily, the charge sheet, forwarding letter, endorsements, and report of investigation are forwarded with the pretrial advice. In addition, the pretrial advice should include when appropriate: a brief summary of the evidence; discussion of significant aggravating, extenuating, or mitigating factors; any recommendations for disposition of the case by commanders or others who have forwarded the charges; and the recommendation of the Article 32 investigating officer. However, there is no legal requirement to include such information, and failure to do so is not error.

Whatever matters are included in the advice, whether or not they are required, should be accurate. Information which is incorrect or so incomplete as to be misleading may result in a determination that the advice is defective, necessitating appropriate relief. *See* R.C.M. 905(b)(1);906(b)(3).

The standard of proof to be applied in R.C.M. 406(b)(2) is probable cause. *See* R.C.M. 601(d)(1). Defects in the pretrial advice are not jurisdictional and are raised by pretrial motion. *See* R.C.M.905(b)(1) and its Discussion.

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(c) *Distribution.* A copy of the advice of the staff judge advocate shall be provided to the defense if charges are referred to trial by general court-martial.

**Rule 407. Action by commander exercising general court-martial jurisdiction**

(a) *Disposition.* When in receipt of charges, a commander exercising general court-martial jurisdiction may:

(1) Dismiss any charges;

**Discussion**

*See* R.C.M. 401(c)(1) concerning dismissal of charges and the effect of dismissing charges.

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(2) Forward charges (or, after dismissing charges, the matter) to a subordinate commander for disposition;