

personal appearance will be necessary. Generally, personal appearance is preferred, but the investigating officer should consider whether, in light of the probable importance of a witness's testimony, an alternative to testimony under subsection (g)(4)(A) of this rule would be sufficient.

After making a preliminary determination of what witnesses will be produced and other evidence considered, the investigating officer should notify the defense and inquire whether it requests the production of other witnesses or evidence. In addition to witnesses for the defense, the defense may request production of witnesses whose testimony would favor the prosecution.

Once it is determined what witnesses the investigating officer intends to call, it must be determined whether each witness is reasonably available. That determination is a balancing test. The more important the testimony of the witness, the greater the difficulty, expense, delay, or effect on military operations must be to permit nonproduction. For example, the temporary absence of a witness on leave for 10 days would normally justify using an alternative to that witness's personal appearance if the sole reason for the witness's testimony was to impeach the credibility of another witness by reputation evidence, or to establish a mitigating character trait of the accused. On the other hand, if the same witness was the only eyewitness to the

offense, personal appearance would be required if the defense requested it and the witness is otherwise reasonably available. The time and place of the investigation may be changed if reasonably necessary to permit the appearance of a witness. Similar considerations apply to the production of evidence, including evidence that may be obtained by subpoena duces tecum.

If the production of witnesses or evidence would entail substantial costs or delay, the investigating officer should inform the commander who directed the investigation.

The provision in (B), requiring the investigating officer to notify the appropriate authorities of requests by the accused for information privileged under Mil. R. Evid. 505 or 506, is for the purpose of placing the appropriate authority on notice that an order, as authorized under subsection (g)(6), may be required to protect whatever information the government may decide to release to the accused."

(c) The Discussion immediately following R.C.M. 405(g)(2)(B) is amended to read as follows:

"The investigating officer should initially determine whether a civilian witness is reasonably available without regard to whether the witness is willing to appear. If the investigating officer determines that a civilian witness is apparently reasonably available, the witness should be invited to attend