

officers must conclude that no lesser methods short of closing the preliminary hearing can be used to protect the overriding interest in the case. Convening authorities or preliminary hearing officers must conduct a case-by-case, witness-by-witness, circumstance-by-circumstance analysis of whether closure is necessary. If a convening authority or preliminary hearing officer believes closing the preliminary hearing is necessary, the convening authority or preliminary hearing officer must make specific findings of fact in writing that support the closure. The written findings of fact must be included in the report of preliminary hearing.

(5) *Presence of accused.* The further progress of the taking of evidence shall not be prevented and the accused shall be considered to have waived the right to be present whenever the accused:

(A) After being notified of the time and place of the proceeding is voluntarily absent; or

(B) After being warned by the preliminary hearing officer that disruptive conduct will cause removal from the proceeding, persists in conduct that is such as to justify exclusion from the proceeding.

(6) *Recording of the preliminary hearing.* Counsel for the government shall ensure that the preliminary hearing is recorded by a suitable recording device. A victim, as defined by subsection (i)(2)(A) of this rule, may request access to, or a copy of, the recording of the proceedings. Upon request, counsel for the government shall provide the requested access to, or a copy of, the recording to the victim not later than a reasonable time following dismissal of the charges, unless charges are dismissed for the purpose of re-referral, or court-martial adjournment. A victim is not entitled to classified information or access to or a copy of a recording of closed sessions that the victim did not have the right to attend under subsections (i)(2)(C) or (i)(2)(D) of this rule.

(7) *Objections.* Any objection alleging a failure to comply with this rule shall be made to the convening authority via the preliminary hearing officer.

(8) *Sealed exhibits and proceedings.* The preliminary hearing officer has the authority to order exhibits, proceedings, or other matters sealed as described in R.C.M. 1103A.

(j) *Report of preliminary hearing.*

(1) *In general.* The preliminary hearing officer shall make a timely written report of the preliminary hearing to the convening authority who directed the preliminary hearing.

(2) *Contents.* The report of preliminary hearing shall include:

(A) A statement of names and organizations or addresses of defense counsel and whether defense counsel was present throughout the taking of evidence, or, if not present, the reason why;

(B) The substance of the testimony taken on both sides;

(C) Any other statements, documents, or matters considered by the preliminary hearing officer, or recitals of the substance or nature of such evidence;

(D) A statement that an essential witness may not be available for trial;

(E) An explanation of any delays in the preliminary hearing;

(F) A notation if counsel for the government failed to issue a *subpoena duces tecum* that was directed by the preliminary hearing officer;

(G) The preliminary hearing officer's 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;

(H) The preliminary hearing officer's 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;

(I) The preliminary hearing officer's determination as to whether a court-martial has jurisdiction over the offense(s) and the accused;