

(D) *Sealing*. The motions, related papers, and the record of an admissibility hearing shall be sealed and remain under seal in accordance with R.C.M. 1113.

(k) *Preliminary hearing procedure*.

(1) *Generally*. The preliminary hearing shall begin with the preliminary hearing officer informing the accused of the accused's rights under R.C.M. 405(g). Counsel for the Government will then present evidence. Upon the conclusion of counsel for the Government's presentation of evidence, defense counsel may present matters. Both counsel for the Government and defense counsel shall be afforded an opportunity to cross-examine adverse witnesses. The preliminary hearing officer may also question witnesses called by the parties. If the preliminary hearing officer determines that additional evidence is necessary for a determination of the issues under R.C.M. 405(a), the preliminary hearing officer may provide the parties an opportunity to present additional testimony or evidence. Except as provided in R.C.M. 405(m)(2)(J), the preliminary hearing officer shall not consider evidence not presented at the preliminary hearing in making the determination under R.C.M. 405(a). The preliminary hearing officer shall not call witnesses *sua sponte*.

(2) *Presentation of evidence*.

(A) *Testimony*. Witness testimony may be provided in person, by video teleconference, by telephone, or by similar means of remote testimony. All testimony shall be taken under oath, except that the accused may make an unsworn statement. The preliminary hearing officer shall only consider testimony that is relevant to the issues for determination under R.C.M. 405(a).

(B) *Other evidence*. If relevant to the issues for determination under R.C.M. 405(a) and not cumulative, a preliminary hearing officer may consider other evidence offered by

either counsel for the Government or defense counsel, in addition to or in lieu of witness testimony, including statements, tangible evidence, or reproductions thereof, that the preliminary hearing officer determines is reliable. This other evidence need not be sworn.

(3) *Access by spectators.* Preliminary hearings are public proceedings and should remain open to the public whenever possible, whether conducted in person or via remote means. If there is an overriding interest that outweighs the value of an open preliminary hearing, the convening authority or the preliminary hearing officer may restrict or foreclose access by spectators to all or part of the proceedings. Any restriction or closure must be narrowly tailored to protect the overriding interest involved. Before ordering any restriction or closure, a convening authority or preliminary hearing officer must determine whether any reasonable alternatives to such restriction or closure exist, or if some lesser means can be used to protect the overriding interest in the case. The convening authority or preliminary hearing officer shall make specific findings of fact in writing that support the restriction or closure. The written findings of fact shall be included in the preliminary hearing report.

(4) *Presence of accused.* The accused shall be present for the preliminary hearing.

(A) *Remote presence of the accused.* The convening authority that directed the preliminary hearing may authorize the use of audio-visual technology between the parties and the preliminary hearing officer. In such circumstances, the “presence” requirement of the accused is met only when the accused has a defense counsel physically present at the accused’s location or when the accused consents to presence by remote means with the opportunity for confidential consultation with defense counsel during the proceeding. Such technology may include two or more remote sites as long as all parties can see and hear each other.