**Section 400.700 Privilege**

a) General

1) A person may not claim a privilege with respect to any matter except as required by or provided for in:

A) The U.S. Constitution as applied to members of the armed forces;

B) An Act of Congress applicable to trials by courts-martial;

C) This Manual; or

D) The principles of common law generally recognized in the trial of criminal cases in the United States district courts pursuant to Rule 501 of the Federal Rules of Evidence insofar as the application of those principles in trials by courts-martial is practicable and not contrary to or inconsistent with the Code or this Manual.

2) A claim of privilege includes, but is not limited to, the assertion by any person of a privilege to:

A) Refuse to be a witness;

B) Refuse to disclose any matter;

C) Refuse to produce any object or writing; or

D) Prevent another from being a witness or disclosing any matter or producing any object or writing.

3) The term "person" includes an appropriate representative of the federal government, a state or political subdivision thereof, or any other entity claiming to be the holder of a privilege. Including any other provision of this Section, information not otherwise privileged does not become privileged on the basis that it was acquired by a medical officer or civilian physician in a professional capacity. (Il. Mil. R. Evid. 501)

b) Lawyer-Client Privilege

1) Definitions. As used in this Section:

A) "Client" means a person, public officer, corporation, association, organization or other entity, either public or private, who receives professional legal services from a lawyer, or who consults a lawyer with a view to obtaining professional legal services from the lawyer.

B) "Confidential Communication" or "Communication" means a communication not intended to be disclosed to third persons other than those to whom disclosure is in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication.

C) "Lawyer" means a person authorized, or reasonably believed by the client to be authorized, to practice law, or a member of the armed forces detailed, assigned or otherwise provided to represent a person in a court-martial case or in any military investigation or proceeding. The term "lawyer" does not include a member of the armed forces serving in a capacity other than as a judge advocate, legal officer, or law specialist as defined in Code Section 1, unless the member:

i) is detailed, assigned or otherwise provided to represent a person in a court-martial case or in any military investigation or proceeding;

ii) is authorized by the armed forces, or reasonably believed by the client to be authorized, to render professional legal services to members of the armed forces; or

iii) is authorized to practice law and render professional legal services during off-duty employment.

D) "Representative" means a lawyer or a person employed by or assigned to assist a lawyer in providing professional legal services.

2) General Rule of Privilege. A client has a privilege to refuse to disclose, and to prevent any other person from disclosing, confidential communications made for the purpose of facilitating the rendition of professional legal services:

A) to the client;

B) between the client or the client's representative and the lawyer or the lawyer's representative;

C) between the lawyer and the lawyer's representative;

D) by the client or the client's lawyer to a lawyer representing another in a matter of common interest;

E) between representatives of the client or between the client and a representative of the client; or

F) between lawyers representing the client.

3) Who May Claim the Privilege. The privilege may be claimed by the client, the guardian or conservator of the client, the personal representative of a deceased client, or the successor, trustee or similar representative of a corporation, association or other organization, whether or not in existence. The lawyer or the lawyer's representative who received the communication may claim the privilege on behalf of the client. The authority of the lawyer to do so is presumed in the absence of evidence to the contrary.

4) Exceptions. There is no privilege under this Section in the following circumstances:

A) Crime or Fraud: If the communication clearly contemplated the future commission of a fraud or crime, or if services of the lawyer were sought or obtained to enable or aid anyone to commit or plan to commit what the client knew or reasonably should have known to be a crime or fraud;

B) Claimants Through Same Deceased Client: As to a communication relevant to an issue between parties who claim, through the same deceased client, regardless of whether the claims are by testate or intestate succession or by inter vivos transaction;

C) Breach of Duty by Lawyer or Client: As to a communication relevant to an issue of breach of duty by the lawyer to the client or by the client to the lawyer;

D) Document Attested to by Lawyer: As to a communication relevant to an issue concerning an attested document to which the lawyer is an attesting witness; or

E) Joint Clients: As to a communication relevant to a matter of common interest between 2 or more clients, if the communication was made by any of them to a lawyer retained or consulted in common, when offered in an action between any of the clients. (Il. Mil. R. Evid. 502)

c) Communications to Clergy

1) Definitions. As used in this subsection (c):

A) "Clergyman" means a minister, priest, rabbi, chaplain or other similar functionary of a religious organization, or an individual reasonably believed to be so by the person consulting the clergyman.

B) "Clergyman's Assistant" means a person employed by or assigned to assist a clergyman in his or her capacity as a spiritual advisor.

C) "Confidential Communication" or "Communication" means a communication made to a clergyman in the clergyman's capacity as a spiritual adviser, or to a clergyman's assistant in the assistant's official capacity, that is not intended to be disclosed to third persons other than those to whom disclosure is in furtherance of the purpose of the communication or to those reasonably necessary for the transmission of the communication.

2) General Rule of Privilege. A person has a privilege to refuse to disclose and to prevent another from disclosing a confidential communication by the person to a clergyman or to a clergyman's assistant if that communication is made either as a formal act of religion or as a matter of conscience.

3) Who May Claim the Privilege. The privilege may be claimed by the person, by the guardian or conservator, or by a personal representative if the person is deceased. The clergyman or clergyman's assistant who received the communication may claim the privilege on behalf of the person. The authority of the clergyman or clergyman's assistant to do so is presumed in the absence of evidence to the contrary. (Il. Mil. R. Evid. 503)

d) Husband-Wife Privilege

1) Definitions. As used in this subsection (d):

A) "Confidential Communication" or "Communication" means a confidential communication made privately by any person to the spouse of the person and is not intended to be disclosed to third persons other than those reasonably necessary for transmission of the communication.

B) "A Child of Either" includes not only a biological child, adopted child, or ward of one of the spouses, but also includes a child who is under the permanent or temporary physical custody of one of the spouses, regardless of the existence of a legal parent-child relationship. For purposes of this subsection (d) only, a child is:

i) an individual under the age of 18; or

ii) an individual over the age of 18 with a mental disability that results in the individual functioning at the capacity of a person under the age of 18.

C) "Temporary Physical Custody" includes instances in which a parent entrusts his or her child to another. There is no minimum amount of time necessary to establish temporary physical custody, nor must there be a written agreement. Rather, the focus is on the parent's agreement with another for assuming parental responsibility for the child. For example, temporary physical custody may include instances in which a parent entrusts another with the care of his or her child for recurring care or during absences due to temporary duty or deployments.

2) Spousal Incapacity. A person has a privilege to refuse to testify against his or her spouse.

3) Confidential Communication Made During Marriage

A) General Rule of Privilege. A person has a privilege during and after the marital relationship to refuse to disclose, and to prevent another from disclosing, any confidential communication made to the spouse of the person while they were husband and wife and not separated as provided by law.

B) Who May Claim the Privilege. The privilege may be claimed by the spouse who made the communication or by the other spouse on his or her behalf. The authority of the latter spouse to do so is presumed in the absence of evidence of a waiver. The privilege will not prevent disclosure of the communication at the request of the spouse to whom the communication was made if that spouse is an accused, regardless of whether the spouse who made the communication objects to its disclosure.

4) Exceptions

A) Spousal Incapacity Only. There is no privilege under subsection (d)(2) when, at the time the testimony of one of the parties to the marriage is to be introduced in evidence against the other party, the parties are divorced or the marriage has been annulled.

B) Spousal Incapacity and Confidential Communications. There is no privilege under subsection (d)(2) or (3):

i) In proceedings in which one spouse is charged with a crime against the person or property of the other spouse or a child of either, or with a crime against the person or property of a third person committed in the course of committing a crime against the other spouse;

ii) When the marital relationship was entered into with no intention of the parties to live together as spouses, but only for the purpose of using the purported marital relationship as a sham, and:

• with respect to the privilege in subsection (d)(2), the relationship remains a sham at the time the testimony or statement of one of the parties is to be introduced against the other; or

• with respect to the privilege in subsection (d)(3), the relationship was a sham at the time of the communication;

iii) In proceedings in which a spouse is charged, in accordance with Code Section 133 or 134:

• with importing the other spouse as an alien for prostitution or other immoral purposes in violation of 8 USC 1328;

• with transporting the other spouse in interstate commerce for immoral purposes or other offense in violation of 18 USC 2421 through 2424; or

• with violation of other similar statutes under which the privilege may not be claimed in the trial of criminal cases in the United States district courts; or

iv) When both parties have been substantial participants in illegal activity, communications between the spouses during the marriage regarding the illegal activity in which they have jointly participated. (Il. Mil. R. Evid. 504)

e) Classified Information

1) Definitions. As used in this subsection (e):

A) "Classified Information" means:

i) any information or material that has been determined by the U.S. government, pursuant to an executive order, statute or regulations, to require protection against unauthorized disclosure for reasons of national security; and

ii) any restricted data, as defined in Section 2014(6) of the federal Atomic Energy Act of 1954.

B) "National Security" means the national defense and foreign relations of the United States.

2) General Rule of Privilege. Classified information is privileged from disclosure if disclosure would be detrimental to the national security. As with other rules of privilege, this rule applies to all stages of the proceedings.

3) Who May Claim the Privilege. The privilege may be claimed by the head of the concerned executive or military department or government agency based on a finding that the information is properly classified and that disclosure would be detrimental to the national security. A person who may claim the privilege may authorize a witness or trial counsel to claim the privilege on his or her behalf. The authority of the witness or trial counsel to do so is presumed in the absence of evidence to the contrary.

4) Action Prior to Referral of Charges. Prior to referral of charges, the convening authority shall respond in writing to a request by the accused for classified information if the privilege in this subsection (e) is claimed for that information. The convening authority may:

A) Delete specified items of classified information from documents made available to the accused;

B) Substitute a portion or summary of the information for the classified documents;

C) Substitute a statement admitting relevant facts that the classified information would tend to prove;

D) Provide the document subject to conditions that will guard against the compromise of the information disclosed to the accused; or

E) Withhold disclosure if action under subsections (e)(4)(A) through (D) cannot be taken without causing identifiable damage to the national security. Any objection by the accused to withholding of information or to the conditions of disclosure shall be raised through a motion for appropriate relief at a pretrial session.

5) Pretrial Session. At any time after referral of charges and prior to arraignment, any party may move for a session under Code Section 39(a) to consider matters relating to classified information that may arise in connection with the trial. Following such motion or sua sponte, the military judge promptly shall hold a session under Code Section 39(a) to establish the timing of requests for discovery, the provision of notice under subsection (e)(8), and the initiation of the procedure under subsection (e)(9). In addition, the military judge may consider any other matters that relate to classified information or that may promote a fair and expeditious trial.

6) Action After Referral of Charges. If a claim of privilege has been made under this subsection (e) with respect to classified information that apparently contains evidence that is relevant and necessary to an element of the offense or a legally cognizable defense and is otherwise admissible in evidence in the court-martial proceeding, the matter shall be reported to the convening authority. The convening authority may:

A) institute action to obtain the classified infor­mation for use by the military judge in making a determination under subsection (e)(9);

B) dismiss the charges;

C) dismiss the charges or specifications, or both, to which the information relates; or

D) take such other action as may be required in the interests of justice. If, after a reasonable period of time, the information is not provided to the military judge in circumstances in which proceeding with the case without that information would materially prejudice a substantial right of the accused, the military judge shall dismiss the charges or specifications or both to which the classified information relates.

7) Disclosure of Classified Information to the Accused

A) Protective Order. If the government (i.e., the prosecution) agrees to disclose classified information to the accused, the military judge, at the request of the government, shall enter an appropriate protective order to guard against the compromise of the information disclosed to the accused. The terms of the protective order may include provisions:

i) Prohibiting the disclosure of the information, except as authorized by the military judge;

ii) Requiring storage of material in a manner appropriate for the level of classification assigned to the documents to be disclosed;

iii) Requiring controlled access to the material during normal business hours and at other times upon reasonable notice;

iv) Requiring appropriate security clearances for persons having a need to examine the information in connection with the preparation of the defense. All persons requiring security clearances shall cooperate with investigatory personnel in any investigations that are necessary to obtain a security clearance.

v) Requiring the maintenance of logs regarding access by all persons authorized by the military judge to have access to the classified information in connection with the preparation of the defense;

vi) Regulating the making and handling of notes taken from material containing classified information; or

vii) Requesting the convening authority to authorize the assignment of government security personnel and the provisions of government storage facilities.

B) Limited Disclosure

i) The military judge, upon motion of the government, shall authorize the deletion of specified items of classified information from documents to be made available to the defendant, the substitution of a portion or summary of the information for the classified documents, or the substitution of a statement admitting relevant facts that the classified information would tend to prove, unless the military judge determines that disclosure of the classified information itself is necessary to enable the accused to prepare for trial.

ii) The government's motion and any materials submitted in support of the motion shall, upon request of the government, be considered by the military judge in camera and shall not be disclosed to the accused.

C) Disclosure of Certain Statements Previously Made by a Witness

i) Scope. After a witness called by the government has testified on direct examination, the military judge, on motion of the accused, may order production of statements in the possession of the government under Code Section 46. This provision does not preclude discovery or assertion of a privilege otherwise authorized under this Manual.

ii) Closed Session. If the privilege in this subsection (e) is invoked during consideration of a motion under Code Section 46, the government may deliver the statement for the inspection only by the military judge in camera and may provide the military judge with an affidavit identifying the portions of the statement that are classified and the basis for the classification assigned. If the military judge finds that disclosure of any portion of the statement identified by the government as classified could reasonably be expected to cause damage to the national security in the degree required to warrant classification under the applicable executive order, statute or regulation and that such portion of the statement is consistent with the witness' testimony, the military judge shall excise that portion from the statement. With the material excised, the military judge shall direct delivery of the statement to the accused for use by the accused. If the military judge finds that the portion of the statement is inconsistent with the witness' testimony, the government may move for a proceeding under subsection (e)(9).

D) Record of Trial. If, under this subsection (e), any information is withheld from the accused, the accused objects to that withholding, and the trial is continued to an adjudication of guilt of the accused, the entire unaltered text of the relevant documents, as well as the government's motion and any materials submitted in support of the motion, shall be sealed and attached to the record of trial as an appellate exhibit. This material shall be made available to reviewing authorities in closed proceedings for the purpose of reviewing the determination of the military judge.

8) Notice of the Accused's Intentions to Disclose Classified Information

A) Notice by the Accused. If the accused reasonably expects to disclose or to cause the disclosure of classified information in any manner in connection with a court-martial proceeding, the accused shall notify the trial counsel in writing of that intention and file a copy of the notice with the military judge. The notice shall be given within the time specified by the military judge under subsection (e)(5) or, if no time has been specified, prior to arraignment of the accused.

B) Continuing Duty to Notify. Whenever the accused learns of classified information not covered by a notice under subsection (e)(8)(A) that the accused reasonably expects to disclose at any proceeding, the accused shall notify the trial counsel and the military judge in writing as soon as possible thereafter.

C) Content of Notice. The notice required by this subsection (e)(8) shall include a brief description of the classified information. The description, to be sufficient, must be more than a mere general statement of the areas about which evidence may be introduced. The accused must state, with particularity, which items of classified information he or she reasonably expects will be revealed by his or her defense.

D) Prohibition Against Disclosure. The accused may not disclose any information known or believed to be classified until notice has been given under this subsection (e)(8) and until the government has been afforded a reasonable opportunity to seek a determination under subsection (e)(9).

E) Failure to Comply. If the accused fails to comply with the requirements of this subsection (e)(8), the military judge may preclude disclosure of any classified information not made the subject of notification and may prohibit the examination by the accused of any witness with respect to any such information.

9) In Camera Proceedings for Cases Involving Classified Information

A) Definition. For purposes of this subsection (e)(9), an "in camera proceeding" is a session under Code Section 39(a) from which the public is excluded.

B) Motion for In Camera Proceeding. Within the time specified by the military judge for the filing of a motion under this subsection (e), the government may move for an in camera proceeding concerning the use at any proceeding of any classified information. Thereafter, either prior to or during trial, the military judge, for good cause shown or otherwise upon a claim of privilege under this subsection (e) may grant the government leave to move for an in camera proceeding concerning the use of additional classified information.

C) Demonstration of National Security Nature of the Information. In order to obtain an in camera proceeding under this subsection (e)(9), the government shall submit the classified information and an affidavit ex parte for examination by the military judge only. The affidavit shall demonstrate that disclosure of the information reasonably could be expected to cause damage to the national security in the degree required to warrant classification under the applicable executive order, statute or regulation.

D) In Camera Proceeding

i) Procedure. Upon finding that the government has met the standard set forth in subsection (e)(9)(C) with respect to some or all of the classified information at issue, the military judge shall conduct an in camera proceeding. Prior to the in camera proceeding, the government shall provide the accused with notice of the information that will be at issue. This notice shall identify the classified information that will be at issue whenever that information previously has been made available to the accused in connection with proceedings in the same case. The government may describe the information by generic category, in such form as the military judge may approve, rather than identifying the classified information, when the government has not previously made the information available to the accused in connection with pretrial proceedings. Following briefing and argument by the parties in the in camera proceeding, the military judge shall determine whether the information may be disclosed at the court-martial proceeding. When the government's motion under subsection (e)(5) is filed prior to the proceeding at which disclosure is sought, the military judge shall rule prior to the commencement of the relevant proceeding.

ii) Standard. Classified information is not subject to disclosure under this subsection (e) unless the information is relevant and necessary to an element of the offense or a legally cognizable defense and is otherwise admissible in evidence. In presentencing proceedings, relevant and material classified information pertaining to the appropriateness of, or the appropriate degree of, punishment shall be admitted only if no unclassified version of that information is available.

iii) Ruling. Unless the military judge makes a written determination that the information meets the standard set forth in subsection (e)(9)(D)(ii), the information may not be disclosed or otherwise elicited at a court-martial proceeding. The record of the in camera proceeding shall be sealed and attached to the record of trial as an appellate exhibit. The accused may seek reconsideration of the determination prior to or during trial.

iv) Alternatives to Full Disclosure. If the military judge makes a determination under this subsection (e)(9) that would permit disclosure of the information, or if the government elects not to contest the relevance, necessity and admissibility of any classified information, the government may proffer a statement admitting, for purposes of the proceeding, any relevant facts the information would tend to prove. The government may submit a portion of summary to be used in lieu of the information. The military judge shall order that the statement, portion or summary be used by the accused in place of the classified information unless the military judge finds that use of the classified information itself is necessary to afford the accused a fair trial.

v) Sanctions. If the military judge determines that alternatives to full disclosure may not be used and the government continues to object to disclosure of the information, the military judge shall issue any order that the interests of justice require, including an order:

• striking or precluding all or part of the testimony of a witness;

• declaring a mistrial;

• finding against the government on any issue as to which the evidence is relevant and material to the defense;

• dismissing the charges, with or without prejudice; or

• dismissing the charges or specifications, or both, to which the information relates.

vi) Any such order shall permit the government to avoid the sanction for nondisclosure by permitting the accused to disclose the information at the pertinent court-martial proceeding.

10) Introduction of Classified Information

A) Classification Status. Writing, recordings and photographs containing classified information may be admitted into evidence without change in their classification status.

B) Precautions by the Military Judge. In order to prevent unnecessary disclosure of classified information, the military judge may order admission into evidence of:

i) only part of a writing, recording or photograph; or

ii) the whole writing, recording or photograph with excision of some or all of the classified information.

C) Contents of Writing, Recording or Photograph. The military judge may permit proof of the contents of a writing, recording or photograph that contains classified information without requiring introduction into evidence of the original or a duplicate.

D) Taking of Testimony. During the examination of a witness, the government (i.e., the prosecution) may object to any question or line of inquiry that may require the witness to disclose classified information not previously found to be relevant and necessary to the defense. Following such an objection, the military judge shall take suitable action to determine whether the response is admissible, considering whether the action will safeguard against the compromise of any classified information. The action may include requiring:

i) the government to provide the military judge with a proffer or the witness' response to the question or line of inquiry; and

ii) the accused to provide the military judge with a proffer of the nature of the information the accused seeks to elicit.

E) Closed Session. The military judge may exclude the public during that portion of the presentation of evidence that discloses classified information.

F) Record of Trial. The record of trial with respect to any classified matter will be prepared in accordance with Code Section 54 and RCM 1103(h) and 1104(b)(1)(D).

11) Security Procedures to Safeguard Against Compromise of Classified Information Disclosed to Courts-Martial. The Secretary of Defense may prescribe security procedures for protection against the compromise of classified information submitted to courts-martial and appellate authorities. (Il. Mil. R. Evid. 505)

f) Government Information Other Than Classified Information

1) General Rule of Privilege. Except when disclosure is required by law, government information is privileged from disclosure if disclosure would be detrimental to the public interest.

2) Scope. "Government information" includes official communication and documents and other information within the custody or control of the government. This subsection (f) does not apply to classified information, which is addressed in subsection (e), or to the identity of an informant, which is addressed in subsection (g).

3) Who May Claim the Privilege. The privilege may be claimed by the head of the executive or military department or government agency concerned. The privilege for records and information of the Inspector General may be claimed by the immediate superior of the inspector general officer responsible for creation of the records or information, the Inspector General, or any other superior authority. A person who may claim the privilege may authorize a witness or the trial counsel to claim the privilege on his or her behalf. The authority of a witness or the trial counsel to do so is presumed in the absence of evidence to the contrary.

4) Action Prior to Referral of Charges. Prior to referral of charges, the government shall respond in writing to a request for government information if the privilege in this subsection (f) is claimed for that information. The government shall:

A) delete specified items of government information claimed to be privileged from documents made available to the accused;

B) substitute a portion or summary of the information for those documents;

C) substitute a statement admitting relevant facts that government information would tend to prove;

D) provide the document subject to conditions similar to those set forth in subsection (f)(7); or

E) withhold disclosure if actions under (f)(4)(A) through (D) cannot be taken without causing identifiable damage to the public interest.

5) Pretrial Session. At any time after referral of charges and prior to arraignment, any party may move for a session under Code Section 39(a) to consider matters relating to government information that may arise in connection with the trial. Following that motion, or sua sponte, the military judge promptly shall hold a pretrial session under Code Section 39(a) to establish the timing of requests for discovery, the provision of notice under subsection (f)(8), and the initiation of the procedure under subsection (f)(9). In addition, the military judge may consider any other matters that relate to government information or that may promote a fair and expeditious trial.

6) Action After Motion for Disclosure of Information. After referral of charges, if the defense moves for disclosure of government information for which a claim of privilege has been made under this subsection (f), the matter shall be reported to the convening authority. The convening authority may:

A) institute action to obtain the information for use by the military judge in making a determination under subsection (f)(9);

B) dismiss the charges;

C) dismiss the charges or specifications, or both, to which the information relates; or

D) take other action as may be required in the interests of justice. If, after a reasonable period of time, the information is not provided to the military judge, the military judge shall dismiss the charges or specifications or both to which the information relates.

7) Disclosure of Government Information to the Accused. If the government agrees to disclose government information to the accused subsequent to a claim of privilege under this subsection (f), the military judge, at the request of the government, shall enter an appropriate protective order to guard against the compromise of the information disclosed to the accused. The terms of any such protective order may include provisions:

A) Prohibiting the disclosure of the information, except as authorized by the military judge;

B) Requiring storage of the material in a manner appropriate for the nature of the material to be disclosed, upon reasonable notice;

C) Requiring controlled access to the material during normal business hours and at other times upon reasonable notice;

D) Requiring the maintenance of logs recording access by persons authorized by the military judge to have access to the government information in connection with the preparation of the defense;

E) Regulating the making and handling of notes taken from material containing government information; or

F) Requesting the convening authority to authorize the assignment of government security personnel and the provision of government storage facilities.

8) Prohibition Against Disclosure. The accused may not disclose any information known or believed to be subject to a claim of privilege under this subsection (f) unless the military judge authorizes that disclosure.

9) In Camera Proceedings in Cases Involving Nonclassified Government Information

A) Definition. For the purpose of this subsection (f)(8), an "in camera proceeding" is a session under Code Section 39(a) from which the public is excluded.

B) Motion for In Camera Proceeding. Within the time specified by the military judge for the filing of a motion under this subsection (f)(9), the government may move for an in camera proceeding concerning the use at any proceeding of any government information that may be subject to a claim of privilege. Thereafter, either prior to or during trial, the military judge, for good cause shown, or otherwise upon a claim of privilege, may grant the government leave to move for an in camera proceeding concerning the use of additional government information.

C) Demonstration of Damage to the Public Interest. In order to obtain an in camera proceeding under this subsection (f)(9), the government shall demonstrate, through the submission of affidavits and information for examination only by the military judge, that disclosure of the information reasonably could be expected to cause identifiable damage to the public interest.

D) In Camera Proceedings

i) Finding of Identifiable Damage. Upon finding that the disclosure of some or all of the information submitted by the government under subsection (f)(9)(C) reasonably could be expected to cause identifiable damage to the public interest, the military judge shall conduct an in camera proceeding.

ii) Disclosure of the Information to the Defense. Subject to subsection (f)(9)(D)(vi), the government shall disclose government information for which a claim of privilege has been made to the accused, for the limited purpose of litigating in camera the admissibility of the information at trial. The military judge shall enter an appropriate protective order to the accused and all other appropriate trial participants concerning the disclosure of the information according to subsection (f)(7). The accused shall not disclose any information provided under this subsection (f)(9)(D)(ii) unless, and until, that information has been admitted into evidence by the military judge. In the in camera proceeding, both parties shall have the opportunity to brief and argue the admissibility of the government information at trial.

iii) Standard. Government information is subject to disclosure at the court-martial proceeding under this subsection (f)(9)(D)(iii) if the party making the request demonstrates a specific need for information containing evidence that is relevant to the guilt or innocence or to punishment of the accused and is otherwise admissible in the court-martial proceeding.

iv) Ruling. No information may be disclosed at the court-martial proceeding or otherwise unless the military judge makes a written determination that the information is subject to disclosure under the standard set forth in subsection (f)(9)(D)(iii). The military judge will specify in writing any information that he or she determines is subject to disclosure. The record of the in camera proceeding shall be sealed and attached to the record of trial as an appellate exhibit. The accused may seek reconsideration of the determination prior to or during trial.

v) Alternatives to Full Disclosure. If the military judge makes a determination under this subsection (f)(9) that the information is subject to disclosure, or if the government elects not to contest the relevance, necessity and admissibility of the government information, the government may proffer a statement admitting, for purposes of the court-martial, any relevant facts the information would tend to prove. The government may submit a portion or summary to be used in lieu of the information. The military judge shall order that the statement, portion or summary, or some other form of information the military judge finds to be consistent with the interests of justice, be used by the accused in place of the government information unless the military judge finds that use of the government information itself is necessary to afford the accused a fair trial.

vi) Sanctions. Government information may not be disclosed over the government's objection. If the government continues to object to disclosure of the information following rulings by the military judge, the military judge shall issue any order that the interests of justice require, including an order:

• striking or precluding all or part of the testimony of a witness;

• declaring a mistrial;

• finding against the government on any issue as to which the evidence is relevant and necessary to the defense;

• dismissing the charges, with or without prejudice; or

• dismissing the charges or specifications, or both, to which the information relates.

10) Appeals of Orders and Rulings. In a court-martial in which a punitive discharge may be adjudged, the government may appeal an order or ruling of the military judge that terminates the proceedings with respect to a charge or specification, directs the disclosure of government information, or imposes sanctions for nondisclosure of government information. The government may also appeal an order or ruling in which the military judge refuses to issue a protective order sought by the State to prevent the disclosure of government information, or to enforce such an order previously issued by appropriate authority. The government may not appeal an order or ruling that is, or amounts to, a finding of not guilty with respect to the charge or specification.

11) Introduction of Government Information Subject to a Claim of Privilege

A) Precautions by Military Judge. In order to prevent unnecessary disclosure of government information after there has been a claim of privilege under this subsection (f), the military judge may order admission into evidence of:

i) only part of a writing, recording or photograph; or

ii) the whole writing, recording or photograph with excision of some or all of the government information.

B) Contents of Writing, Recording or Photograph. The military judge may permit proof of the contents of a writing, recording or photograph that contains government information that is the subject of a claim of privilege under this subsection (f) without requiring introduction into evidence of the original or a duplicate.

C) Taking of Testimony. During examination of a witness, the prosecution may object to any question or line of inquiry that may require the witness to disclose government information not previously found relevant and necessary to the defense if that information has been or is reasonably likely to be the subject of a claim of privilege under this subsection (f). Following such an objection, the military judge shall take suitable action to determine if the response is admissible, considering whether the action will safeguard against the compromise of any government information. The action may include requiring:

i) the government to provide the military judge with a proffer of the witness' response to the question or line of inquiry; and

ii) the accused to provide the military judge with a proffer of the nature of the information the accused seeks to elicit.

12) Procedures to Safeguard Against Compromise of Government Information Disclosed to Courts-Martial. The Secretary of Defense or the Adjutant General may prescribe procedures for protection against the compromise of government information submitted to courts-martial and appellate authorities after a claim of privilege. (Il. Mil. R. Evid. 506)

g) Identity of Informants

1) Rule of Privilege. The United States or a State or subdivision thereof has a privilege to refuse to disclose the identity of an informant. An "informant" is a person who has furnished information relating to or assisting in an investigation of a possible violation of law to a person whose official duties include the discovery, investigation or prosecution of crime. Unless otherwise privileged under this Section, the communications of an informant are not privileged except to the extent necessary to prevent the disclosure of the informant's identity.

2) Who May Claim the Privilege. The privilege may be claimed by an appropriate representative of the United States, regardless of whether information was furnished to an officer of the United States or a State or subdivision thereof. The privilege may be claimed by an appropriate representative of a State or subdivision if the information was furnished to an officer thereof, except the privilege shall not be allowed if the prosecution objects.

3) Exceptions

A) Voluntary Disclosures; Informant as Witness. No privilege exists under this subsection (g):

i) if the identity of the informant has been disclosed to those who would have cause to resent the communication by a holder of the privilege or by the informant's own action; or

ii) if the informant appears as a witness for the prosecution.

B) Testimony on the Issue of Guilt or Innocence. If a claim of privilege has been made under this subsection (g), the military judge shall, upon motion by the accused, determine whether disclosure of the identity of the informant is necessary to the accused's defense on the issue of guilt or innocence. Whether such a necessity exists will depend on the particular circumstances of each case, taking into consideration the offense charged, the possible defense, the possible significance of the informant's testimony, and other relevant factors. If it appears from the evidence in the case or from another showing by a party that an informant may be able to give testimony necessary to the accused's defense on the issue of guilt or innocence, the military judge may make any order required by the interests of justice.

C) Legality of Obtaining Evidence. If a claim of privilege has been made under this subsection (g) with respect to a motion under Section 400.635, the military judge shall, upon motion of the accused, determine whether disclosure of the identity of the informant is required by the U.S. Constitution as applied to members of the armed forces. In making this determination, the military judge may make any order required by the interests of justice.

4) Procedures. If a claim of privilege has been made under this subsection (g), the military judge may make any order required by the interests of justice. If the military judge determines that disclosure of the identity of the informant is required under the standards set forth in this subsection (g), and the prosecution elects not to disclose the identity of the informant, the matter shall be reported to the convening authority. The convening authority may institute action to secure disclosure of the identity of the informant, terminate the proceedings, or take such other action as may be appropriate under the circumstances. If, after a reasonable period of time, disclosure is not made, the military judge, sua sponte or upon motion of either counsel and after a hearing, if requested by either party, may dismiss the charge or specifications, or both, to which the information regarding the informant would relate if the military judge determines that further proceedings would materially prejudice a substantial right of the accused. (Il. Mil. R. Evid. 507)

h) Political Vote. A person has a privilege to refuse to disclose the tenor of the person's vote at a political election conducted by secret ballot unless the vote was cast illegally. (Il. Mil. R. Evid. 508)

i) Deliberations of Courts and Juries. Except as provided in Section 400.705(f), the deliberations of courts, courts-martial, military judges, and grand and petit juries are privileged to the extent that the deliberations are privileged, but the results of the deliberations are not privileged. (Il. Mil. R. Evid. 509)

j) Waiver of Privilege by Voluntary Disclosure

1) A person upon whom this Section confers a privilege against disclosure of a confidential matter or communication waives the privilege if the person or the person's predecessor, while holder of the privilege, voluntarily discloses or consents to disclosure of any significant part of the matter or communication under such circumstances that it would be inappropriate to allow the claim of privilege. This subsection (j)(1) does not apply if the disclosure is itself a privileged communication.

2) Unless testifying voluntarily concerning a privileged matter or communication, an accused who testifies in his or her own behalf or a person who testifies under a grant or promise of immunity does not, merely by reason of testifying, waive a privilege to which he or she may be entitled pertaining to the confidential matter or communication. (Il. Mil. R. Evid. 510)

k) Disclosure Under Compulsion or Without Opportunity to Claim Privilege

1) Evidence of a statement or other disclosure of privileged matter is not admissible against the holder of the privilege if disclosure was compelled erroneously or was made without an opportunity for the holder of the privilege to claim the privilege.

2) The telephonic transmission of information otherwise privileged under this Section does not affect its privileged character. Use of electronic means of communication other than the telephone for transmission of information otherwise privileged under this Section does not affect the privileged character of that information if use of electronic means of communication is necessary and in furtherance of the communication. (Il. Mil. R. Evid. 511)

l) Comment Upon or Inference from Claim of Privilege; Instruction

1) The claim of a privilege by the accused, whether in the present proceeding or upon a prior occasion, is not a proper subject of comment by the military judge or counsel for any party. No inference may be drawn from that claim of privilege.

2) The claim of a privilege by a person other than the accused, whether in the present proceeding or upon a prior occasion, normally is not a proper subject of comment by the military judge or counsel for any party. An adverse inference may not be drawn from that claim of privilege except when determined by the military judge to be required by the interests of justice.

3) In a trial before a court-martial with members, proceedings must be conducted, to the extent practicable, so as to facilitate the making of claims of privilege without the knowledge of the members. This subsection (l)(3) does not apply to a special court-martial without a military judge.

4) Upon request, any party against whom the members might draw an adverse inference from a claim of privilege is entitled to an instruction that no inference may be drawn from the claim except as provided in subsection (l)(2). (Il. Mil. R. Evid. 512)

m) Psychotherapist and Patient Privilege

1) Definitions. For purposes of this subsection (m):

A) "Assistant to a Psychotherapist" or "Assistant" means a person directed by or assigned to assist a psychotherapist in providing professional services, or who is reasonably believed by the patient to be an assistant to a psychotherapist.

B) "Confidential Communication" or " Communication" not intended to be disclosed to third persons other than those to whom disclosure is in furtherance of the rendition of professional services to the patient or those reasonably necessary for transmission of the communication.

C) "Evidence of a Patient's Records or Communications" means testimony of a psychotherapist or assistant psychotherapist, or patient records, that pertain to communications by a patient to a psychotherapist or assistant to a psychotherapist for the purposes of diagnosis or treatment of the patient's mental or emotional condition.

D) "Patient" means a person who consults with or is examined or interviewed by a psychotherapist for purposes of advice, diagnosis or treatment of a mental or emotional condition.

E) "Psychotherapist" means a psychiatrist, clinical psychologist or clinical social worker who is licensed in any state, territory, possession, the District of Columbia or Puerto Rico to perform professional services as such, or who holds credentials to provide these services from any military health care facility, or is a person reasonably believed by the patient to have the appropriate license or credentials.

2) General Rule of Privilege. A patient has a privilege to refuse to disclose, and to prevent any other person from disclosing, a confidential communication made between the patient and a psychotherapist or assistant, in a case arising under the UCMJ, if the communication was made for the purpose of facilitating diagnosis or treatment of the patient's mental or emotional condition.

3) Who May Claim the Privilege. The privilege may be claimed by the patient or the guardian or conservator of the patient. A person who may claim the privilege may authorize trial counsel or defense counsel to claim the privilege on his or her behalf. The psychotherapist or assistant who received the communication may claim the privilege on behalf of the patient. The authority of such a psychotherapist, assistant, guardian, or conservator to so assert the privilege is presumed in the absence of evidence to the contrary.

4) Exceptions. There is no privilege under this subsection (m):

A) when the patient is dead;

B) when the communication is evidence of child abuse or neglect, or in a proceeding in which one spouse is charged with a crime against a child of either spouse;

C) when federal law, State law, or service regulation imposes a duty to report information contained in a communication;

D) when a psychotherapist or assistant believes that a patient's mental or emotional condition makes the patient a danger to any person, including the patient;

E) if the communication clearly contemplated the future commission of a fraud or crime or if the services of the psychotherapist are sought or obtained to enable or aid anyone to commit or plan to commit what the patient knew or reasonably should have known to be a crime or fraud;

F) when necessary to ensure the safety and security of military personnel, military dependents, military property, classified information or the accomplishment of a military mission;

G) when an accused offers statements or other evidence concerning his or her mental condition in defense, extenuation or mitigation, under circumstances not covered by Section 400.615. In these situations, the military judge may, upon motion, order disclosure of any statement made by the accused to a psychotherapist as may be necessary in the interests of justice; or

H) when admission or disclosure of a communication is constitutionally required.

5) Procedure to Determine Admissibility of Patient Records or Communications

A) In any case in which the production or admission of records or communications of a patient other than the accused is a matter in dispute, a party may seek an interlocutory ruling by the military judge. In order to obtain such a ruling, the party shall:

i) file a written motion at least 5 days prior to entry of pleas specifically describing the evidence and stating the purpose for which it is sought or offered, or objected to, unless the military judge, for good cause shown, requires a different time for filing or permits filing during trial; and

ii) serve the motion on the opposing party and the military judge and, if practical, notify the patient or the patient's guardian, conservator or representative that the motion has been filed and that the patient has an opportunity to be heard as set forth in subsection (m)(5)(B).

B) Before ordering the production or admission of evidence of a patient's records or communication, the military judge shall conduct a hearing. Upon the motion of counsel for either party and upon good cause shown, the military judge may order the hearing closed. At the hearing, the parties may call witnesses, including the patient, and offer other relevant evidence. The patient shall be afforded a reasonable opportunity to attend the hearing and be heard at the patient's own expense unless the patient has been otherwise subpoenaed or ordered to appear at the hearing. However, the proceedings shall not be unduly delayed for this purpose. In a case before a court-martial composed of a military judge and members, the military judge shall conduct the hearing outside the presence of the members.

C) The military judge shall examine the evidence or a proffer of evidence in camera, if that examination is necessary to rule on the motion.

D) To prevent unnecessary disclosure of evidence of a patient's records or communications, the military judge may issue protective orders or may admit only portions of the evidence.

E) The motion, related papers, and record of the hearing shall be sealed and shall remain under seal unless the military judge or an appellate court orders otherwise. (Il. Mil. R. Evid. 513)

n) Victim Advocate and Safe Helpline Privilege

1) Definitions. As used in this subsection (n):

A) "Assistant to a Victim Advocate" or "Assistant" means a person directed by or assigned to assist a victim advocate in providing victim and victim advocate services or who is reasonably believed by the victim to be an Assistant to a victim advocate.

B) "Confidential Communication" or "Communication" means a communication made to a victim advocate acting in the capacity of a victim advocate that is not intended to be disclosed to third persons other than:

i) those to whom disclosure is made in furtherance of the rendition of advice or assistance to the victim; or

ii) an assistant to a victim advocate reasonably necessary for transmission of the communication.

C) "Evidence of a Victim's Records or Communications" means testimony of a victim advocate, or record that pertains to communications by a victim to a victim advocate, for the purposes of advising or providing supportive assistance to the victim.

D) "Victim" means any person who suffered direct physical or emotional harm as the result of a sexual or violent offense.

E) "Victim Advocate" means a person who is:

i) designated in writing as a victim advocate;

ii) authorized to perform victim advocate duties in accordance with service regulations, and acting in the performance of those duties; or

iii) certified as a victim advocate pursuant to federal or State requirements.

2) General Rule of Privilege. A victim has a privilege to refuse to disclose, and to prevent any other person from disclosing, a confidential communication between the victim and a victim advocate, in a case arising under the UCMJ, if that communication was made for the purpose of facilitating advice or supportive assistance to the victim.

3) Who May Claim the Privilege. The privilege may be claimed by the victim or any guardian or conservator of the victim. A person who may claim the privilege may authorize trial counsel or a defense counsel representing the victim to claim the privilege on his or her behalf. The victim advocate who received the communication may claim the privilege on behalf of the victim. The authority of the a victim advocate, guardian or conservator, or a defense counsel representing the victim, to so assert the privilege is presumed in the absence of evidence to the contrary.

4) Exceptions. There is no privilege under this subsection (n):

A) when the victim is dead;

B) when federal law, State law or service regulation imposes a duty to report information contained in a communication;

C) if the communication clearly contemplated the future commission of a fraud or crime or if the services of the victim advocate are sought or obtained to enable or aid anyone to commit or plan to commit what the victim knew or reasonably should have known to be a crime or fraud;

D) when necessary to ensure the safety and security of military personnel, military dependents, military property, classified information or completion of a mission;

E) when necessary to ensure the safety of any other person (including the victim) when a victim advocate believes that a victim's mental or emotional condition makes the victim a danger; or

F) when admission or disclosure of a communi­cation is constitutionally required.

5) Procedure to Determine Admissibility of Victim Records or Communications

A) In any case in which the production or admission of records or communications of a victim is a matter in dispute, a party may seek an interlocutory ruling by the military judge. In order to obtain such a ruling, the party shall:

i) file a written motion at least 5 days prior to entry of pleas specifically describing the evidence and stating the purpose for which it is sought or offered, or objected to, unless the military judge, for good cause shown, requires a different time for filing or permits filing during trial; and

ii) serve the motion on the opposing party and the military judge and, if practical, notify the victim or the victim's guardian, conservator or representative that the motion has been filed and that the victim has an opportunity to be heard as set forth in subsection (n)(5)(B).

B) Before ordering the production or admission of evidence of a victim's records or communication, the military judge shall conduct a hearing. Upon the motion of counsel for either party and upon good cause shown, the military judge may order the hearing closed. At the hearing, the parties may call witnesses, including the victim, and offer other relevant evidence. The victim shall be afforded a reasonable opportunity to attend the hearing and be heard at the victim's own expense unless the victim has been otherwise subpoenaed or ordered to appear at the hearing. However, the proceedings shall not be unduly delayed for this purpose. In a case before a court-martial composed of a military judge and members, the military judge shall conduct the hearing outside the presence of the members.

C) The military judge shall examine the evidence or a proffer thereof in camera, if that examination is necessary to rule on the motion.

D) To prevent unnecessary disclosure of evidence of a victim's records or communications, the military judge may issue protective orders or may admit only portions of the evidence.

E) The motion, related papers, and record of the hearing shall be sealed and shall remain under seal unless the military judge or an appellate court orders otherwise. (Il. Mil. R. Evid. 514)