Executive Summary of Proposed Amendments
Military Rules of Evidence, 2011

Generally. The military rules have been revised to improve clarity and to conform to the style and conventions of the restyled Federal Rules of Evidence (FRE) approved by the U.S. Supreme Court on 26 April 2011 and which will take effect, pursuant to the Rules Enabling Act, on 1 December 2011. In accordance with 10 U.S.C. § 936 and Military Rule of Evidence (MRE) 1102(a), amendments to the FRE will automatically amend parallel provisions of the MRE eighteen months after the effective date of such amendments, absent contrary action by the President. The MCM and DoD Directive 5500.17, "Role and Responsibilities of the Joint Service Committee (JSC) on Military Justice," May 3, 2003, require the JSC to assist the President in fulfilling his rulemaking responsibilities under 10 U.S.C. § 936. These proposed changes have not been coordinated within the Department of Defense under DoD Directive 5500.1, "Preparation, Processing and Coordinating Legislation, Executive Orders, Proclamations, Views Letters Testimony," June 15, 2007, and do not constitute the official position of the Department of Defense, the Military Departments, or any other Government agency. Except as noted below, the proposed amendments are stylistic only; are not meant to change any result on any ruling on evidence admissibility; and are identical to FRE restyling conventions. In the current rules, several MREs are written as rules of conduct outside the courtroom rather than rules of admissibility. This is particularly true in Section III, for which there are no FRE equivalent rules. In conformity with FRE restyling conventions, military rules addressing conduct have been recast as rules of admissibility.

Examples of FRE restyling conventions adopted by these amendments include:

- The word “shall” has been changed to “should” or “may” as appropriate.
- Text has been formatted to achieve greater clarity, e.g.: using vertical v. horizontal lists and dissecting paragraphs into constituent parts.

Examples of stylistic differences between FREs and MREs:

- The MREs have substituted the term “military judge” for the term “court” in instances in which the FRE refers to the function of the judge.
- The term “jurors” as used in the FREs was changed to “court-martial members” or “members.”
- Military specific language has generally been retained in the MREs to add greater clarity and consistency for trial practitioners.

Specific Rule Amendments. Rules that have been amended in conformity with FRE restyling are not addressed below. Generally, other than ministerial amendments, rules that deviate from FRE restyling; that are substantively amended; or that are amended beyond FRE restyling are addressed below. Section III and Section V of the MRE, for which there are no FRE counterparts, were amended in conformity with the FRE restyling. For the first time, discussion paragraphs have been added, similar to discussion paragraphs in the Rules for Courts-Martial, to inform the practitioner of conduct-based guidance and relevant court opinions which may affect admissibility of evidence. The discussion paragraphs are non-binding but intended to be informative. *See* MANUAL FOR COURTS-MARTIAL, Preamble, paragraph 4 and accompanying discussion.

MRE 101 now includes the definition of a rule prescribed by Supreme Court.

MRE 103(a) and (f) retain the phrase “materially prejudices a substantial right” rather than the Federal rule’s “affects a substantial right” to remain consonant with Article 59(a). Rule 103(c) retains a pre-

existing military rule addition to the effect that Constitutional error will be reviewed under the higher standard of harmlessness beyond a reasonable doubt.

MRE 104 follows the new Federal rule, except that it retains a note clarifying that the military judge rather than the members determine the sufficiency of evidence offered to prove conditional relevance.

MRE 201(b)(1) retains the military rule's cognizance that court-martial jurisdiction under Article 5, UCMJ, has no geographic limitations. Rule 201(c) retains a requirement that the military judge inform the members when taking judicial notice of an adjudicative fact essential to establishing an element of the case.

MRE 202 has no FRE counterpart; has been revised in accordance with FRE stylistic conventions; and has been renumbered from 201A to 202.

MRE 301 was amended in conformity with the FRE restyling conventions and has been slightly restructured for ease of understanding. Below MRE 301(c), a discussion paragraph was added in place of former Rule 301(b)(2).

MRE 303 was amended to address admissibility rather than conduct.

MRE 304 has been significantly restructured for ease of understanding and definitions were moved closer to beginning of the rule.

MRE 305 has been significantly restructured for ease of understanding. Provisions related to Article 31 rights, Fifth Amendment rights, and Sixth Amendment rights are grouped together and labeled as such. Discussion paragraphs were added in place of former Rules 305(a)(1) and 305(f). Rule 305(a)(3) retains wording from former Rule 305(e)(2) exceeding the minimal Constitutional standard in *Montejo v. Louisiana*, 129 S.Ct. 1667 (2009) (holding that a defendant may validly waive his right to counsel for police interrogation, even if police initiate the interrogation after the defendant's assertion of his right to counsel at an arraignment or similar proceeding). Under the military rule, a person represented by counsel presumptively cannot be interrogated about the subject matter of preferred charges and need not invoke. Rule 305(c) retains the requirement in the previous MRE 305(g)(1) that waiver of the privilege against self-incrimination must be affirmative, exceeding the minimal Constitutional standard under *Berghuis v. Thompkins*, 130 S. Ct. 2250 (2010) (requiring affirmative assertion of the right to remain silent).

MRE 311 has been restructured for ease of understanding.

MRE 312 has been restructured for ease of understanding. Discussion paragraphs were added in place of former Rules 312(b)(2); 312(e) [first sentence only]; and 312(f) [first sentence only]. Additional language has been added to Rule 312(f) in light of *United States v. Stevenson*, 66 M.J. 15 (CAAF, 2008), which found that even a *de minimis* additional intrusion not necessary for medical reasons violated the IV Amendment.

MRE 313 has been slightly restructured for ease of understanding and uniformity within the rule [inspections and inventories].

MRE 314 has been reworded in several subdivisions to state rules of admissibility rather than rules of conduct outside the courtroom. Former Rule 314(c) was replaced with a discussion paragraph as it was explicitly not a rule affecting the admissibility of evidence. Rule 314(g)(2) has been modified to conform with *Arizona v. Gant*, 129 S.Ct. 1710 (2009), which disallowed the warrantless search of a motor vehicle

after the person arrested had been removed from the vehicle. Rule 314(g)(3) has been revised to clarify the rule in *Maryland v. Buie*, 494 U.S. 325 (1990), which specifies the circumstances permitting the search for other persons.

MRE 315 has been in many provisions reworded to state rules of admissibility rather than rules of conduct outside the courtroom. Rule 315(c)(4), which previously purported to direct out-of-court conduct without stating an exclusionary rule, has been reworded to note that the applicable standard for search of nonmilitary property in a foreign country is reasonableness. The last sentence in former Rule 315(d)(2) has been moved into the main subdivision 315(d) [last sentence] to make clear that its content applies to both (d)(1) and (d)(2), in keeping with *United States v. Huntzinger*, 69 M.J. 1 (CAAF, 2010). Rule 315(g) defines exigency rather than attempting to enumerate examples, and military operational necessity has been retained as an exigency. Former Rule 315(h) regarding execution of search authorizations has been removed as it was explicitly not a rule affecting the admissibility of evidence.

MRE 316 has been slightly restructured for ease of understanding, and "reasonable" was added to Rule 316(a).

MRE 317 is largely unchanged; however, subdivisions (b) and (c)(3), addressing compliance with federal law, have been moved to a discussion paragraph.

MRE 321 has been restructured for ease of understanding.

MRE 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, and 411 follow the new Federal rules, though certain additions specific to the military rules are retained. Rule 405 retains provisions specific to military practice defining "reputation" and "community" and allowing the defense, and the prosecution in rebuttal, to submit affidavits to prove character. Rule 410 retains a provision specifying that a request for an administrative discharge in lieu of court-martial is a statement made during plea discussions for purposes of that rule.

MRE 412 generally follows the Federal Rule; however, it has been amended in response to *U.S. v. Gaddis*, 70 M.J. 248 (C.A.A.F. 2011) and *U.S. v. Ellerbrock*, 70 M.J. 314 (C.A.A.F. 2011). The balancing test in former subdivision (c)(3) has been removed, and a discussion paragraph has been added to provide guidance to practitioners in an effort to protect both victim's privacy and the accused's constitutional rights.

MRE 413 and 414 more closely follow the Federal rule.

MRE 501, 502, 503, and 504 have only minor revisions to conform to the style of the new Federal rules.

MRE 505 has been significantly restructured for ease of understanding, and some additional provisions have been added to bring greater clarity and regularity to military practice. Subdivision (c) is modeled on a provision of the Military Commissions Rule of Evidence and implements Article 46 of the Uniform Code of Military Justice. Subdivision (d), requiring classification review, is modeled on a provision of the Military Commissions Rule of Evidence and reflects military practice. The military judge's explicit authorization to conduct ex parte hearings has been included in subdivisions (f)(2), (i)(3), and (k)(2)(B). Subdivision(h)(1)(A) adds "or designee" to the provision requiring a declaration invoking the classified information privilege to be signed by the head of the executive or military department or government agency concerned. A discussion paragraph was added after subdivision (k)(3) to address the applicable rule regarding closure of a criminal trial to the public.

MRE 506 has been restructured for ease of understanding, and additional provisions have been added at subdivisions (h) and (i) to bring greater regularity to defense discovery of information subject to a claim of government privilege and to disclosure by the accused. These provisions closely mirror MRE 505 provisions. Subdivision (d) adds "or designee" to the provision requiring the government information privilege to be claimed by the head of the executive or military department or government agency concerned. Subdivision (m) has been added to provide clarity regarding the record of trial in cases involving the government information privilege.

MRE 507 has been restructured for ease of understanding. Subdivision (d)(1) was added to allow the prosecution to ask for ex parte review of matters related to a claim of privilege.

MRE 509 has been amended to explicitly include courts-martial and military judges, in light of *United States v. Matthews*, 68 M.J. 29 (CAAF 2009), holding that MRE 509 privilege applies to military judges.

MRE 511, 512, 513, and 514 have been modified to conform to the style of the new Federal rules.

MRE 601, 602, 603, and 604 follow the new Federal rules.

MRE 605 and 606 closely follow the new Federal rules while retaining military-specific language.

MRE 607, 608, and 609 closely follow the new Federal rules while retaining military-specific language; e.g.: subdivision (c) explicitly allows impeachment by evidence of bias or motive to misrepresent, and subdivision (a)(3) specifies that for purposes of impeachment by "felony" conviction, a qualifying UCMJ offense is defined by the maximum authorized punishment without regard to whether the case was tried by general, special, or summary court-martial. (The point is reiterated at MRE 803(22)(D).)

MRE 610 follows the new Federal rule.

MRE 611 follows the parallel provisions of the new Federal rule, but retains military-specific provisions in subdivision (d) [providing for remote live testimony by child witnesses]. Subdivision (d)(5) conforms with Federal practice by explicitly authorizing the military judge to question a child witness outside the courtroom in furtherance of determining whether the child should be allowed to testify outside the presence of the accused.

MRE 612 and 613 closely follow the new Federal rules.

MRE 614 closely follows the new Federal rules and retains provisions governing questions from court-martial panel members.

MRE 615 closely follows the new Federal rules, and subdivision (e) retains the military rule that a victim may not be excluded solely on the basis that he or she may be a witness in presentencing.

MRE 701, 702, 703, and 705 closely follow the new Federal rules.

MRE 704 closely follows the new Federal rules, and subdivision (b) brings to the military rule the longstanding rule from Federal practice that an expert witness may not state an opinion about whether the defendant did or did not have a mental state or condition that constitutes an element of the crime charged or of a defense. The current MRE did not follow the prior Federal rule.

MRE 706 departs from the Federal rule in that appointment of experts in military practice is governed by Article 46 and R.C.M. 703.

MRE 707 has been modified to conform to the style of the new Federal rules.

MRE 801, 802, 803, 804, 805, 806, and 807 closely follow the new Federal rules, while retaining minor differences from the old military rules; e.g.: MRE 803(6) and (8) add examples of records kept in military life, and MRE 804(a)(6) notes that a declarant may be unavailable under Article 49(d). MRE 801(d)(2) conforms to the Federal rule change in no longer referring to statements by an opposing party as "admissions," as not all statements covered by this exclusion are "admissions" in the colloquial sense.

MRE 901, 902, and 903 closely follow the new Federal rules, while retaining minor differences from the old military rules; e.g.: MRE 902(4)(a) describes government documents accompanied by attesting certificates, and MRE 902(11) incorporates into the rule the foundational requirements for that class of records.

MRE 1001, 1002, 1003, 1004, 1005, 1006, 1007, and 1008 follow the new Federal rules, with military-specific language retained.

MRE 1101 has been modified to conform to the style of the new Federal rules. Subdivision (d)(1) and (e) were adopted from the Federal rule despite their exclusion from the current and prior MRE versions.

MRE 1102 has been modified stylistically and to make changes to the Federal rules applicable by operation of law only when the amended Federal rule has a parallel provision in the military rules.