

Executive Summary of Proposed Amendments Military Rules of Evidence (2012)

Generally. The Military Rules of Evidence (M.R.E.) have been revised to improve clarity and to conform to the style and conventions of the restyled Federal Rules of Evidence (F.R.E.) which took effect on December 1, 2011. In accordance with 10 U.S.C. § 936 and M.R.E. 1102(a), amendments to the F.R.E. will automatically amend parallel provisions of the M.R.E. unless the President takes contrary action within eighteen months. The mission of the Joint Service Committee on Military Justice (JSC) is to assist the President in fulfilling his rulemaking responsibilities under 10 U.S.C. § 936. *See* DoD Directive 5500.17. Although it is the intent of the JSC that the F.R.E. apply to the armed forces to the extent practicable, the F.R.E. are often in need of modification to adapt them to the military criminal justice system, to application throughout the world, and to be consistent with military jurisprudence.

Background of F.R.E. Amendments. Beginning in 2007, the Rules Advisory Committee began “restyling” the F.R.E. to counter years of previous amendments in which prior rules committees used differing stylistic writing. In the F.R.E. amendment process, there were no consistent style conventions, and differences were apparent from one set of rules to another. Style varied because a committee seeking to amend a rule did not always consider how another rule expressed the same concept. Style also varied based on the membership of a particular advisory committee or as the advisory committee changed over time. Different rules expressed the same thought in different ways, leading to a risk that similarly worded F.R.E. might be interpreted differently. Different rules sometimes used the same word or phrase to mean different things, again leading to a risk of misinterpretation. Drafters who were experts in the relevant substantive and procedural areas sometimes did not express themselves using consistent terminology. For all of these reasons, the F.R.E. were restyled as a whole. The Rules Advisory Committee developed uniform principles to be applied to each rule in a carefully deliberated process. After almost four years of review and edit, the F.R.E. were approved by the Supreme Court in April 2011 and took effect in December 2011.

Background of M.R.E. Amendments. Beginning in early 2011, the JSC began restyling the M.R.E. in conformity with the F.R.E. 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 F.R.E. restyling conventions. The JSC did make some substantive changes primarily related to search and seizure, confessions and admissions, line-ups, classified and protected information, and evidence related to victims of sexual offenses. Also following F.R.E. stylistic conventions, several M.R.E. in Section III were amended to define admissibility rather than prescribing conduct-based guidance to the person searching or questioning a suspect. Substantive amendments are addressed more fully below. New in 2012, the JSC added Discussion adjacent to certain M.R.E. to provide treatise-like guidance to practitioners. *See* paragraph b.(1) on page A21-3 in the Manual for Courts-Martial. The JSC is also preparing detailed analysis related to each M.R.E. subsection, as amended, to be included in a proposed Executive Order in 2012 and to be included in the revised Manual for Courts-Martial (projected in 2013). Following are examples of principles the JSC used when amending the M.R.E.

Examples of F.R.E. restyling conventions adopted by these amendments include:

- The word “shall” has been replaced by the word “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 F.R.E.s and M.R.E.s:

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

Specific Rule Amendments. The M.R.E. addressed below fall into one of three categories: they deviate from F.R.E. restyling; they are otherwise substantively amended; or they are amended beyond F.R.E. restyling conventions. Rules that have only ministerial amendments or have been amended in conformity with F.R.E. restyling are not addressed below.

M.R.E. 101(c) is followed by the first Discussion which explains its purpose and authority.

M.R.E. 103(a) and (f) retain the phrase “materially prejudices a substantial right” rather than the Federal rule’s phrase “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.

M.R.E. 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.

M.R.E. 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.

M.R.E. 202 has no F.R.E. counterpart; has been revised in accordance with F.R.E. stylistic conventions; and has been renumbered from 201A to 202.

M.R.E. 301 was amended in conformity with the F.R.E. restyling conventions and has been slightly restructured for ease of understanding. Below M.R.E. 301(c), a Discussion was added in place of former Rule 301(b)(2).

M.R.E. 303 was amended to address admissibility rather than conduct and to use active rather than passive voice.

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

M.R.E. 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. 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(e) retains the requirement in the previous M.R.E. 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).

M.R.E. 311 has been restructured for ease of understanding.

M.R.E. 312 has been restructured for ease of understanding. Discussion was 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. Rule 312(d) was amended to consistently use the words "nonconsensual extraction."

M.R.E. 313 has been slightly restructured for ease of understanding and uniformity within the rule.

M.R.E. 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 Discussion as it was explicitly not a rule affecting the admissibility of evidence. New Discussion was added to Rule 314(f)(2) and (3) to provide more guidance related to frisks. Rule 314(g)(2) has been modified to conform with *Arizona v. Gant*, 129 S.Ct. 1710 (2009). 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.

M.R.E. 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 was converted to a Discussion as it was explicitly not a rule affecting the admissibility of evidence.

M.R.E. 316 has been slightly restructured for ease of understanding, and “reasonable” was added to Rule 316(a).

M.R.E. 317 is largely unchanged; however, subdivisions (b) and (c)(3), addressing compliance with federal law, have been moved to Discussion.

M.R.E. 321 has been restructured for ease of understanding.

M.R.E. 401-414 (except 412) comport with the restyled F.R.E. while terms unique to the armed forces 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.

M.R.E. 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 Discussion has been added to provide guidance to practitioners in an effort to protect both the victim’s interests and the accused’s constitutional rights. The words “alleged victim” were replaced by the word “victim” and moved to the definition section of the rule, in conformity with F.R.E. 412. As a general rule, the words “alleged victim” were replaced by the word “victim” throughout the M.R.E. for uniformity and consistency.

M.R.E. 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 the words “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. New Discussion was added after subdivision (k)(3) to address the applicable rule regarding closure of a criminal trial to the public.

M.R.E. 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 M.R.E. 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.

M.R.E. 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.

M.R.E. 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 M.R.E. 509 privilege applies to military judges.

M.R.E. 513 was amended by Executive Order 13593 (signed December 13, 2011) to remove the words “spouse abuse” and the phrase “the person of the other spouse or”, thus expanding the overall scope of the privilege. In removing the spouse abuse exception, the privilege is now consistent with M.R.E. 514 in that spouse victim communications to a provider who qualifies as both a psychotherapist for purposes of M.R.E. 513 and victim advocate for purposes of M.R.E. 514 are covered.

M.R.E. 514 is a new rule implemented by Executive Order 13593 (signed December 13, 2011) designed to provide protection to communications between victims and victim advocates, similar to the privilege in M.R.E. 513.

M.R.E. 601-610 closely follow the new Federal rules while retaining military-specific language; e.g.: Rule 608(c) explicitly allows impeachment by evidence of bias or motive to misrepresent, and Rule 609(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 (reiterated in M.R.E. 803(2)).

M.R.E. 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)(3) was amended to conform with the holding in *United States v. Pack*, 65 M.J. 381 (C.A.A.F. 2007) (referring to *Maryland v. Craig*, 497 U.S. 836 (1990)). 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.

M.R.E. 612-615 closely follow the new Federal rules while Rule 614 retains provisions governing questions from court-martial panel members and Rule 615(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.

M.R.E. 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 M.R.E. did not follow the prior Federal rule.

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

M.R.E. 801-807 closely follow the new Federal rules, while retaining minor differences from the current M.R.E.; e.g.: M.R.E. 803(6) and (8) add examples of records kept in military life, and M.R.E. 804(a)(6) notes that a declarant may be unavailable under Article 49(d). M.R.E. 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.

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

M.R.E. 1001-1008 follow the new Federal rules, with military-specific language retained.

M.R.E. 1101 has been modified to conform to the style of the new Federal rules. Subdivision (d)(1) was adopted from the Federal rule despite its exclusion from the current and prior M.R.E. versions.

M.R.E. 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.