

JSC'S INITIAL DRAFT TO COMPLEMENT PROPOSED UCMJ
AMENDMENTS

JSC Recommended Option (Part III)

**Modifications to Part III, Military Rules of Evidence
Manual for Courts-Martial**

I. "SECTION IV - RELEVANCY AND ITS LIMITS"

"Rule 412. Sexual offenses; relevance of victim's behavior or sexual predisposition

(a) *Evidence generally inadmissible.* The following evidence is not admissible in any proceeding involving alleged sexual misconduct except as provided in subdivisions (b) and (c):

- (1) Evidence offered to prove that any alleged victim engaged in other sexual behavior.
- (2) Evidence offered to prove any alleged victim's sexual predisposition.

(b) *Exceptions.*

(1) In a proceeding, the following evidence is admissible, if otherwise admissible under these rules:

(A) evidence of specific instances of sexual behavior by the alleged victim offered to prove that a person other than the accused was the source of semen, injury, or other physical evidence;

(B) evidence of specific instances of sexual behavior by the alleged victim with respect to the person accused of the sexual misconduct offered by the accused to prove consent or by the prosecution; and

(C) evidence the exclusion of which would violate the constitutional rights of the accused.

(c) *Procedure to determine admissibility.*

(1) A party intending to offer evidence under subsection (b) must -

(A) 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 offered unless the military judge, for good cause shown, requires a different time for filing or permits filing during trial; and

(B) serve the motion on the opposing party and the military judge and notify the alleged victim or, when appropriate, the alleged victim's guardian or representative.

(2) Before admitting evidence under this rule, the military judge must conduct a hearing, which shall be closed. At this hearing, the parties may call witnesses, including the

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alleged victim, and offer relevant evidence. The victim must be afforded a reasonable opportunity to attend and be heard. 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 pursuant to Article 39(a). The motion, related papers, and the record of the hearing must be sealed and remain under seal unless the court orders otherwise.

(3) If the military judge determines on the basis of the hearing described in paragraph (2) of this subdivision that the evidence that the accused seeks to offer is relevant and that the probative value of such evidence outweighs the danger of unfair prejudice, such evidence shall be admissible in the trial to the extent an order made by the military judge specifies evidence that may be offered and areas with respect to which the alleged victim may be examined or cross-examined.

(d) For purposes of this rule, the term "sexual behavior" includes any sexual behavior not encompassed by the alleged offense. The term "sexual predisposition" refers to an alleged victim's mode of dress, speech, or lifestyle that does not directly refer to sexual activities or thoughts but that may have a sexual connotation for the fact finder."

SECTION-BY-SECTION ANALYSIS

Modifications to the military's rape-shield law under Military Rule of Evidence 412 are proposed to correspond to the proposed changes to the Uniform Code of Military Justice and Manual for Courts-Martial in which the focus of the sexual offenses involved is on the actions of the alleged offender, rather than on whether the conduct was without the victim's consent. Military Rules of Evidence are established by Executive Order pursuant to the President's rule-making authority in Article 36 (UCMJ; 10 U.S.C. 836). The proposed modifications delete the references in the rule that would serve to limit the protection afforded by the rule to sexual offenses that are nonconsensual in nature. It is being recommended that the word "Nonconsensual" be deleted from the title of the rule, and that the reference and definition of "nonconsensual sexual offense" be deleted at subsection 412(e)."

II. "SECTION V – PRIVILEGES"

"**Rule 513.** Psychotherapist-patient privilege.

(a) 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 an assistant to the psychotherapist, if such communication was made for the purpose of facilitating diagnosis or treatment of the patient's mental or emotional condition.

(b) Definitions. As used in this rule of evidence:

(1) A "patient" is a person who consults with or is examined or interviewed by a

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psychotherapist for purposes of advice, diagnosis, or treatment of a mental or emotional condition.

(2) A "psychotherapist" is 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 such services from any military health care facility, or is a person reasonably believed by the patient to have such license or credentials.

(3) An "assistant to a psychotherapist" is a person directed by or assigned to assist a psychotherapist in providing professional services, or is reasonably believed by the patient to be such.

(4) A communication is "confidential" if 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 such transmission of the communication.

(5) "Evidence of a patient's records or communications" is testimony of a psychotherapist, or assistant to the same, or patient records that pertain to communications by a patient to a psychotherapist, or assistant to the same for the purposes of diagnosis or treatment of the patient's mental or emotional condition.

(c) 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 to the psychotherapist 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.

(d) Exceptions. There is no privilege under this rule:

(1) when the patient is dead;

(2) 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;

(3) when federal law, state law, or service regulation imposes a duty to report information contained in a communication;

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

(5) if the communication clearly contemplated the future commission of a fraud or crime

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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;

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

(7) when an accused offers statements or other evidence concerning his mental condition in defense, extenuation, or mitigation, under circumstances not covered by R.C.M. 706 or Mil. R. Evid. 302. In such 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

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

(e) Procedure to determine admissibility of patient records or communications.

(1) 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:

(A) 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

(B) serve the motion on the opposing party, 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 subparagraph (e)(2).

(2) 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.

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

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(4) 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.

(5) The motion, related papers, and the record of the hearing shall be sealed and shall remain under seal unless the military judge or an appellate court orders otherwise."

SECTION-BY-SECTION ANALYSIS

Reports and recommendations by a 2002 Defense Task Force on Domestic Violence; a 2003 DoD USAFA Sexual Misconduct Review Panel (The Fowler Commission), and a 2004 DoD Task Force on Care for Victims of Sexual Assault all recommended some form of confidentiality be afforded to victims of either domestic violence or sexual assault, and to the consideration of extending to them the privileged communications of the psychotherapist-patient privilege in Military Rule of Evidence 513. However, several reviewing officials, in not supporting that course of action, referenced the fact that the privilege doesn't apply during investigations and administrative actions because subsection (a) of the rule states that the privilege applies "in a case arising under the UCMJ," and that the privilege cannot be extended to victims of spouse abuse because subsection (d)(2) states that there is no privilege under this rule when the communication is evidence of "spouse abuse" ...".

In order to preserve any "confidentiality" protections that victims of sexual assault and domestic violence may be given during the initial aftermath of the incident, when a completed investigation and disposition decision results in the perpetrator's court-martial where strict rules of evidence apply, arguably the above-referenced provisions would have to be deleted before the rule of privilege can operate for the benefit of such victims.

Military Rules of Evidence, including rules of privilege, are established by Executive Order pursuant to the President's rule-making authority in Article 36 (UCMJ; 10 U.S.C. 836). These modifications would be necessary in the event that the Department of Defense decided to allow for such confidentiality and privilege to communications involving sexual assault and domestic violence victims who chose to consult with psychotherapists and their assistants during UCMJ and non-UCMJ proceedings or circumstances. Deletion of these provisions from the rule will not, by itself, create or establish such privilege or confidentiality in non-UCMJ proceedings, but will remove from the Military Rules of Evidence language that purportedly prohibits or inhibits their establishment for victims of domestic violence or sexual assault in either UCMJ or non-UCMJ circumstances or proceedings.

Any consideration given to extending a communications privilege to any confidentiality that has been afforded a victim of sexual abuse or domestic violence in consultations with a victim advocate, who does not qualify as a psychotherapist or psychotherapist assistant, will also have to be established by a further modification to this rule or by a separate rule of evidence.

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Rules for Courts-Martial

I. To Complement the Proposed Amendment to Article 39(a), UCMJ, the Joint Service Committee on Military Justice would propose the following changes to RCM 804, "Presence of accused at trial proceedings," and RCM 805, "Presence of military judge, members, and counsel":

- a. Amend RCM 804 by inserting new paragraph (b) and re-lettering the current (b),(c), and (d) to (c), (d), and (e) respectively:

"(b) Presence by remote means. If permitted by the regulations of the Secretary concerned, the military judge may order the use of video-teleconferencing or similar technology between the parties and the military judge for purposes of Article 39(a) sessions. Use of such video-teleconferencing or similar technology will satisfy the "presence" requirement of the accused, when the accused has a counsel physically present at his location. Such technology may include two or more remote sites as long as all parties can see and hear each other."

- b. Amend the Discussion to RCM 804 by adding a paragraph immediately before the "Removal for Disruption" paragraph in the Discussion, which reads:

"Presence of the accused by remote means does not require the consent of the accused."

- c. Amend RCM 805(a) by adding the following after the sole sentence: "If permitted by regulations of the Secretary concerned, for purposes of Article 39(a) sessions solely, the presence of the military judge at Article 39(a) sessions may be satisfied by the use of video-teleconferencing or similar technology."

- d. Amend RCM 805(c) to read as follows:

(c) *Counsel.*

(1) *Trial Counsel.* As long as at least one qualified trial counsel is present, other trial counsel may be absent from a court-martial session. An assistant trial counsel who lacks the qualifications necessary to serve as trial counsel may not act at a session in the absence of such qualified trial counsel. If permitted by regulations of the Secretary concerned, for purposes of Article 39(a) sessions solely, the presence of a trial counsel may be satisfied by the use of video-teleconferencing or similar technology.

(2) *Defense Counsel.* As long as at least one qualified defense counsel is present, other defense counsel may be absent from a court-martial session. A

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defense counsel who lacks the qualifications necessary to serve as defense counsel may not act at a session in the absence of such qualified defense counsel. If permitted by regulations of the Secretary concerned, for purposes of Article 39(a) sessions solely, the presence of a defense counsel may be satisfied by the use of video-teleconferencing or similar technology, as long as the accused has one qualified defense counsel physically present at his location.”

II. "Rule 1103A. Sealed exhibits and proceedings.

(a) *In general.* If the record of trial contains exhibits, proceedings, or other matter ordered sealed by the military judge, the trial counsel shall cause such materials to be sealed so as to prevent indiscriminate viewing or disclosure. Trial counsel shall ensure that such materials are properly marked, including an annotation that the material was sealed by order of the military judge, and inserted at the appropriate place in the original record of trial. Copies of the record shall contain appropriate annotations that matters were sealed by order of the military judge and have been inserted in the original record of trial.

(b) *Examination of sealed exhibits and proceedings.* Except as provided in the following subsections to this rule, sealed exhibits may not be examined.

(1) *Examination of sealed matters.* For the purpose of this rule, “examination” includes reading, viewing, photocopying, photographing, disclosing, or manipulating the documents in any way.

(2) *Prior to authentication.* Prior to authentication of the record by the military judge, sealed materials may not be examined in the absence of an order from the military judge based on good cause shown.

(3) *Authentication through action.* After authentication and prior to disposition of the record of trial pursuant to Rule for Courts-Martial 1111, sealed materials may not be examined in the absence of an order from the military judge upon a showing of good cause at a post-trial Article 39a session directed by the Convening Authority.

(4) *Reviewing and appellate authorities.*

(A) Reviewing and appellate authorities may examine sealed matters when those authorities determine that such action is reasonably necessary to a proper fulfillment of their responsibilities under the Uniform Code of Military Justice, the Manual for Courts-Martial, governing directives, instructions, regulations, applicable rules for practice and procedure, or rules of professional responsibility.

(B) Reviewing and appellate authorities shall not, however, disclose sealed matter or information in the absence of:

(i) Prior authorization of the Judge Advocate General in the case of review under Rule for Courts-Martial 1201(b); or

(ii) Prior authorization of the appellate court before which a case is pending review under Rules for Courts-Martial 1203 and 1204.

(C) In those cases in which review is sought or pending before the United States Supreme Court, authorization to disclose sealed materials or information shall be obtained under that Court’s rules of practice and procedure.

(D) The authorizing officials in paragraph (B)(ii) above may place conditions on authorized disclosures in order to minimize the disclosure.

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- (E) For purposes of this rule, reviewing and appellate authorities are limited to:
- (i) Judge advocates reviewing records pursuant to Rule for Courts-Martial 1112;
 - (ii) Officers and attorneys in the office of the Judge Advocate General reviewing records pursuant to Rule for Courts-Martial 1201(b);
 - (iii) Appellate government counsel;
 - (iv) Appellate defense counsel;
 - (v) Appellate judges of the Courts of Criminal Appeals and their professional staffs;
 - (vi) The judges of the United States Court of Appeals for the Armed Forces and their professional staffs;
 - (vii) The Justices of the United States Supreme Court and their professional staffs; and
 - (viii) Any other court of competent jurisdiction."

Section–By–Sectional Analysis

"Rule 1103A.

2005 Amendment: The 1998 Amendments to the Manual for Courts-Martial introduced the requirement to seal M.R.E. 412 (rape shield) motions, related papers, and the records of the hearings, to "fully protect an alleged victim of [sexual assault] against invasion of privacy and potential embarrassment." MCM Appendix 22, p. 36. As current Rule 412(c)(2) reads, it is unclear whether appellate courts are bound by orders sealing Rule 412 information issued by the military judge.

The effect and scope of a military judge's order to seal exhibits, proceedings, or materials is similarly unclear. Certain aspects of the military justice system, particularly during appellate review, seemingly mandate access to sealed materials. For example, appellate defense counsel have a need to examine an entire record of trial to advocate thoroughly and knowingly on behalf of a client. Yet there is some uncertainty about appellate defense counsel's authority to examine sealed materials in the absence of a court order. This authority applies to both military and civilian appellate defense counsel.

The rule is designed to respect the privacy and other interests that justified sealing the material in the first place, while at the same time recognizing the need for certain military justice functionaries to review that same information. The rule favors an approach relying on the integrity and professional responsibility of those functionaries, and assumes that they can review sealed materials and at the same time protect the interests that justified sealing the material in the first place. Should disclosure become necessary, then the party seeking disclosure is directed to an appropriate judicial or quasi-judicial official or tribunal to obtain a disclosure order."