

Staff summary of reading materials for JPP members in preparation for Oct 10 public meeting

A. Materials on Assessment of Victims' Prior Sexual Conduct (M.R.E. 412)

1. Military Rule of Evidence (M.R.E.) 412 (Sex offense cases; relevance of alleged victim's sexual behavior or sexual predisposition) and Analysis, MANUAL FOR COURTS-MARTIAL (2012) (3 pages).

Evidentiary rule and explanatory analysis on admissibility of evidence of victims' prior sexual conduct in court-martial proceedings; essentially, the military's "rape shield statute."

- Similar to F.R.E. 412 (federal civilian "rape shield statute"; see below).
- In any proceeding involving an alleged sexual offense, evidence offered to prove that any alleged victim engaged in other sexual behavior or to prove sexual predisposition is generally inadmissible.
- Provides exceptions to the rule of inadmissibility, including where exclusion would violate the constitutional rights of the accused.
- Provides procedures to determine admissibility and to seal motions, related papers, and record of the hearing on admissibility.

2. Federal Rule of Evidence (F.R.E.) 412 (Sex-Offense Cases: The Victim's Sexual Behavior or Predisposition) and Advisory Committee Notes, 28 U.S.C.A. (2014) (8 Pages).

Evidentiary rule and explanatory notes on admissibility of evidence of victims' prior sexual conduct in federal civilian trial proceedings (both civil and criminal); essentially, the federal civilian "rape shield statute."

- Bars evidence relating to victim's sexual behavior or alleged sexual predisposition, whether offered as substantive evidence or for impeachment, except in designated circumstances in which probative value of evidence significantly outweighs possible harm to victim.
- Aims to safeguard victims against the invasion of privacy, potential embarrassment and sexual stereotyping that is associated with public disclosure of intimate sexual details.
- Encourages victims of sexual misconduct to institute and to participate in legal proceedings against their offenders.

3. Michael H. Graham, *Rape Shield Statutes: Overview; Fed.R.Evid. 412; Mode of Dress, Statements of Sexual Nature or Intention*, 48 CRIM. L. BULLETIN 1378 (2012) (27 Pages).

Provides background information on evolution and application of rape shield statutes in civilian jurisdictions.

- Briefly describes historical context and justifications of F.R.E. 412 in criminal (and civil) proceedings.
- Includes detailed explanation of each provision of F.R.E. 412.
- Describes important state-level variations from F.R.E. 412 and its application in federal civilian proceedings.

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4. Michelle J. Anderson, *From Chastity Requirement to Sexuality and License: Sexual Consent and a New Rape Shield Law*, 70 GEORGE WASHINGTON L. REV. 51 (2002) (95 Pages).

Dean Anderson will appear before the Panel during the 11:00 a.m. session on victims' past sexual conduct.

- Part I provides a historical account of chastity requirement under common law.
- Part II describes four categories of civilian rape shield statutes arising from excesses of chastity requirement [(1) legislated exceptions, (2) constitutional catch-all rape shield laws, (3) evidentiary purpose laws, and (4) judicial discretion laws] and analyzes legislative history of F.R.E. 412.
- Part III outlines civilian jurisdiction experiences under rape shield statutes since 1970s.
- Part IV articulates Dean Anderson's theory behind model rape shield statute that she proposes in Part V.
- Part VI reviews Supreme Court jurisprudence relevant to rape shield statutes.

5. Michelle J. Anderson, *Time to Reform Rape Shield Statutes*, 19-SUM CRIMINAL JUSTICE 14 (2004) (8 Pages).

Analyzes arguments advanced by defense in pretrial proceedings in 2004 sexual assault prosecution of NBA player Kobe Bryant seeking admission of victim's prior sexual history.

- Uses Bryant case as vehicle to argue that most rape shield statutes insufficiently protect privacy of sexual assault victims.
- Briefly describes historical chastity requirement and the four categories of civilian rape shield statutes covered extensively in Dean Anderson's 2002 law review article (above).

6. Major Shane R. Reeves, *Time to Fine-Tune Military Rule of Evidence 412*, 196 MILITARY LAW REVIEW 47 (2008) (30 Pages).

Analyzes M.R.E. 412 and offers suggested reforms to its text.

- Analyzes legislative history of M.R.E. 412 and describes distinctions from F.R.E. 412.
- Explains the three enumerated exceptions of M.R.E. 412(b)(1) and argues for elimination of balancing test of M.R.E. 412(b)(3) as redundant.

7. U.S. v. Ellerbrock, 70 M.J. 314 (C.A.A.F. 2011) (39 Pages).

Recent Court of Appeals of the Armed Forces opinion analyzing application of M.R.E. 412 in Article 120 and Article 125 court-martial.

- Accused moved under M.R.E. 412 to admit evidence of victim's prior extramarital affair to support theory that victim had motive to lie to protect her marriage. Military judge held evidence was inadmissible.
- HELD: Exclusion of relevant and material evidence whose probative value outweighed the danger of unfair prejudice, and which tended to show motive to fabricate, was unconstitutional.
- *"It is a fair inference that a second consensual sexual event outside a marriage would be more damaging to a marriage than would a single event..."*

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B. Materials on Victims' Mental Health Records (M.R.E. 513)

8. Military Rule of Evidence (M.R.E.) 513 (Psychotherapist-patient privilege) and Analysis, MANUAL FOR COURTS-MARTIAL (2012) (2 pages).

Evidentiary rule and explanatory analysis.

- Sets forth privilege applicable in Article 32 and court-martial proceedings.
- Motivated by the social benefit of confidential mental-health counseling and is not to be construed as a physician-patient privilege, which does not exist under the Military Rules of Evidence.
- Enumerates exceptions that have been developed to address concerns unique to the military.

9. Clifford S. Fishman, *Defense Access to a Prosecution Witness's Psychotherapy or Counseling Records*, 65 OREGON LAW REVIEW 1 (2007) (41 Pages).

Professor Fishman will appear before the Panel during the 12:45 session on victims' mental health records.

- Explains emergence of federal psychotherapist-patient privilege in the civilian sector and reviews relevant Supreme Court jurisprudence.
- Describes varying requirements imposed by state and federal courts for defendant to trigger in camera review and proposes distinct standards for in camera review and for disclosure.
- Describes various jurisdictions' approaches to timing of in camera review and disclosure.

10. Viktoria Kristiansson, *Walking a Tightrope: Balancing Victim Privacy and Offender Accountability in Domestic Violence and Sexual Assault Prosecutions*, ÆQUITAS STRATEGIES (May 2013) (18 Pages).

Ms. Kristiansson will appear before the Panel during the 12:45 session on victims' mental health records.

- Part I discusses distinction between confidentiality and privilege and addresses importance of confidentiality laws in safeguarding victim privacy, safety, and autonomy.
- Part II describes psychiatrist/patient privilege in context of other types of statutory privileges that often apply in civilian sexual assault prosecutions.

11. National Crime Victim Law Institute (NCVLI), *Refusing Discovery Requests of Privileged Materials Pretrial in Criminal Cases*, VIOLENCE AGAINST WOMEN BULLETIN (June 2011) (8 Pages).

Meg Garvin, NCVLI Executive Director, will appear before the Panel during the 12:45 session on victims' mental health records.

- Describes varying standards used by courts in determining whether to allow defense access to a victim's privileged records before trial.
- Advocates for adoption of absolute privilege against disclosure.

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12. Stacy E. Flippin, *Military Rule of Evidence (MRE) 513: A Shield to Protect Communications of Victims and Witnesses to Psychotherapists*, 2003-SEP Army Lawyer 1 (2003) (19 Pages).

Examines development of psychotherapist-patient privilege in military law.

- Reviews jurisprudence of Supreme Court and in military appellate courts that led to adoption of M.R.E. 513.
- Explains provisions and mechanics of M.R.E. 513 and reviews case law that helps answer question of when disclosure of mental-health records may be constitutionally required.