

3 March 2017

TO: Judicial Proceedings Panel (JPP)

FROM: Colonel Jeffrey G. Palomino and Mr. Brian L. Mizer

SUBJECT: Military Rule of Evidence (M.R.E.) 1101 Does Not Prohibit Examination of Sealed Materials Under Rule For Courts-Martial (R.C.M.) 1103A

DISCLAIMER: The views expressed are our own and do not reflect the official policy or position of the United States Air Force, Department of Defense, or the U.S. Government.

We've been asked to explain how M.R.E. 1101 interacts with R.C.M. 1103A.

Our answer is as follows: M.R.E. 1101 does not prohibit examination of sealed materials under R.C.M. 1103A for two reasons: (1) M.R.E. 1101 does not apply to military courts of appeals and (2) assuming *arguendo* it does apply to military courts of appeals, the M.R.E. 513 privilege is not violated when reviewing and appellate authorities examine sealed materials under R.C.M. 1103A. This is because records sealed pursuant to M.R.E. 513 “must be sealed in accordance with R.C.M. 1103A[.]” Mil. R. Evid. 513(e)(6), Manual for Courts-Martial (MCM), United States (2016 ed.). That is, the MCM itself says the privilege is not pierced when reviewing and appellate authorities examine sealed material in camera under R.C.M. 1103A.

Your request to explain the interaction of M.R.E. 1101 and R.C.M. 1103A comes in light of a recommendation made by a panel member at the 24 February 2017 JPP public meeting. In that meeting, a panel member proposed the JPP recommend changes to R.C.M. 1103A to make it comply with M.R.E. 513 and “M.R.E. 1101(b).” Further, the panelist argued “no one has been able to explain” why M.R.E. 1101 doesn't trump all other rules in the Manual. Finally, the panelist advocated the same in a dissent, dated 23 February 2017 wherein he argued M.R.E. 513 and “1101(b)” prohibit “distribution” of privileged materials. As best we can understand, this panelist believes the trial procedures found in M.R.E. 513 apply also to military courts of appeals and, using M.R.E. 1101 he wants the JPP to create an M.R.E. 513-like process for military appellate courts.

We respectfully disagree. Unfortunately, at the time of the 24 February 2017 meeting, we were not prepared to address this argument. This is because we were not aware of the recommendation, which we received as Col Palomino sat down for the Panel's deliberations, nor had we read the dissent prior to that meeting. Having now heard the argument and read the dissent **this comment addresses why M.R.E. 1101 does not prohibit examination of sealed materials under R.C.M. 1103A.**

Before we address the two reasons given in our answer, above we first make two points of clarification. First, some members of the panel continue to use language of R.C.M. 1103A inartfully. For point of clarification, when sealed materials are reviewed under R.C.M. 1103A they are “examined” *in camera* by reviewing and appellate authorities – they are not

“distributed” to the defense, they are not “released” to the defense, and they are not “given over “ to the defense. Instead, they are examined *in camera* by detailed appellate counsel in a windowless court space that is indistinguishable from any classified sensitive compartmented information facility (SCIF) in which we’ve worked. Moreover, R.C.M 1103A as written further distinguishes between examination of sealed material (which reviewing and appellate authorities may do) and disclosure of sealed materials (which they may not without approval from TJAG, a service CCA or CAAF). So, when discussing this matter we recommend the JPP use precision. To continue with incorrect terms (i.e., to say they’re handed over vice examined) leads to a false perception that sealed materials are lackadaisically handed over to appellate defense counsel without any controls whatsoever.

The second point of clarification is this: Military privileges (including M.R.E. 513) find their legal authority in Executive Orders. That is to say, the privileges found in the Military Rules of Evidence do not find their legal authority in the Constitution nor, for that matter, do they find it in the common law. “Unlike the Federal Rules, the Military Rules contain detailed privileges rather than a general reference to common law, *Compare* Federal Rule of Evidence 501 with Military Rule of Evidence 501–512.” *See* MCM, App. 22 at A22-72 (emphasis in original). Further, military privileges are not inviolate; this is because they themselves must yield to the constitution not the other way around. As the Air Force Court of Criminal Appeals recently held, even M.R.E. 513 itself “is not absolute” as some may think. *United States v. Chisum*, 75 M.J. 943, 947 (A.F. Ct. Crim. App. 2016). To the contrary, it must give way, among other things, to evidence that’s material to the guilt or punishment of the accused. *Id.* This is not to say the privileges found in the Military Rules are not important or deeply held. They certainly are both. However, they are not, as some argue, “constitutionally warranted,” and the assertion that they are begins all discussions in this matter on a faulty premise.

Turning now to your question, M.R.E. 1101 does not prohibit examination of sealed materials under rule of court-martial R.C.M. 1103A. This is so for two reasons.

First, M.R.E. 1101 does not apply to military courts of appeals. This conclusion is warranted (i) based on a comparison between M.R.E. 1101 and its analogue in the Federal Rules of Evidence, Federal Rule of Evidence 1101 (ii) based on a plain reading of the rule, and (iii) based on military appellate practice.

(i) The Military Rules of Evidence are, of course, based on the Federal Rules of Evidence. M.R.E. 1101 has a direct analogue in Federal Rule of Evidence 1101. Both rules say where the rules of evidence apply. However, comparing the two side-by-side is telling. This is because F.R.E. 1101(a) says the federal rules apply in “United States courts of appeals” and M.R.E. 1101(a) does not contain a reference to any courts of appeals. That this omission was intentional is proven by the 1101 analysis, which says, “The Federal Rules have been revised extensively to adapt them to the military criminal legal system.” MCM, App. 22 at A22-72 The analysis section then directly notes that the Federal Rule 1101 lists the “types of courts to which the Federal Rules are applicable, and. . . the types of proceedings to be governed by the Federal Rules.” *Id.* Had the drafters of the M.R.E.s wanted the rules of evidence, including the rules on privileges, to apply to military appellate courts, they would have said so. M.R.E. 1101 makes no mention of military appellate courts whereas its federal counter part does.

(ii) This leads to the second reason why M.R.E. 1101 does not apply to military courts of appeals – it’s based on plain reading of the rule. As a counter to our point (i), we’re certain the panelist dissenter would argue that “1101(b)” singles out the rules of privilege when it says, “The Rules on privilege apply at all stages of a case or proceeding.” First, before we address this, we need to clarify that at the 24 February 2017 the panelist dissenter cited the 2012 edition of the Manual for Courts-Martial when he referred to “1101(b)”. In the 2016 Manual “1101(b)” has changed to “1101(c),” and, indeed, it does say, “The Rules on privilege apply at all stages of a case or proceeding.” However, the question then becomes, “What is a ‘case or proceeding’?” The answer is found in in M.R.E. 1101(a). It says,

(a) *In General.* Except as otherwise provided in this Manual, these rules apply generally to all courts-martial, including summary courts-martial, Article 39(a) sessions, limited factfinding proceedings ordered on review, proceedings in revision, and contempt proceedings other than contempt proceedings in which the judge may act summarily.

R.C.M. 1101(a), MCM.

Therefore, a plain reading of M.R.E. 1101 vectors military justice practitioners to the reality that a “case or proceeding” is, in fact, this list of trial-like proceedings listed in M.R.E. 1101(a). And, again, the fact that the rule does not include appellate courts is telling.

(iii) Finally, while we’re certain the panelist dissenter won’t accept this answer, and, instead, will argue appeals are certainly a stage of the case, there is no case that supports this proposition. This is due to the fundamental nature of military appellate courts. Military appeals adjudicate the application of rules of privilege (and evidence) below; they don’t employ them. Military appeals are not governed by military rules of evidence, but instead by the jurisdictional and procedural practice rules of the Court of Appeals for the Armed Forces and the service courts of criminal appeals. Military appeals interpret military rules of evidence and trials are governed by military rules of evidence. Trials are adversarial proceedings subject to the rules of evidence; appeals are a check on the application of the rules of evidence subject to appellate court practice rules. At trial, victims may, through counsel, be heard on a military judge’s interpretation of the military rules of evidence; on appeal that decision has been made and now it’s time to see if the military judge was correct. When a trial ends and an appeal begins all arguing, decisions and actions of the trial are final including rulings on privilege. On appeal, there is no re-litigating of trial court decisions. Instead, the appellate courts now decide of the initial litigation was correct in law and fact. Simply put, military appellate practice is not a re-litigated trial.

Second, assuming *arguendo* M.R.E. 1101 does apply to military appeals, the M.R.E. 513 privilege is not violated when reviewing and appellate authorities examine sealed materials under R.C.M. 1103A. This is because M.R.E. 513 excepts out 1103A examination by reviewing and appellate authorities from those privileges. That is, the Manual itself says the privilege is not pierced when reviewing and appellate authorities examine sealed material under R.C.M. 1103A.

At the 24 February 2017 JPP public meeting, an Air Force panelist assigned to the Trial and Appellate Government Division made the most important point of the day when she observed that M.R.E. 513 specifically references R.C.M. 1103A. This observation is very helpful. It helps in understanding what really is happening when reviewing an appellate authorities reviewing sealed materials under R.C.M. 1103A.

What does M.R.E. 513 say about R.C.M. 1103A? In a section labeled “Procedure to Determine Admissibility of Patient Records or Communications,” M.R.E. 513(e)(6) tells military justice practitioners what to do with “[t]he motion, related papers, and the record of the hearing” on M.R.E. 513 trial litigation. What must happen to them? They “must be sealed in accordance with R.C.M. 1103A and must remain under seal unless the military judge or an appellate court orders otherwise.”

What is the significance of the fact that M.R.E. 513 references R.C.M. 1103A? By referencing R.C.M. 1103A in M.R.E. 513 the drafters of the rule squarely and unambiguously wrote R.C.M. 1103A into M.R.E. 513. What this means is **the drafters of the Manual do not see the procedures or R.C.M. 1103A as violating the M.R.E. 513 privilege.** By including R.C.M. 1103A the drafters of M.R.E. 513 are saying, “The M.R.E. 513 privilege isn’t pierced when reviewing and appellate authorities use the procedures found in 1103A.” **Stated as clearly as possible, when examined under R.C.M. 1103A, M.R.E. 513 records remain under seal with no violation of privilege. In this examination, the reviewing and appellate authorities listed in R.C.M. 1103A act as trusted agents working within M.R.E.**

This, of course, stands to reason because the rule, as written, doesn’t open up review to just anyone nor does it open it even to the “accused” or the “appellant.” Instead R.C.M. 1103A limits the alleged universe of people seeing sealed materials to 8 finite sets of people, all with statutory appellate duties under the UCMJ. Further, the rule dictates examination of sealed materials be in compliance with, among other things, the reviewing and appellate authorities service and state bar rules of professional responsibility. Finally, as stated above, the rule distinguishes between examination of sealed materials and disclosure of sealed materials. **All of this proves the drafter’s intent: They intended to place R.C.M. 1103A reviewing and appellate authorities into the privilege itself. They do not see examination of a victim’s sealed materials as violating any privilege.** To the contrary, they see R.C.M. 1103A as respecting the privacy interests that justified sealing in the first place. Had they not seen it this way M.R.E. 513 would not reference R.C.M. 1103A and R.C.M. 1103A would not make the distinction between examination and disclosure.

And, of course, this is what the rule was designed to do in the first place. Seeking in 2005 to balance the statutory and constitutional rights of service members against competing interests, R.C.M. 1103A’s purpose is set forth in the Drafter’s Analysis. It says,

Certain aspects of the military justice system, particularly during appellate review, seemingly mandate access to sealed material. 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 material in the absence of a court order.

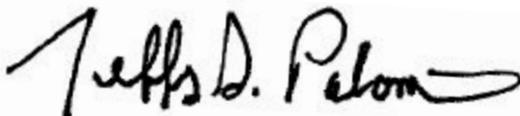
The rule is designed to respect the privacy and other interests that justified sealing the material in the first place, while at the same time recognizing the need for certain military justice functionaries to review that same information. The rule favors an approach relying on the integrity and professional 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.

MCM, App. 21 at A21-85-86 UNITED STATES (2016 ed.) (emphasis added).

In conclusion, you asked for us to explain how M.R.E. 1101 interacts with R.C.M. 1103A. Does it, as some say, trump all other rules? The answer is no; M.R.E. 1101 does not prohibit examination of sealed materials under R.C.M. 1103A. This is because it does not apply to military courts of appeals and even assuming it does, the M.R.E. 513 itself says the privilege is not pierced when reviewing and appellate authorities examine sealed material in camera under R.C.M. 1103A. On this basis, we respectfully ask the Panel to not revisit its previous vote to reject recommended changes to R.C.M. 1103A that include M.R.E. 1101.

Further, we respectfully ask you recommend to the Joint Service Committee (JSC) that it not go through with its proposed amendment of R.C.M. 1103A, which seeks to normalize *in camera, ex parte* review. This is because R.C.M. 1103A – as currently written – sets forth the only fair default position: trusted appellate reviewing authorities, including appellate defense counsel, may examine sealed materials, but may not disclose them absent a court order.

Very Respectfully,



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