

**JUDICIAL PROCEEDINGS PANEL
REQUEST FOR INFORMATION SET # 6**

147. Services: Article 32 hearings.

a. What is the SVC's role regarding Article 32 hearings?

USA	Special Victim Counsel's role is to zealously advocate for their client and protect their clients' rights. The SVC may be present at all stages of the preliminary hearing. Special Victim Counsel may be consulted by Preliminary Hearing Officer (PHO) to determine if the victim intends to testify at the preliminary hearing.
USAF	An SVC's role is to advocate for their client and prevent violations of their rights and privileges. SVCs play an integral role in court-martial proceedings and discuss with trial counsel their client's and their own plans for participation. When a client does not testify at an Article 32 hearing, the SVC may attend the hearing to 1) review the evidence presented by trial and defense counsel; 2) hear arguments by the counsel; and 3) advocate for their client's interests to trial and defense counsel and the preliminary hearing officer (PHO). All of these actions are taken so the SVC can best inform and advise their client. If the SVC has not previously received all relevant documents and information from trial and defense counsel, the Article 32 hearing is an opportunity to obtain them. The SVC's review of such documents and information can identify issues, such as evidence covered by Military Rule of Evidence 513.
USN	<p>A VLC's initial task is to ensure the victim has been provided with adequate notice of the upcoming Art. 32 hearing. This requires coordinating a face-to-face meeting with the detailed TC so a victim receives a comprehensive explanation of the military justice process, with a particular focus on the legal significance of the Art. 32 hearing.</p> <p>Next, the VLC determines if the victim intends to testify at the Art. 32 hearing. If the victim elects to testify, the VLC provides a detailed explanation of all rights and privileges afforded to the victim at the Art. 32 hearing. For victims declining to testify, the VLC notifies the Preliminary Hearing Officer (PHO) of this declination. If a victim declines to testify, it is critical for the VLC to ensure a victim's right to attend the Art. 32 hearing is maintained. This requires notice to all parties that the victim will attend the hearing and any challenge to their presence must be made in accordance with RCM 405(i)(2)(C).</p> <p>Prior to the Art. 32 hearing, VLC communicates with all parties to ensure the VLC is notified if a party intends to introduce evidence implicating any victim right and privilege operative under RCM 405(h)(1)-(3). Many Art. 32 hearings involve both TC and Defense Counsel (DC) submitting large amounts of documentary evidence for review by the PHO. Because of this, the VLC may consider a written letter to the PHO requesting all documentary evidence implicating the victim's rights and privileges be properly considered and the party submitting this evidence held to appropriate notice requirements.</p> <p>Immediately before commencement of the hearing, the VLC should request guidance from the PHO on handling any objections the VLC may make during the proceeding. This guidance is crucial because the VLC must be vigilant in ensuring a victim's rights and privileges are adequately protected throughout the hearing.</p> <p>At the conclusion of the Art. 32 hearing, VLC communicates with TC for guidance on</p>

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	the PHO's recommendation and the ultimate disposition decision. VLC and the client discuss the victim's right to receive a recording of the Art. 32 hearing, and if the victim elects to receive the recording, VLC will assist in drafting a request to TC.
USMC	The VLC's role in an Article 32 hearing is to advise the client, and protect the client's interests using representation and advocacy. Specifically, the VLC's role is as follows: <ul style="list-style-type: none"> - To advise the victim on Rule for Court-Martial (RCM) 405 and the client's option to testify and to be present. - To represent the client's interests by ensuring that Military Rules of Evidence (MRE) 412, 513, and 514 are applied appropriately. - To protect the client's rights found in UCMJ Article 6b. - To be present alongside the client to explain the Article 32 hearing process and answer any of the client's questions so the client can continue to intelligently exercise the client's rights.
USCG	To represent their clients' interests.

b. How many victims who were represented by SVCs clients chose to participate in the Article 32 hearing? How many victims declined to participate in the hearing?

USA	The Army does not track this statistic.
USAF	Of the 203 Article 32 hearings involving Air Force SVC-represented clients during FY15, 21 clients elected to participate in the Article 32 hearing; 182 did not participate.
USN	Of the 114 sexual offense cases where the victim was represented by VLC and where the case went to an Article 32 hearing during FY15, 29 clients participated while 82 victims declined to participate. The remaining three clients did not participate for other reasons, such as they were not required or requested to participate.
USMC	During FY15, 10 victims represented by a VLC chose to participate in an Article 32 hearing, and 49 victims represented by a VLC declined to participate.
USCG	This information is not tracked. Anecdotally, most victims do not elect to participate in the Article 32 investigation.

c. Are investigating officers allowing the SVCs to participate in the proceedings?

USA	Yes, SVC are being allowed to participate in all parts of the preliminary hearing.
USAF	Yes, SVCs are allowed to participate in Article 32 hearings with rare exception.
USN	Yes. There are no reports of PHOs barring VLC participation in an Art. 32 hearing by the PHO.
USMC	Preliminary Hearing Officers are allowing VLCs to participate in Article 32 hearings.
USCG	Yes.

d. (Update to JPP RFI 47) In addition to Executive Order 13669, what guidance and/or procedures address whether and how investigating officers hear and review MRE 412 or MRE 513 evidence before determining admissibility?

USA	DA PAM 27-17, Preliminary Hearing Officer's Guide, has been updated to reflect the new procedures for MRE 412 and MRE 513.
USAF	AFLOA/JAJM has incorporated Executive Order 13669 and the amendments to Rule for Court-Martial 405 into the Article 32 Guide that is used by the Preliminary Hearing

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	<p>Officer (PHO) when presiding over an Article 32 hearing. The guide is available on the Virtual Military Justice Deskbook and can be accessed by all members of the JAG Corps. Also, AFLOA/JAJM has issued guidance and explained the new procedures through Webcasts and notices in TJAG Online News, a weekly e-publication sent to all JAG Corps personnel. In addition to the Article 32 Guide, AFI 51-201, <i>Administration of Military Justice</i>, has been revised, is pending approval by TJAG, and now includes explicit instructions on how a PHO handles Military Rule of Evidence (M.R.E.) 412 and 513 evidence. (M.R.E. 513 evidence is entirely excluded from an Article 32 hearings; M.R.E. 412 applies only in part.) The guidance follows:</p> <p>4.1.9.5. Rulings on Evidence. In applying an M.R.E. to a preliminary hearing, the term “military judge” shall mean PHO. The PHO shall assume the military judge’s authority to exclude evidence from the preliminary hearing, and in discharging this duty follow the procedural requirements of the corresponding M.R.E. Failure of either party to follow the procedural requirements of the corresponding M.R.E. should ordinarily result in exclusion of evidence from the preliminary hearing, unless good cause is shown. The PHO stands in the place of a military judge with respect to an M.R.E. that applies to the preliminary hearing as articulated in R.C.M. 405(h). PHOs have the authority to conduct closed hearings and to seal records. The PHO shall note the beginning and the end time of any closed hearing.</p> <p>4.1.9.6. Military Rule of Evidence 412. M.R.E. 412 applies in any case that includes a charge defined as a sexual offense under M.R.E. 412(d). However, M.R.E. 412(b)(1)(C), the constitutionally required exception, does not apply. The PHO assumes the military judge’s authority to follow procedures in M.R.E. 412 and to exclude evidence from the preliminary hearing. Sexual behavior is defined as “any sexual behavior not encompassed by the alleged offense.” Sexual predisposition refers to an alleged victim’s “mode of dress, speech or lifestyle that does not directly relate to sexual activities or thoughts but that may have a sexual connotation for the fact finder.”</p> <p>ENCLOSURE:</p> <p>Article 32 Preliminary Hearing Officer’s Guide, February 2016</p>
<p>USN</p>	<p>The Naval Justice School provides training to PHOs on the new Article 32 process, which includes specific guidance on the procedures that PHOs must follow when dealing with MRE 412 and 513 issues. The entire training can be found at: https://www.youtube.com/watch?v=ocmnsY3qZUc.</p> <p>The Naval Justice School also provides a PHO Article 32 guide that instructs PHOs on how to handle MRE 412 and 513 issues. The guidance is found on pages 9-10 and 12-14 of the PHO Guide (enclosure 34). The entire guide is located at the same link above.</p> <p>ENCLOSURE:</p> <p>Article 32 Preliminary Hearing Officer’s Guide – December 2014</p>

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USMC	In December of 2014, the Marine Corps directed all judge advocates to complete Article 32 refresher training in MARADMIN 681/14. This training included all statutory changes to R.C.M. 405 and was required for all prospective Article 32 officers and all current Article 32 officers. Additionally, the Preliminary Hearing Officer Guide and Article 32 appointing order were amended to account for the changes. As a practical matter, Preliminary Hearing Officers receive VLC motions and oral argument, when offered, before determining the admissibility of MRE 412 and 513 evidence.
USCG	The Coast Guard does not have specific guidance or procedures specifically related to treatment of MRE 412 or 513 matters at preliminary hearings. However, Coast Guard judge advocates assigned as preliminary hearing officers receive support and resources from the Coast Guard's Office of Military Justice.