

**JUDICIAL PROCEEDINGS PANEL
REQUEST FOR INFORMATION SET # 1**

IV. Victim Privacy Issues: Past Sexual Conduct and Mental Health Records

Evidence of Victim Prior Sexual Conduct at Article 32 Hearing: Review and assess those instances in which prior sexual conduct of the alleged victim was considered in a proceeding under section 832 of title 10, United States Code (Article 32 of the Uniform Code of Military Justice), and any instances in which prior sexual conduct was determined to be inadmissible. *(FY13 NDAA)*.

Evidence of Victim Prior Sexual Conduct at Court-Martial: Review and assess those instances in which evidence of prior sexual conduct of the alleged victim was introduced by the defense in a court-martial and what impact that evidence had on the case. *(FY13 NDAA)*.

Use of Victim Mental Health Records by Defense: Examine use of mental health records by defense during preliminary hearings and courts-martial and compare to the similar use in civilian criminal legal proceedings in order to identify any significant discrepancies. *(Proposed FY15 NDAA)*.

46. Services: How do commanders and/or legal representatives preserve and protect personal information contained in evidence of prior sexual conduct (MRE 412) and mental health records (MRE 513) of adult victims during Article 32 hearings and at trial? How has Executive Order 13669 (June 13, 2014) impacted or changed procedures for Article 32 hearings?

USA	<p>Military commanders and their legal staff vigorously safeguard information relating to prior sexual behavior by reported victims of sexual assault and information contained in mental health records. At courts-martial, Military Rule of Evidence 412 provides that the admissibility of prior sexual behavior must be adjudicated at a closed hearing, without the members of the court-martial being present. Similarly, Rule 513 requires that the production and admissibility of mental health records be adjudicated at a hearing that may be closed, without the members of the court-martial being present. The military judge may also issue protective orders concerning the records or may admit only the relevant portions of the evidence. Any pleadings, related papers, and the record of the hearing to adjudicate the admissibility of either prior sexual behavior or mental health records must be sealed and remain under seal unless the court orders otherwise. Rule for Courts-Martial 405 now authorizes officers presiding over Article 32 proceedings to conduct such hearings and to assume the military judge’s power to exclude evidence of this sort from the pretrial investigation.</p>
USAF	<p>A. Protection of personal information contained in MRE 412 and MRE 513 evidence during Article 32 hearings and at trial.</p> <p>Although MRE 405(i) specifically states that MRE 412 applies at Article 32 hearings, MRE 412 (c) provides: “[b]efore admitting evidence under this rule, the military judge must conduct a hearing, which shall be closed.” Further, this subsection states that evidence and papers offered pursuant to this rule as well as the record of this hearing “must be sealed and remain under seal unless the court orders otherwise.” Moreover, MRE 412(c)(3) states that the “military judge determines on the basis of</p>

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the hearing” whether the evidence offered pursuant to this rule is relevant and admissible. Finally, MRE 412(c)(3) provides that “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.”

AF government representatives are generally raising arguments that the third MRE 412 exceptions (“constitutionally required” evidence) cannot apply at a pretrial hearing, where the constitutional right to confront is not implicated. Investigating Officers (IO) to date have generally agreed with this interpretation.

Proposed amendments to the Manual for Courts-Martial, published in the Federal Register for public comment on 3 October 2014, would provide the preliminary hearing officer (the new equivalent of the IO after FY14 NDAA amendments to Article 32) with the explicit authority to order exhibits, proceedings, or other matters sealed under RCM 1103A.

Efforts to inquire at Article 32 hearings into matters protected by MRE 513 have not been an issue. AF government representatives and SVCs have indicated that defense counsel have generally not pressed this issue and the language of MRE 513 and RCM 405(i) do not explicitly give IO’s power to order disclosure of privileged MRE 513 records. Rather, AF defense counsel indicate that they typically use Article 32 investigations to determine whether a victim has received mental health counseling and potentially what type(s) of treatment were utilized by mental health professionals.

Prior to trial, absent consent from the sexual assault victim, trial counsel do not review records privileged from disclosure by MRE 513. When these records are secured, in anticipation of litigation over release to the parties, the records are secured under seal and not reviewed by trial counsel. At courts-martial, there has been substantial litigation over the “constitutionally required” exception of MRE 513(d)(8) - the basis on which release of these records in courts- martial primary relies. AF trial counsel argue for application of a three-part inquiry pursuant to *U.S. v. Klemick*, 65 M.J. 576 (N.M.C.C.A. 2006) to determine whether the military judge will conduct an *in camera* review:

1. Did the moving party set forth a specific factual basis demonstrating a reasonable likelihood that the requested privileged records would yield evidence admissible under an exception to Mil. R. Evid. 513;
2. Is the information sought merely cumulative of other information available; and
3. Did the moving party make reasonable efforts to obtain the same or substantially similar information through non-privileged sources?

The success of this argument has been inconsistent, with military judges taking different positions on the applicability of the *Klemick* test in AF courts-martial, the quantum of evidence required before conducting an *in camera* review of requested records, and the scope of release of such records after *in camera* review. We anticipate at some point in the future the Air Force Court of Criminal Appeals or the

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Court of Appeals for the Armed Forces will issue a decision applying the Klemick test, or a similar test, before an *in camera review* is required. The procedural approach to resolving MRE 513 privilege issues appears to be similar to that applied in most federal district courts.

Since *LRM v. Kastenberg*, 72 M.J. 364 (C.A.A.F. 2013) SVCs have had the opportunity to represent their clients during MRE 412 and 513 hearings, making legal arguments and advocating their client's position as to the admissibility of evidence. They also request that the military judge issue a protective order for information offered into evidence under MREs 412 and 513. Military judges seal the record of trial for closed hearings involving MREs 412 and 513.

B. Impact of Executive Order 13669

Executive Order 13669 provided clarity for IOs as to the applicability of MRE 412 to Article 32 investigations. Before the EO, testimony concerning victims' prior sexual conduct was elicited and documents were presented by counsel for the government, the defense counsel, and the investigating officer. While this practice was by no means uniform, there was confusion due to conflicting language within the Rules for Court-Martial, the drafters' analysis, and MRE 412 itself. When the issue was raised, it was contested whether any exceptions under MRE 412 applied, whether the Investigating Officer could require the protections of five-day advance notice to the victim, whether the Investigating Officer could conduct a closed hearing, and whether the Investigating Officer could ultimately conclude that consideration of the evidence was necessary to perform a thorough hearing as required by the text of Article 32. The AFLOA/JAJM Article 32 Investigating Officer's Guide, attempted to provide context and guidance to Air Force Article 32 IOs before EO 13669 was signed. (Atch 14.1)

Since EO 13669, the conflicts over whether MRE 412 applies at Article 32 investigations were eliminated. Both government representatives and defense counsel are on clear notice that if they want to elicit evidence of sexual behavior or sexual predisposition, they must follow a distinct set of rules with oversight by a neutral, Judge Advocate, acting as Investigating Officer. Victims have the right to be heard, including through their Special Victims Counsel, at closed hearing. Any documents that are not appropriate for consideration by the Investigating Officer are sealed.

The Air Force supports the further adjustments to remove consideration of the constitutionally required exception of MRE 412 as proposed by the Joint Service Committee on Military Justice as reported in the Federal Register. This adjustment would apply to the new preliminary hearings required by Section 1702 of the FY14 NDAA and substantially revised the Article 32 process.

As noted above, EO 13669 has not had significant impact as MRE 513 issues have rarely been raised during Article 32 investigations.

EO 13669 has not had significant impact on trial process for MRE 412 and 513 issues

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	<p>as there were no changes to these two military rules of evidence in EO 13669.</p> <p><u>References:</u></p> <ul style="list-style-type: none"> - 45 C.F.R. Part 164, Subpart E, <i>Privacy of Individually Identifiable Health Information</i> - DoD 6025.18-R, <i>DoD Health Information Privacy Regulation</i> - http://www.dtic.mil/whs/directives/corres/pdf/602518r.pdf - AFI 44-172, <i>Mental Health</i> http://static.e-publishing.af.mil/production/1/af_sg/publication/afi44-172/afi44-172.pdf - AFI 33-332, <i>The Air Force Privacy and Civil Liberties Program</i> http://static.e-publishing.af.mil/production/1/saf_cio_a6/publication/afi33-332/afi33-332.pdf - AFI 44-109, <i>Mental Health, Confidentiality, and Military Law</i> http://static.e-publishing.af.mil/production/1/af_sg/publication/afi44-109/afi44-109.pdf - <i>U.S. v. Klemick</i>, 65 M.J. 576 (N.M.C.C.A. 2006) - <i>LRM v. Kastenber</i>, 72 M.J. 364 (C.A.A.F. 2013) - http://www.armfor.uscourts.gov/newcaaf/opinions/2012SepTerm/13-5006.pdf - Notice of Proposed Amendments to the Manual for Courts-Martial, 3 Oct 14 http://www.regulations.gov/#!documentDetail;D=DOD-2014-OS-0140-0001 <p>ATTACHMENT: Atch 14.1 AFLOA/JAJM Article 32 Investigating Officer’s Guide (05 May 2014)</p>
USN	<p>Convening authorities, in coordination with trial counsel and VLC, incorporate guidance into Article 32 appointing orders regarding the use and distribution of personal information. Samples of appointing order language and order to seal are provided in enclosure (27).</p> <p>In addition, trial judges close the court room for any hearings held in accordance with MRE 412. In accordance with MRE 513, the trial judge may order the hearing closed upon motion from either party and where good cause is shown. The record of trial for those hearings and all related exhibits are sealed under court order. MRE 513 documents presented to the trial judge for <i>in camera</i> review are also sealed by court order. If the military judge releases any documents to the parties, the judge redacts all PII that is not relevant and necessary to the release, and the judge releases the redacted pages under a protective order that prohibits duplication and tightly constrains access and disclosure.</p> <p>ENCLOSURE 27:</p> <ul style="list-style-type: none"> - <i>U.S. v. Felix</i> - Protective Order Limiting Access to, and Distribution of, Report of Investigation and Recording (Sample) - <i>U.S. v. Felix</i> - VLC Request to Amend Appointing Order for Article 32 (Sample)
USMC	<p>At Article 32 hearings, MRE 412 is applied and the hearing becomes closed. Defense must provide notice to the IO at least 5 days prior to the hearing that they intend to introduce MRE 412 material, and the IO will close that portion of the hearing and order any MRE 412 material discussed to be sealed in the IOs report. At trial, the</p>

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	<p>defense must file a MRE 412 motion to admit any evidence and the trial counsel (TC) affirmatively files a motion to exclude such information even without a defense motion to raise any potential issues.</p> <p>With regard to MRE 513, if the defense requests MRE 513 material, the TC will speak to the VLC and the victim to determine if any material exists in the first place. If such material does exist, the trial counsel will inform the defense of its existence, but will not seek out or turn over any such material. The defense must affirmatively file an MRE 513 motion to obtain such materials and the MJ must order an in camera review before the trial counsel will obtain the materials. Any materials that are not determined relevant, the trial counsel will request be sealed. The trial counsel does not provide any MRE 513 materials to the defense at Article 32 hearings.</p> <p>EO 13669 has had little impact on Marine Corps Article 32 hearings since the question of disclosing protected evidence has always been litigated and considered, before deciding an exception is met at an Article 32 hearing. The greater impact has been the establishment of the Victims' Legal Counsel Organization, which has empowered victims to raise issues at Article 32 more effectively.</p>
<p>USCG</p>	<p>If evidence of M.R.E. 412 material is received and considered by the Article 32 investigating officer, commanders will have access to that material when they review the Article 32 report. The commander is not required to review the material, but may do so. If the Article 32 officer does not consider the M.R.E. 412 evidence, it is not enclosed in the report and thus is not available to the commander.</p> <p>Commanders rarely handle information regarding matters covered by M.R.E. 412 except when reviewing the record of trial after a trial is complete. To the extent there are issues regarding past sexual behavior of a victim of sexual assault contained in the record of a particular case, the commander is able to review that after the trial. Commanders are generally prohibited, however, from reviewing material contained in sealed exhibits. <i>See R.C.M. 1103A.</i></p> <p>For matters proposed for introduction into evidence, judge advocates follow the processes set out in M.R.E. 412(c) to handle such evidence. The most significant change brought about by Executive Order 13669 is that the procedures for handling information regarding possible past sexual behavior of a victim of sexual assault set out in M.R.E. 412(c) used at trial now clearly apply at an Article 32 hearing, including closure of the hearing, <i>in camera</i> review, and sealing of exhibits. While it was clear that M.R.E. 412 applied in terms of limitations on what could be heard at an Article 32 hearing, practices differed as to whether the procedural aspects of the rule applied prior to the Executive Order.</p>