

**Military Rules of Evidence 412 (Sex offense cases: The victim's sexual behavior or predisposition)
and 513 (Psychotherapist-patient privilege)
Issues Outline**

I. Assessment of Military Rule of Evidence 412 (MRE) at Article 32 Hearings under the New Article 32 Process

- A. In approximately what percentage of Article 120 cases involving adult victims does the defense try to introduce MRE 412 evidence?
 - a. What is the evidence offered to prove?
 - b. Consider specific instances in which MRE 412 evidence was excluded. Did the exclusion have a measurable impact on the probable cause determination, disposition recommendation, or ability to present the case at courts-martial?

- B. In approximately what percentage of the cases does the Preliminary Hearing Officer (PHO) allow MRE 412 evidence to be admitted?
 - a. Under which exception was the evidence admitted?
 - b. What is the impact of "constitutionally required" evidence not being an enumerated exception?
 - c. Consider specific instances in which MRE 412 evidence was admitted. What impact did that evidence have on the probable cause determination, disposition recommendation, and ability to present the case at courts-martial?
 - d. Do the PHOs have the training and experience to properly conduct MRE 412 hearings and issue appropriate rulings?

- C. What is the alleged victim's response when MRE 412 evidence is admitted?
 - a. Are victims filing Petitions for Writ of Mandamus? If not, why?
 - b. What percentage of the time are Petitions for Writs being filed?
 - c. Who is filing the Petition for a Writ on behalf of the victim, an SVC/VLC or a trial counsel?
 - d. What effect has the Writ process had on the Article 32 hearing?

- D. Is there a need for further change in law or policy with respect to MRE 412, and if so, what would be a proposed change?

II. Assessment of Military Rule of Evidence 412 at Courts-Martial Proceedings

- A. In approximately what percentage of Article 120 cases involving adult victims does the defense try to introduce MRE 412 evidence?
 - a. What is the evidence offered to prove?
 - b. Consider specific instances in which MRE 412 evidence is excluded. Did the exclusion have a measurable impact on the case?

- B. In approximately what percentage of the cases does the military judge allow MRE 412 evidence to be admitted?
 - a. Under which exception is the evidence admitted?
 - b. If the constitutionally required exception is the basis for admission, what is the evidence offered to prove?
 - c. Consider specific instances in which MRE 412 evidence was admitted. What impact did that evidence have on the case?

- d. Do the military judges have the training and experience to properly conduct MRE 412 hearings and issue appropriate rulings? How is the military judge determining the evidence is relevant to an exception? Are they properly applying the established tests?
- C. What is the alleged victim's response when MRE 412 evidence is admitted?
- a. Are victims filing Petitions for Writ of Mandamus? If not, why?
 - b. What percentage of the time are Petitions for a Writ being filed?
 - c. Who is filing the Petitions for a Writ on behalf of the victim, an SVC/VLC or a trial counsel?
 - d. What effect is the Writ process having on the case?
- D. Is there a need for further change in law or policy with respect to MRE 412 and if so, what would be a proposed change?

III. Assessment of Military Rule of Evidence 513 at Article 32 Hearings under the New Article 32 Process

- A. In approximately what percentage of Article 120 cases involving adult victims does the defense try to introduce mental health records at an Article 32 hearing? (Note: PHO not authorized to order production)
- a. How is the proffered evidence on mental health obtained?
 - b. What is the evidence offered to prove?
 - c. What is the impact of the use of the evidence?
 - d. How is mental health information being handled?

IV. Assessment of Military Rule of Evidence 513 at Courts-Martial Proceedings

- A. In approximately what percentage of Article 120 cases involving adult victims does the defense seek production of MRE 513 evidence for *in camera* review?
- a. Are the production procedures being followed for *in camera* review?
 - b. What enumerated exception is the evidence offered under?
 - c. In approximately what percentage of cases are *in camera* reviews being conducted?
 - d. Is there a uniform method of conducting *in camera* reviews? Should there be?
 - e. Is production of MRE 513 evidence narrowly tailored to the permitted exception?
- B. In approximately what percentage of cases are military judges allowing disclosure of MRE 513 evidence after conducting an *in camera* review?
- a. Is disclosure of MRE 513 evidence narrowly tailored to the permitted exception?
 - b. What is the impact on the case of admission of the MRE 513 evidence?
 - c. Do military judges have sufficient training, experience, and guidance to conduct MRE 513 hearings?
- C. What is the alleged victim's response when a military judge requires production, or permits disclosure, of MRE 513 evidence?
- a. Are victims filing Petitions for Writ of Mandamus? If not, why?
 - b. What percentage of the time are Petitions for a Writ being filed?
 - c. Who is filing the Petitions for a Writ on behalf of the victim, an SVC/VLC or a trial counsel?
 - d. What effect is the Writ process having on the case?
- D. Is there a need for further change in law or policy with respect to MRE 513 and if so, what would be a proposed change?