



Judicial Proceedings Panel
Minutes of March 10, 2017 Public Meeting

AUTHORIZATION: The Judicial Proceedings Since Fiscal Year 2012 Amendments Panel (JPP or Panel) is a federal advisory committee established pursuant to Section 576(a)(2) of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2013, as amended by section 1731(b) of the NDAA for FY 2014 and section 546 of the NDAA for FY 2015, and in accordance with the Federal Advisory Committee Act of 1972, the Government in Sunshine Act of 1976, and governing federal regulations.

EVENT: The JPP held a public meeting on March 10, 2017, from 9:31 a.m. to 3:00 p.m. During the morning session, the Panel received a public comment on the Joint Service Committee on Military Justice's proposal to amend Rule for Courts-Martial 1103A and deliberated on victims' appellate rights. In the afternoon, the Panel received a presentation from a JPP Subcommittee member on the observations made by the Subcommittee during their site visits. The Panel then deliberated on Military Rules of Evidence (M.R.E.) 412 and 513.

LOCATION: The meeting was held at the Bobby Junker Executive Conference Center, One Liberty Center, 875 North Randolph Street, Arlington, Virginia 22203.

MATERIALS: A verbatim transcript of the meeting, as well as preparatory materials provided to the JPP members prior to and during the meeting, are incorporated herein by reference and listed individually below. The meeting transcript and materials received by the Panel are available on the JPP website: <http://jpp.whs.mil>.

PARTICIPANTS

Participating JPP Members

The Honorable Elizabeth Holtzman, Chair
The Honorable Barbara Jones
Mr. Victor Stone
Professor Thomas W. Taylor
Vice Admiral (Retired) Patricia Tracey

Attending JPP Staff

Captain Tammy Tideswell, JAGC, U.S. Navy, Staff Director
Lieutenant Colonel Patricia Lewis, JAGC, U.S. Army, Deputy Staff Director
Mr. Dale Trexler, Chief of Staff
Ms. Julie Carson, Legislative Liaison and Staff Attorney
Dr. Janice Chayt, Investigator
Ms. Theresa Gallagher, Staff Attorney
Ms. Nalini Gupta, Staff Attorney
Ms. Meghan Peters, Staff Attorney
Ms. Stayce Rozell, Senior Paralegal
Ms. Terri Saunders, Staff Attorney
Ms. Tiffany Williams, Supervising Paralegal

Other Participants

Ms. Maria Fried, Designated Federal Official (DFO)

Subject Matter Experts

Mr. James Martinson, U.S. Navy, Highly Qualified Expert

Mr. Stephen McCleary, U.S. Coast Guard, Deputy Chief of Staff and Deputy Managing Counsel,
Department of Homeland Security.

Colonel William Orr, Jr., U.S. Air Force (Retired), Chief Strategic Military Justice Legislation
and Policy

Lieutenant Colonel Mary Catherine Vergona, U.S. Army, Chief, Policy Branch, Criminal Law
Division

Subcommittee Presenters

Ms. Laurie Kepros, JPP Subcommittee Member

Brigadier General James Schwenk, U.S. Marine Corps (Retired), JPP Subcommittee Member

Ms. Jill Wine-Banks, JPP Subcommittee Member

MEETING MINUTES

The DFO opened the public meeting at 9:31 a.m. The Honorable Elizabeth Holtzman provided opening remarks and summarized the agenda for the meeting.

Panel Deliberations on Joint Service Committee on Military Justice's (JSC) Proposed Amendments to Rule for Court-Martial 1103A; Victims' Appellate Rights Report; and Public Comment on Victims' Appellate Rights

The session began with a public comment from Mr. Don Christensen, President of Protect Our Defenders, regarding M.R.E. 513, the patient-psychotherapist privilege. Mr. Christensen urged the Panel to treat the patient-psychotherapist privilege as a real privilege. He noted that current appellate procedures have weakened the privilege.

After Mr. Christensen's public comment, the Panel discussed its recommendations on victims' appellate rights. The Panel began with a discussion of the JSC's proposed amendment to Rule for Courts-Martial 1103A. While the Panel voted in support of the JSC amendment, it recommended that the JSC revise its proposed amendment to Rule for Courts-Martial 1103A(b)(4)(B)(ii) to provide a person whose records are about to be examined with notice and the opportunity to be heard.

The Panel then approved its recommendation on notice, which stated: "The Services formalize procedures to (1) provide victims with a means to receive notice of significant appellate matters, including but not limited to the date and time of any appellate courtroom proceedings and the final decision of any appellate court, if requested, and (2) provide victims with a means to receive appellate pleadings and briefs, if requested."¹

¹ At its April 7, 2017 meeting, the JPP revised its recommendation on notice. The JPP's final recommendation on notice states: "The Services formalize procedures to provide victims in sexual assault cases (1) with timely notice, unless declined, of significant appellate matters, including but not limited to the date and time of the filing of appellate pleadings and briefs, of any appellate courtroom proceedings, the date when the case is taken under submission, and of

The Panel next deliberated on its recommendation regarding Section 547 of S. 2943, a provision in the Senate version of the Fiscal Year 2017 National Defense Authorization Act which would have allowed victims to file pleadings in appellate proceedings as a “real party in interest.” The Panel decided to wait until its next public meeting on April 7, 2017 to finalize its recommendation on victim standing in appellate proceedings so that Panel members had the opportunity to submit proposed recommendations.

Finally, the Panel approved a recommendation stating, “Congress amend Article 6b of the Uniform Code of Military Justice to grant the Court of Appeals for the Armed Forces (CAAF) jurisdiction to hear a victim’s appeal if a Service Court of Criminal Appeals denies the victim’s petition for a writ of mandamus under Article 6b.”

Subcommittee Presentation on Site Visit Observations Regarding the Department of Defense (DoD) Withholding Policy, Military Rules of Evidence (M.R.E.) 412 & 513, and Attorney Training

During the second session of the public meeting, JPP Subcommittee Member Brigadier General James Schwenk, U.S. Marine Corps (Retired), presented the Subcommittee’s observations on the DoD withholding policy, attorney training, and the impact of changes to M.R.E. 412 and 513 on Article 32 hearings and courts-martial. Brigadier General Schwenk advised that the Subcommittee was not making any recommendations in these areas, but felt it was important to share its observations with the Panel.

Brigadier General Schwenk first noted that there did not appear to be any adverse results of the decision to withhold the initial disposition authority to commanders in the grade of O-6. He added that many lower commanders had welcomed the change.

Brigadier General Schwenk then discussed M.R.E. 412 and 513. He noted that there were no recent changes to M.R.E. 412, which is raised in almost every court-martial involving a sexual assault offense. During the site visits, trial counsel stated that the Special Victims’ Counsel (SVC)/Victims’ Legal Counsel (VLC) procedures for raising objections need to be standardized. The attorneys on the site visits also explained that it is now very difficult to demonstrate a specific factual basis that mental health records would yield admissible evidence, and the result is that judges rarely request the delivery of records for in camera review, much less for disclosure to the defense. Further, the removal of the “constitutionally required” enumerated exception under M.R.E. 513 has substantially kept mental health records out of the courtroom.

Finally, Brigadier General Schwenk reported on attorney training. He noted that all trial counsel involved in the site visits felt their training was adequate and appropriate to prepare them for their positions. However, the Subcommittee found that the experience levels of trial counsel varied considerably depending on the Service and the location. The SVC/VLCs also felt their training prepared them for their job; however, not all of them received SVC/VLC training prior to starting in the position.

the final decision and any opinion of any appellate court, and (2) with convenient access to any unsealed document filed in the case, if requested.”

Panel Deliberations on M.R.E. 412 and 513

During the last session of the day, the Panel deliberated on a strategy for further review of M.R.E. 412 and 513. Ms. Gallagher briefed the Panel on recent significant changes to M.R.E. 412 and 513. The panel discussed three issues.

The first issue was whether to address inconsistent victim access to the Article 32 report and exhibits. SVCs/VLCs, during their testimony on January 6, 2017, indicated that they did not routinely receive copies of the Article 32 report or documentary evidence considered by the Article 32 Preliminary Hearing Officer (PHO). SVCs/VLCs are finding it difficult to protect their clients' privilege and ensure compliance with M.R.E. 412. To verify whether there is a systemic problem, Ms. Holtzman requested that the JPP staff review the Service policies and to present the findings to the Panel.

Secondly, the Panel discussed whether to clarify the scope of the psychotherapist-patient privilege under M.R.E. 513. The rule does not expressly address whether a protected communication includes psychiatric diagnosis, prescribed medications, durations prescribed medications were to be taken, type of therapies used, or the resolution of the diagnosed psychiatric condition. Recently, the Coast Guard Court of Criminal Appeals determined that a psychotherapist's diagnosis and prescribed medications were privileged under M.R.E. 513. Mr. Stone discussed whether this was an issue that should be resolved judicially as it is essentially a legal decision. Ms. Kepros noted that an assessment of civilian practice would not be a very useful comparison. Professor Taylor suggested an Executive Order could be issued to clarify the scope of the rule. Ms. Holtzman cautioned that additional evidence would have to be presented to the Panel before a recommendation could be made. The Panel discussed concerns about whether sufficient time remained for the Panel to address the issue before the Panel's September 30, 2017 deadline. The Panel decided to look at the definition in a future meeting.

Finally, the Panel discussed whether to explore the addition of an enumerated exception to M.R.E. 513 to allow for discovery and admission of psychotherapist-patient communication evidence bearing on credibility, perception, ability to recall, or motive. Previous testimony indicated that prior to the changes to M.R.E. 513, counsel used the enumerated "constitutionally required" exception to admit this type of evidence. With the removal of the "constitutionally required" exception, the revised M.R.E. 513 does not contain an exception encompassing potentially exculpatory evidence. Ms. Kepros advised that most states have a provision allowing evidence to be disclosed if it is exculpatory and relevant to guilt or innocence. Judge Jones asked if military judges were applying the language of the rule literally. Ms. Gallagher advised that based on prior testimony and information received by the Subcommittee, trial judges appear to be applying the rule inconsistently. Mr. Stone thought the issue was under judicial review and stated that he would be inclined to let the courts decide the issue. Judge Jones and Ms. Holtzman stated that evidence required by the Constitution should be allowed without being expressly stated in the rule. Vice Admiral Tracey noted that the confusion may be caused by the intentional deletion of the "constitutionally required" exception. Ms. Holtzman expressed concern about whether the Panel could resolve this issue in the short period of time remaining. Ms. Holtzman suggested referring this issue to the successor panel.

The DFO closed the public meeting at 3:00 p.m.

CERTIFICATION

I hereby certify, to the best of my knowledge, the foregoing minutes are accurate and complete.



Elizabeth Holtzman
Chair
Judicial Proceedings Panel

MATERIALS

Meeting Records

1. Transcript of March 10, 2017 JPP meeting, prepared by Neal R. Gross and Co., Inc.

Read Ahead Materials Provided Prior to and at the Public Meeting

2. Meeting agenda
3. Summary of Subject Matter Experts and Subcommittee Presenters Biographies

Materials for Panel Deliberations on Victims' Appellate Rights Report

4. Table of contents and summary of read ahead materials for JPP members
5. Victims' Appellate Rights Timeline of Events
6. Section 547 of the Senate Version of the FY 2017 NDAA (S. 2943) to Amend Article 6b of the UCMJ
7. Article 6b, UCMJ with Proposed Language from Section 547 of the Senate Version of the FY 2017 NDAA (S. 2943)
8. Victims' Appellate Rights: Questions for JPP Deliberations
9. JPP Staff Document Combining (1) the Department of Defense Joint Service Committee on Military Justice's (JSC) Proposed Amendments to Rule for Courts-Martial (R.C.M.) 1103A, (2) the Current Version of R.C.M. 1103A, and (3) the Service Courts of Criminal Appeals Rules Governing Access to Sealed Materials
10. Public Comments Received by the JPP Regarding Joint Service Committee on Military Justice's Proposed Amendments to R.C.M. 1103A
11. Service Responses to JPP Request for Information Question 163 Regarding the Air Force Procedures for Appellate Counsel Review of Sealed Materials
12. Draft Judicial Proceedings Panel Report on Victims' Appellate Rights
13. Military Rule of Evidence 1101 and Drafter's Analysis
14. Dissenting Views of JPP Panel Member Victor D. Stone, Esq., Supporting Limited Appellate Participation for Crime Victims When Their Rights Are Already At Issue
15. Dissenting Views of JPP Panel Member Victor D. Stone, Esq., Concluding that M.R.E. 513 and 1101(b) Prohibit Distribution of Privileged Materials
16. Public Comment Received by the JPP addressing how M.R.E. 1101 interacts with R.C.M. 1103A

Materials for Subcommittee Presentation on Site Visit Observations Regarding the DoD Withholding Policy, M.R.E. 412 and 513, and Attorney Training

17. JPP Subcommittee Papers on DoD Initial Disposition Withholding Policy, Military Rules of Evidence 412 and 513, and Training and Experience of Trial Counsel and Special Victims' Counsel / Victims' Legal Counsel

Materials for Panel Deliberations on Military Rules of Evidence 412 and 513

18. Military Rule of Evidence 412
19. Military Rule of Evidence 513
29. Timelines Highlighting JPP Tasks and Key Events Affecting Military Rules of Evidence 412 and 513
21. Deliberations Chart on Military Rules of Evidence 412 and 513
22. Case Law Applicable to Military Rule of Evidence 513: *H.V. v. Kitchen*, *Randolph v. H.V*