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DEPARTMENT OF DEFENSE

Office of the Secretary

[Docket ID: DoD–2014–OS–0140]

Manual for Courts-Martial; Proposed Amendments

AGENCY: Joint Service Committee on Military Justice (JSC), Department of Defense.

ACTION: Notice of response to public comments on proposed amendments to the Manual for Courts-Martial, United States (2012 ed.).

SUMMARY: The Joint Service Committee on Military Justice (JSC) is publishing final proposed amendments to the Manual for Courts-Martial, United States (MCM). The proposed changes concern the rules of evidence and the punitive articles applicable in trials by courts-martial. These proposed changes have not been coordinated within the Department of Defense under DoD Directive 5500.1, "Preparation, Processing and Coordinating Legislation, Executive Orders, Proclamations, Views Letters and Testimony," June 15, 2007, and do not constitute the official position of the Department of Defense, the Military Departments, or any other Government agency.

FOR FURTHER INFORMATION CONTACT: Capt Harlye S. Carlton, USMC, (703) 963-9299 or harlye.carlton@usmc.mil.

SUPPLEMENTARY INFORMATION:

Background

On October 3, 2014 (79 FR 59938-59959), the JSC published a Notice of Proposed Amendments concerning the rules of procedure and evidence and the punitive articles applicable in trials by courts-martial and a Notice of Public Meeting to receive comments on these

proposals. The public meeting was held on October 29, 2014. Two members of the public provided oral comments at the public meeting, with one of the members of the public also submitting a written comment. Additionally, several written comments were received electronically. All comments were considered by the JSC.

Public Comments: Comments and materials received from the public are available under Docket ID Number DoD-2014-OS-0140-0001, Federal Register Number 2014-23546, and at the following link http://www.regulations.gov/#!documentDetail;D=DOD-2014-OS-0140-0001.

Discussion of Comments and Changes

The JSC considered each public comment and made some modifications to the proposed amendments accordingly. Additionally, the JSC added proposed amendments to implement provisions in the National Defense Authorization Act for Fiscal Year 2015, Public Law 113-291, December 19, 2014 (FY15 NDAA). Comments that were submitted that are outside the scope of these proposed changes will be considered as part of the JSC's 2015 annual review of the MCM. The JSC will forward the public comments and proposed amendments to the Department of Defense. The public comments regarding the proposed changes and a summary of proposed amendments to implement FY15 NDAA provisions follow:

a. Several comments recommended adding a requirement to RCM 305(i) that a neutral and detached officer should inquire whether a victim has been contacted and provided the opportunity to be heard during the 7-day review of pretrial confinement. Comments also recommended that a neutral and detached officer should inquire whether the victim has waived the right to be heard. The JSC has adopted this proposal in part as follows:

- **R.C.M. 305(i)(2)(D) is amended to read as follows:**

"*Memorandum*. The 7-day reviewing officer's conclusions, including the factual findings on which they are based, shall be set forth in a written memorandum. The memorandum shall also state whether the victim was notified of the review, was given the opportunity to confer with the representative of the command or counsel for the government, and was given a reasonable opportunity to be heard. A copy of the memorandum and all documents considered by the 7-day reviewing officer shall be maintained in accordance with regulations prescribed by the Secretary concerned and provided to the accused or the Government on request."

b. Two comments recommended amending RCM 702 to clarify that the right of a victim not to testify at the Article 32 preliminary hearing may not be circumvented by ordering a pretrial deposition. The JSC has adopted this proposal in part and proposed additional amendments to RCM 702 to implement Section 532 of the FY15 NDAA as follows:

- **R.C.M. 702(a) is amended to read as follows:**

"(a) *In general*. A deposition may be ordered whenever, after preferral of charges, due to exceptional circumstances of the case it is in the interest of justice that the testimony of a prospective witness be taken and preserved for use at a preliminary hearing under Article 32 or a court-martial. A victim's declination to testify at a preliminary hearing or a victim's declination to submit to pretrial interviews shall not, by themselves, be considered exceptional circumstances. In accordance with subsection (b) of this rule below, the convening authority or military judge may order a deposition of a victim only if it is determined, by a preponderance of the evidence, that the victim will not be available to testify at court-martial."

- **R.C.M. 702(c)(2) is amended to read as follows:**

"(2) *Contents of request*. A request for a deposition shall include:

(A) The name and address of the person whose deposition is requested, or, if the name of the person is unknown, a description of the office or position of the person;

(B) A statement of the matters on which the person is to be examined; and

(C) Whether an oral or written deposition is requested."

- **R.C.M. 702(c)(3)(A) is amended to read as follows:**

"(A) Upon receipt of a request for a deposition, the convening authority or military judge shall determine whether the requesting party has shown, by a preponderance of the evidence, that due to exceptional circumstances and in the interest of justice, the testimony of the prospective witness must be taken and preserved for use at a preliminary hearing under Article 32 or court-martial."

- **R.C.M. 702(d)(1) is amended to read as follows:**

"(1) *Detail of deposition officer*. When a request for a deposition is approved, the convening authority shall detail a judge advocate certified under Art. 27(b) to serve as deposition officer. When the appointment of a judge advocate as deposition officer is not practicable, the convening authority may detail an impartial commissioned officer or appropriate civil officer authorized to administer oaths, not the accuser, to serve as deposition officer. If the deposition officer is not a judge advocate, an impartial judge advocate certified under Art. 27(b) shall be made available to provide legal advice to the deposition officer."

c. Several comments recommended changes to the new proposed RCM 1001A, indicating that victims should have the right to testify under oath or allocute in an unsworn statement. The JSC adopted these proposals in part as follows:

- **A new rule, R.C.M.1001A, is inserted to read as follows:**

"**Rule 1001A. Crime victims and presentencing**

(a) *In general.* A crime victim of an offense of which the accused has been found guilty has the right to be reasonably heard at a sentencing hearing relating to that offense. A victim under this rule is not considered a witness for purposes of Article 42(b). Trial counsel shall ensure the victim is aware of the opportunity to exercise that right. If the victim exercises the right to be reasonably heard, the victim shall be called by the court. This right is independent of whether the victim testified during findings or is called to testify under R.C.M. 1001.

(b) *Definitions.*

(1) *Crime victim.* For purposes of this rule, a "crime victim" is an individual who has suffered direct physical, emotional, or pecuniary harm as a result of the commission of an offense of which the accused was found guilty.

(2) *Victim Impact*. For the purposes of this rule "victim impact" includes any financial, social, psychological, or medical impact on the victim directly relating to or arising from the offense of which the accused has been found guilty.

(3) *Mitigation*. For the purposes of this rule "mitigation" includes a matter to lessen the punishment to be adjudged by the court-martial or to furnish grounds for a recommendation of clemency.

(4) *Right to be reasonably heard.*

(A) *Capital cases*. In capital cases, for purposes of this rule the "right to be reasonably heard" means the right to make a sworn statement.

(B) *Non-capital cases*. In non-capital cases, for purposes of this rule the "right to be reasonably heard" means the right to make a sworn or unsworn statement.

(c) *Content of statement*. The content of statements made under subsections (d) and (e) of this rule may include victim impact or matters in mitigation.

(d) *Sworn statement*. The victim may give a sworn statement under this rule and shall be subject to cross-examination concerning it by the trial counsel or defense counsel or examination on it by the court-martial, or all or any of the three. When a victim is under 18 years of age, incompetent, incapacitated, or deceased, the sworn statement may be made by the victim's designee appointed under R.C.M. 801(a)(6). Additionally, a victim under 18 years of age may elect to make a sworn statement.

(e) *Unsworn statement.* The victim may make an unsworn statement and may not be cross-examined by the trial counsel or defense counsel upon it or examined upon it by the court-martial. The prosecution or defense may, however, rebut any statements of facts therein. The unsworn statement may be oral, written, or both. When a victim is under 18 years of age, incompetent, incapacitated, or deceased, the unsworn statement may be made by the victim's designee appointed under R.C.M. 801(a)(6). Additionally, a victim under 18 years of age may elect to make an unsworn statement.

(1) *Procedure for presenting unsworn statement*. After the announcement of findings, a victim who would like to present an unsworn statement shall provide a copy to the trial counsel, defense counsel, and military judge. The military judge may waive this requirement for good cause shown.

(2) Upon good cause shown, the military judge may permit the victim's counsel to deliver all or part of the victim's unsworn statement.

d. The JSC has proposed an amendment to MRE 404(2)(A) to implement Section 536 of the FY15 NDAA as follows:

- **Mil. R. Evid. 404(a)(2)(A) is amended to read as follows:**

"(A) The accused may offer evidence of the accused's pertinent trait, and if the evidence is admitted, the prosecution may offer evidence to rebut it. General military character is not a pertinent trait for the purposes of showing the probability of innocence of the accused for the following offenses under the UCMJ:

(i) Articles 120-123a;

(ii) Articles 125-127;

(iii) Articles 129-132;

(iv) Any other offense in which evidence of general military character of the accused is not relevant to any element of an offense for which the accused has been charged; or

(v) An attempt or conspiracy to commit one of the above offenses."

e. Several comments recommended changes to MREs 412, 513, and 514. Several comments recommended modifying MRE 513(e)(2) to allow for a patient's counsel to motion the military judge for a closed hearing. Several comments recommended deleting language stating that the opportunity to attend and be heard at MRE 513 hearings is "at the patient's own expense." The JSC has adopted these proposals in part and proposed additional amendments to MREs 412, 513, and 514 to implement Sections 534 and 537 of the FY15 NDAA as follows:

- **Mil. R. Evid. 412(c)(2) is amended to read as follows:**

"(2) Before admitting evidence under this rule, the military judge must conduct a hearing, which shall be closed. At this hearing, the parties may call witnesses, including the alleged victim, and offer relevant evidence. The alleged victim must be afforded a

reasonable opportunity to attend and be heard. However, the hearing may not be unduly delayed for this purpose. The right to be heard under this rule includes the right to be heard through counsel, including victims' counsel under section 1044e of title 10, United States Code. In a case before a court-martial comprised of a military judge and members, the military judge shall conduct the hearing outside the presence of the members pursuant to Article 39(a). The motion, related papers, and the record of the hearing must be sealed in accordance with R.C.M. 1103A and remain under seal unless the military judge or an appellate court orders otherwise."

- **Mil. R. Evid. 513(b)(2) is amended to read as follows:**

"(2) "Psychotherapist" means a psychiatrist, clinical psychologist, clinical social worker, or other mental health professional who is licensed in any State, territory, possession, the District of Columbia or Puerto Rico to perform professional services as such, or who holds credentials to provide such services as such, or who holds credentials to provide such services from any military health care facility, or is a person reasonably believed by the patient to have such license or credentials."

- **Mil. R. Evid. 513(d)(8) is deleted.**

- **Mil. R. Evid. 513(e)(2) is amended to read as follows:**

"(2) Before ordering the production or admission of evidence of a patient's records or communication, the military judge must conduct a hearing, which shall be closed. At the hearing, the parties may call witnesses, including the patient, and offer other relevant evidence. The patient must be afforded a reasonable opportunity to attend the hearing and be heard. However, the hearing may not be unduly delayed for this purpose. The right to be heard under this rule includes the right to be heard through counsel, including

victims' counsel under section 1044e of title 10, United States Code. In a case before a court-martial comprised of a military judge and members, the military judge must conduct the hearing outside the presence of the members."

- **Mil. R. Evid. 513(e)(3) is amended to read as follows:**

"(3) The military judge may examine the evidence or a proffer thereof in camera, if such examination is necessary to rule on the production or admissibility of protected records or communications. Prior to conducting an in camera review, the military judge must find by a preponderance of the evidence that the moving party:

(A) showed a specific factual basis demonstrating a reasonable likelihood that the records or communications would yield evidence admissible under an exception to the privilege;

(B) that the requested information meets one of the enumerated exceptions under subsection (d) of this rule;

(C) that the information sought is not merely cumulative of other information available; and

(D) that the party made reasonable efforts to obtain the same or substantially similar information through non-privileged sources."

- **Mil. R. Evid. 513(e)(4) is inserted following Mil. R. Evid. 513(e)(3) to read as follows:**

"(4) Any production or disclosure permitted by the military judge under this rule must be narrowly tailored to only the specific records or communications, or portions of such records or communications, that meet the requirements for one of the enumerated exceptions to the privilege under subsection (d) above and are included in the stated

purpose for which the records or communications are sought under subsection (e)(1)(A) above."

- **Mil. R. Evid. 513(e)(4) is renumbered as Mil. R. Evid. 513(e)(5).**
- **Mil. R. Evid. 513(e)(5) is renumbered as Mil. R. Evid. 513(e)(6).**
- **The title of Mil. R. Evid. 514 is amended to read as follows:**

"Victim advocate-victim and Department of Defense Safe Helpline staff-victim privilege."

- **Mil. R. Evid. 514(a) is amended to read as follows:**

"(a) *General Rule*. A victim has a privilege to refuse to disclose and to prevent any other person from disclosing a confidential communication made between the alleged victim and a victim advocate or between the alleged victim and Department of Defense Safe Helpline staff, in a case arising under the UCMJ, if such communication was made for the purpose of facilitating advice or assistance to the alleged victim."

- **Mil. R. Evid. 514(b)(3)-(5) is amended to read as follows**

"(3) "Department of Defense Safe Helpline staff" is a person who is designated by competent authority in writing as Department of Defense Safe Helpline staff.

(4) A communication is "confidential" if made in the course of the victim advocate-victim relationship or Department of Defense Safe Helpline staff-victim relationship and not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of advice or assistance to the alleged victim or those reasonably necessary for such transmission of the communication.

(5) "Evidence of a victim's records or communications" means testimony of a victim advocate or Department of Defense Safe Helpline staff, or records that pertain to

communications by a victim to a victim advocate or Department of Defense Safe Helpline staff, for the purposes of advising or providing assistance to the victim."

- **Mil. R. Evid. 514(c) is amended to read as follows:**

"(c) *Who May Claim the Privilege*. The privilege may be claimed by the victim or the guardian or conservator of the victim. A person who may claim the privilege may authorize trial counsel or a counsel representing the victim to claim the privilege on his or her behalf. The victim advocate or Department of Defense Safe Helpline staff who received the communication may claim the privilege on behalf of the victim. The authority of such a victim advocate, Department of Defense Safe Helpline staff, guardian, conservator, or a counsel representing the victim to so assert the privilege is presumed in the absence of evidence to the contrary."

- **Mil. R. Evid. 514(d)(2)-(4) is amended to read as follows:**

"(2) When federal law, state law, Department of Defense regulation, or service regulation imposes a duty to report information contained in a communication;

(3) When a victim advocate or Department of Defense Safe Helpline staff believes that a victim's mental or emotional condition makes the victim a danger to any person, including the victim;

(4) If the communication clearly contemplated the future commission of a fraud or crime, or if the services of the victim advocate or Department of Defense Safe Helpline staff are sought or obtained to enable or aid anyone to commit or plan to commit what the victim knew or reasonably should have known to be a crime or fraud;"

- **Mil. R. Evid. 514(e)(2) is amended to read as follows:**

"(2) Before ordering the production or admission of evidence of a victim's records or communication, the military judge must conduct a hearing, which shall be closed. At the hearing, the parties may call witnesses, including the victim, and offer other relevant evidence. The victim must be afforded a reasonable opportunity to attend the hearing and be heard. However, the hearing may not be unduly delayed for this purpose. The right to be heard under this rule includes the right to be heard through counsel, including victims' counsel under section 1044e of title 10, United States Code. In a case before a court-martial composed of a military judge and members, the military judge must conduct the hearing outside the presence of the members."

- **Mil. R. Evid. 514(e)(3) is amended to read as follows:**

"(3) The military judge may examine the evidence or a proffer thereof in camera, if such examination is necessary to rule on the production or admissibility of protected records or communications. Prior to conducting an in camera review, the military judge must find by a preponderance of the evidence that the moving party:

(A) showed a specific factual basis demonstrating a reasonable likelihood that the records or communications would yield evidence admissible under an exception to the privilege;

(B) that the requested information meets one of the enumerated exceptions under subsection (d) of this rule;

(C) that the information sought is not merely cumulative of other information available; and

(D) that the party made reasonable efforts to obtain the same or substantially similar information through non-privileged sources."

- **Mil. R. Evid. 514(e)(4) is inserted following Mil. R. Evid. 514(e)(3) to read as follows:**

"(4) Any production or disclosure permitted by the military judge under this rule must be narrowly tailored to only the specific records or communications, or portions of such records or communications, that meet the requirements for one of the enumerated exceptions to the privilege under subsection (d) above and are included in the stated purpose for which the records or communications are sought under subsection (e)(1)(A) above."

- **Mil. R. Evid. 514(e)(4) is renumbered as Mil. R. Evid. 514(e)(5).**
- **Mil. R. Evid. 514(e)(5) is renumbered as Mil. R. Evid. 514(e)(6).**

f. Comments making typographical corrections were received and those corrections were made.

g. Comments were received suggesting additional amendments to RCM 104, 105, 404A, RCM 405, 801 1103A and MREs 412 and 513. These suggested changes were not incorporated. Several suggested changes to the MCM as well as recommended legislative changes to UCMJ articles were not contemplated in the proposals currently under review. Those suggestions will be considered in the course of the 2015 annual review of the MCM, which is required by DoD Directive 5500.17.

Dated: January 30, 2015.

Aaron Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

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