**USALSA Report**

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*Trial Judiciary Note*

**A View from the Bench: M.R.E. 412 Hearings: “The Right to be Heard” v. Herding Cats**

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**Introduction**

To say that there has been an increase in sexual assault prosecutions in Army Courts-Martial is a significant understatement.[[1]](#footnote-2) Given the dramatic rise in sexual assault cases, there has naturally been a corresponding uptick in the number of Military Rule of Evidence (M.R.E.) 412 hearings, in which the defense or the government seek to introduce evidence covered by M.R.E. 412. The results of these M.R.E. 412 hearings often become lynchpins of the trial. As a result, it is vital that trial counsel, defense counsel, and now Special Victims Counsel (SVC) learn the nuances of both the substance and procedure of the Rule. Additionally, the SVC’s practical involvement in the proceedings is a matter of first impression for many participants. Accordingly, this article seeks to provide an analytical roadmap for counsel navigating critical M.R.E. 412 issues, especially for newly appointed SVCs that may be experiencing their first foray into a court-martial.

**Is the Evidence Covered by M.R.E. 412?**

The first question to ask is whether the evidence is covered by M.R.E. 412. M.R.E. 412(a) states that:

The following evidence is not admissible in any proceeding involving an alleged sexual offense… (1) Evidence offered to prove that any alleged victim engaged in other sexual behavior. (2) Evidence offered to prove any alleged victim’s sexual predisposition.[[2]](#footnote-3)

*Is evidence offered to prove victim engaged in other sexual behavior?*

M.R.E. 412(d) describes “sexual behavior” to include

“any sexual behavior not encompassed by the alleged offense.”[[3]](#footnote-4) Generally, any form of intimate contact qualifies, such as kissing, sexual touching, grinding, or massages. Intimate conversations may also fall into this category although speech may also be categorized as evidence of sexual predisposition. However, as evidence of these conversations often comes in the form of social media and can include graphic descriptions and pictures, it may be hard to separate the conversations from the behavior it describes.

*Is evidence offered to prove victim’s sexual predisposition?*

M.R.E. 412(d) defines “sexual predisposition” as

referring to the victim’s “mode of dress, speech, or lifestyle that does not directly refer to sexual activities or thoughts but that may have a sexual connotation to the factfinder.”[[4]](#footnote-5)

There may be a significant generation gap between today’s Soldiers and military judges and panels on what amounts to a “sexual connotation.” Soldiers often view some sexual activity the same way the fact finders may view a handshake. This becomes important when ascertaining whether an alleged victim’s mode of dress, speech, or lifestyle has a sexual connotation. An alleged victim may wear something or say something that to an older generation would clearly signify a willingness to participate in sexual activity, but not have intended any such thing. Counsel need to be prepared to address this generational gap when addressing this objective standard.

If such evidence of sexual behavior or predisposition is admissible, it is typically only admissible through specific instances of conduct known to the accused, not as reputation or opinion evidence. The accused might argue that such reputation or opinion evidence is constitutionally required,[[5]](#footnote-6) perhaps to demonstrate a mistake of fact as to consent,[[6]](#footnote-7) but such an interpretation would be an exception that could swallow the rule.

**Does an M.R.E. 412 Exception Apply?**

Presuming the evidence being offered falls under the general M.R.E. 412 prohibition, the proponent will attempt to fit the evidence into one of three exceptions. M.R.E. 412(b)(1) lists the following exceptions:

(A) evidence of specific instances of sexual behavior by the alleged victim offered to prove that a person other than the accused was the source of semen, injury, or other physical evidence; (B) evidence of specific instances of sexual behavior by the alleged victim with respect to the person accused of the sexual misconduct offered by the accused to prove consent or by the prosecution; and (C) evidence the exclusion of which would violate the constitutional rights of the accused.[[7]](#footnote-8)

*Is evidence offered to prove an alternate source of injury or physical evidence?*

This is probably the most straightforward and common sense exception to the rule. If the government alleges that the victim was injured during the sexual assault, for example a tear or abrasion in her vagina, and the defense can offer evidence that she had sexual intercourse with her boyfriend the night before the alleged assault, then that evidence can be admitted to show that it is possible that someone besides the accused caused the injury. Similarly, if someone else’s DNA is found on the alleged victim’s body, the defense will want to introduce that evidence, and how and why it was present on the victim, to cast doubt on whether an assault occurred or if the perpetrator was the accused.

*Is the evidence prior behavior with the accused offered to prove consent or by the prosecution?*

This exception is most often cited in “acquaintance rape” or “date rape” situations where there was some type of pre-existing relationship between the alleged victim and the accused. Often, there will be a prior sexual relationship between the two parties. Generally, the more often and more recent the prior sexual activity between the parties occurred, the more likely it is that the defense can claim that activity evidences consent, or a mistake of fact on the part of the accused. However, the circumstances of the prior sexual encounters in comparison with the alleged assault may be telling in determining if the prior incidents indicated consent, or could have led the accused to be mistaken about the victim’s consent. The prosecution might invoke this exception to show that the circumstances of the prior sexual acts are so disparate from the facts of the alleged offense that they indicate the offense was not consensual or the accused could not have been mistaken about the victim’s consent.

*Is the evidence constitutionally required?*

The final exception pertains to evidence which, if excluded, would violate the constitutional rights of the accused. The most common example is evidence of bias or a motive to fabricate. Such evidence is always relevant and never collateral.[[8]](#footnote-9) To exclude it because it is evidence of other sexual behavior or sexual disposition of the victim would violate the accused’s fundamental right to a fair trial. A very common example is the existence of a relationship. If the alleged victim is in a relationship, especially a monogamous relationship, she has a clear motive to assert that the sexual conduct with the accused was nonconsensual. To admit she consented to the sexual activity would threaten her relationship. That is not to say that it is always necessary to introduce evidence that the relationship was sexual in nature. Especially in light of evolving mores about casual sex, a romantic interest in another individual is likely to be an even stronger motivation to lie than a sexual relationship, such that evidence of sexual activity may not be required to be introduced.

**Is the Evidence Relevant, Material, and Favorable?**

Even if an M.R.E. 412 exception applies, the proponent must show that the evidence is relevant.[[9]](#footnote-10) Relevant evidence is evidence that “has any tendency to make a fact more or less probable than it would be without the evidence, and … the fact is of consequence in determining the action.”[[10]](#footnote-11)

Additionally, the consent and constitutionally required exceptions require the evidence to be material and favorable.[[11]](#footnote-12) Whether evidence is material is a “multi-factored test” looking at “the importance of the issue for which the evidence was offered in relation to the other issues in the case; the extent to which the issue is in dispute; and the nature of the other evidence in the case pertaining to that issue.”[[12]](#footnote-13) “Favorable (or ‘vital’) to the defense” refers to a defense theory of the case.[[13]](#footnote-14)

**Is the Probative Value Substantially Outweighed by a Danger of Unfair Prejudice?**

If evidence is relevant, and material and favorable if required, it still must be shown that the probative value of the evidence outweighs the danger of unfair prejudice.[[14]](#footnote-15) The balancing test used is found in M.R.E. 403 (“The military judge may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the members, undue delay, wasting time, or needlessly presenting cumulative evidence.”).[[15]](#footnote-16) In conducting this balancing test, an alleged victim’s privacy interestalone cannot preclude evidence “the exclusion of which would violate the constitutional rights of the accused.”[[16]](#footnote-17) “If after application of M.R.E. 403 factors the military judge determines that the probative value of the proffered evidence outweighs the danger of unfair prejudice, it is admissible no matter how embarrassing it might be to the alleged victim.”[[17]](#footnote-18)

**Additional Considerations**

*Mechanics of the Hearing*

M.R.E. 412(c)(2) imposes four basic procedural requirements for M.R.E. 412 evidence.[[18]](#footnote-19) First, the moving party must provide written notice to the court, opposing counsel, and the alleged victim or their representative at least 5 days prior to entry of pleas. Second, the hearing on the M.R.E. 412 motion must be closed to spectators. Third, the victim must be afforded a reasonable opportunity to attend and be heard, which will be discussed *infra*. Finally, the record of the hearing, and all related papers, must be sealed.

*The victim’s right to be heard*

The 2013 CAAF decision of LRM v Kastenberg[[19]](#footnote-20) resulted in a cottage industry in the military legal community, the development of the Special Victim Counsel (SVC) position. This new era dawned in the Army with the publication of a TJAG Sends, an OTJAG Policy Memorandum, and a Special Victim Counsel Handbook, all within three weeks of one another.[[20]](#footnote-21) Before the year was out, dozens of SVCs had been trained, certified, and began making their presence known in Army Courts-Martial. While the ideal SVC should have court-martial experience, early indications are that many SVCs may be first-time trial participants.[[21]](#footnote-22)

The most important point to take from the *Kastenberg* opinion is that the SVC’s ability to advocate on behalf of their client is limited to the victim’s opportunity to be heard as authorized within the Manual for Courts-Martial; for example, in evidentiary hearings under M.R.E. 412, 513, and 514. Thus, the Army’s SVC handbook acknowledges that the victim’s standing in court-martial proceedings is not increased “beyond the standing victims are currently afforded under existing law and rules.”[[22]](#footnote-23) Furthermore, whether represented by counsel or not, victims “are not parties to a court-martial under Rules for Courts-Martial 103 and do not have the same entitlements as parties under the UCMJ.”[[23]](#footnote-24)

Practically, the introduction of another attorney into court-martial proceedings has required military judges to establish parameters for the SVC, who, as noted, may not have any court-martial experience. First, Army Rules of Court require the government to notify the court when the victim is represented. Second, the SVC’s information is included on the docket request.[[24]](#footnote-25) Given that the SVC generally works in Legal Assistance, it should not prove any more difficult to docket motions hearings or trials with the extra attorney involved, as court proceedings take precedence over their normal duties. Once trial dates have been docketed, it may be helpful to include the SVC in the R.C.M. 802 conference, or at least that portion of the conference that deals with the matters relevant to the SVC, although R.C.M. 802 applies only to parties and SVCs are not parties. At this time, the judge may establish how and when the SVC will address the court during the hearing. A chief concern for the trial judge is that the SVC does not disrupt the proceedings, which is especially true in a trial with members. While the judge will try to resolve all issues in an Article 39(a) pre-trial hearing, occasionally an M.R.E. 412 issue will resurface in trial, perhaps due to unexpected testimony, inartful questioning, or both. In such cases, the parties may wish to request an Article 39(a) session on the M.R.E. 412 issue, at which point the victim has a renewed right to be heard.

This becomes more problematic if the parties do not request an Article 39(a) session during trial, but the victim, through their SVC, wants to be heard on a perceived violation of the judge’s pre-trial ruling on the M.R.E. 412 matters. The victim at that point arguably has the right to be heard, but how does the SVC make that request known to the military judge from his position in the gallery without causing a disturbance? A logical methodology, particularly in panel cases, might be for the military judge to assign the SVC some “base runner’s signal” to let the judge know when the SVC wishes to address the issue (such as, stand until eye contact is made with the military judge, at which point the SVC resumes his seat and the judge calls for an Article 39(a) session). Generally, a victim’s interests may align with the government; in those instances and the government will simultaneously object, making the SVC’s actions moot, but that will not always be the case. When called upon, the SVC may reasonably be expected to pass the bar and speak from the counsel podium.

This may be the case during the pre-trial hearing as well, where MRE 412(c)(2) allows the victim to be heard, typically after the parties (which may in turn permit the parties a brief rebuttal). The *Kastenberg* opinion indicates that a reasonable opportunity to be heard “includes the right to present facts;”[[25]](#footnote-26) however, the scope of that right, including the ability of SVC to call witnesses has not been clarified. And while a victim may soon not be required to testify under the new Article 32 preliminary hearing,[[26]](#footnote-27) he or she does not have the right to refuse to be a witness at an M.R.E. 412 hearing. If called as a witness by either party in the M.R.E. 412 hearing, he or she is required to testify in the closed session of court or the court may continue or abate the proceedings.[[27]](#footnote-28)

**Conclusion**

As noted at the outset, with the proliferation of sexual assault prosecutions in the military, M.R.E. 412 hearings have become a ubiquitous part of most courts-martial. The outcome of these hearings often directly correlates to the outcome of the trial. As such, effective advocacy in M.R.E. 412 hearings is critical, be it by the government, the defense, or the Special Victim Counsel. Never has the victim’s right to be heard been more scrutinized, argued, or enforced. While some may feel the M.R.E. 412 hearing has become an exercise in herding cats, safeguarding the constitutional rights of the accused while simultaneously honoring the victim’s right to be heard has never been more challenging, or more important.

1. \* Judge Advocate, U.S. Army. This article was written while assigned as Circuit Judge, Fort Bliss, Texas, Fourth Judicial Circuit, U.S. Army Legal Services Agency. The author expresses appreciation to COL David Conn and LTC Douglas Watkins for their assistance.

   Anecdotally, the author notes that as a Military Judge in 2008-2009, only 6 of his first 50 cases involved Soldier on Soldier sexual assaults. In 2012-2013, 16 of his first 50 cases met such criteria, which is roughly an increase from 1 in 8 cases to 1 in 3. [↑](#footnote-ref-2)
2. Manual for Courts-Martial, United States, Mil. R. Evid. 412(a) (2012) [hereinafter MCM]. [↑](#footnote-ref-3)
3. MCM, *supra* note 2, Mil. R. Evid. 412(d). [↑](#footnote-ref-4)
4. *Id.* [↑](#footnote-ref-5)
5. United States v. Hollimon, 16 M.J. 164 (C.M.A. 1983). [↑](#footnote-ref-6)
6. United States v. Elvine, 16 M.J. 14, at 19 (C.M.A. 1983). [↑](#footnote-ref-7)
7. MCM, *supra* note 2, Mil. R. Evid. 412(b)(1). [↑](#footnote-ref-8)
8. MCM, *supra* note 2, Mil. R. Evid. 608(c). Notwithstanding, the military judge retains wide latitude to place reasonable limits on the scope of cross-examination and other evidence of bias and motive to fabricate, in light of competing interests under M.R.E. 403 and 412. See Delaware v. VanArsdall, 475 U.S.673, 679 (1986). [↑](#footnote-ref-9)
9. MCM, *supra* note 2, Mil. R. Evid. 412(c)(3). [↑](#footnote-ref-10)
10. MCM, *supra* note 2, Mil. R. Evid. 401. [↑](#footnote-ref-11)
11. United States v. Kelly,33 M.J. 878 (A.C.M.R. 1991); United States v. Banker,60 M.J. 216 (2004)(partially abrogated for other reasons by United States v. Gaddis*,* 70 M.J. 248 (2011). [↑](#footnote-ref-12)
12. United States v. Ellerbrock, 70 M.J. 314, 319 (2011)(quoting *Banker, supra* note 8*,* at 222). [↑](#footnote-ref-13)
13. United States v. Dorsey*,* 16 M.J. 1, 8 (C.M.A. 1983). [↑](#footnote-ref-14)
14. MCM, *supra* note 2, Mil. R. Evid. 412(c)(3). [↑](#footnote-ref-15)
15. MCM, *supra* note 2, Mil. R. Evid. 403. [↑](#footnote-ref-16)
16. Gaddis*, supra* note 8,at 253. [↑](#footnote-ref-17)
17. *Id.* at 256. [↑](#footnote-ref-18)
18. MCM, *supra* note 2, Mil. R. Evid. 412(c)(2). [↑](#footnote-ref-19)
19. LRM v. Kastenberg, 72 M.J. 364 (2013). [↑](#footnote-ref-20)
20. TJAG Sends, Volume 39-02, dated 15 October 2013; OTJAG Policy Memorandum #14-01, Special Victim Counsel, dated 1 November 2013; Special Victim Counsel Handbook, dated 1 November 2013. [↑](#footnote-ref-21)
21. Of the 5 SVCs this author has worked with in the first 4 months of the program’s implementation, none have prior court-martial experience. [↑](#footnote-ref-22)
22. SVC Handbook, *supra* note 19, at 1. When petitioning the court, SVCs should always be prepared to provide legal authority for their request. [↑](#footnote-ref-23)
23. *Id.* [↑](#footnote-ref-24)
24. *See* U.S. Army Trial Judiciary Rule of Court 2.3 (1 November 2013) and Appendix A. [↑](#footnote-ref-25)
25. LRM v. Kastenberg, *supra* note 18. [↑](#footnote-ref-26)
26. 2014 National Defense Authorization Act, Section 1702. [↑](#footnote-ref-27)
27. MCM, *supra* note 2, Rule for Court-martial 703. [↑](#footnote-ref-28)