

23. (ALL) What privacy protections are available for a victim at an Article 32 hearing?

DOD	<p>DOD OGC:          Military Rule of Evidence 412 (the rape shield rule) and the Military Rules of Evidence establishing privileges, including the psychotherapist-patient privilege under Rule 513 and the victim advocate-victim privilege under Rule 514, apply at Article 32 hearings. See R.C.M. 405(i); Mil. R. Evid. 1101(d). An Article 32 investigation hearing may be closed based on a “case-by-case, witness-by-witness, and circumstance-by-circumstance” determination that closure “is necessary to protect the welfare of a victim or alleged victim of sexual assault.” ABC v. Powell, 47 M.J. 363, 365 (C.A.A.F. 1997). The investigating officer also retains inherent authority to protect witnesses, including victims, from abusive questioning. See R.C.M. 405(i) discussion (“The investigating officer shall exercise reasonable control over the scope of the inquiry.”). The Department of Defense’s Joint Service Committee has also studied how to enhance application of the military’s rape shield rule (Military Rule of Evidence 412) at Article 32 hearings and has suggested an amendment to the Manual for Courts-Martial to accomplish that goal. See, e.g., Notice of Proposed Amendments to the Manual for Courts-Martial, United States (2012 ed.), 72 Fed. Reg. 64854 (Oct. 23, 2012); Notice of Response to Public Comments on Proposed Amendments to the Manual for Courts-Martial, United States (2012 ed.), 78 Fed. Reg. 14271 (March 5, 2013).</p>
CJCS	<p>All military rules of evidence associated with privacy apply to Article 32 hearings, including privileges and Military Rule of Evidence 412, our version of rape shield protection. There is currently a revision awaiting presidential signature that would clarify the application of MRE 412 to Article 32s.</p>
USA	<p>Currently, if the victim of an offense under investigation is a civilian, he or she may not be compelled to appear and testify at an Article 32, UCMJ, investigation as there is no subpoena mechanism available to the prosecution in military pretrial investigations with a view to courts-martial. Service members who are victims of criminal offenses under investigation pursuant to Article 32, UCMJ, may be compelled to attend only if reasonably available at the time of the investigation within the meaning of the rules and procedures for Article 32 investigations; otherwise a substitute for their testimony may be considered by the investigating officer.</p> <p>Currently, all victims, regardless of status, are protected by the military rape shield law incorporated in Military Rule Evidence (MRE) 412 which is largely based on Federal Rule Evidence 412. Rule for Courts-Martial 405, Pretrial Investigation, was amended in 1993 to specifically apply the rape shield protection found in MRE 412 to Article 32, UCMJ, investigations. This means that a victim’s prior sexual behavior or predisposition is not admissible at that pretrial hearing. Additionally, MRE 412(b) sets forth three very specific, limited exceptions to admitting this kind of evidence, however, only a military judge can conduct the necessary balancing test in an in camera hearing to determine that evidence’s admissibility. Article 32,</p>

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	<p>UCMJ, investigating officers are generally not military judges and, as such, do not attempt to apply one of the exceptions at the Article 32 investigation. Such litigation should be reserved for a subsequent Article 39a, UCMJ, pretrial hearing before a military judge after arraignment to determine the relevance and admissibility of such proffered evidence.</p> <p>Military Rule of Evidence 303, Degrading Question, also currently applies at the Article 32, UCMJ, investigations and prevents any of party at the hearing from asking witnesses, including victim-witnesses, degrading questions which are intended to humiliate, harass, or intimidate the witness. Additionally, the Article 32 investigating officer or the commander who appointed that officer, may close a hearing to the public in the event that either or both determine that there is an overriding interest in doing so. Such an overriding interest may include “preventing psychological harm or trauma to a child witness or an alleged victim of sexual crime...”</p> <p>Pursuant to the Secretary of Defense’s directive issued in August 2013, victims may now have a Special Victim Counsel (SVC) to assist the victim at an Article 32, UCMJ, investigation.</p>
USAF	<p>Under the current procedural rules for Article 32 hearings (RCM 405), evidence generally may be considered by the investigating officer (IO) so long as it is relevant and reasonably available. There are a handful of exceptions to this general rule enumerated in RCM 405(i). Evidence may be excluded from consideration if it is covered by the following MREs:</p> <ol style="list-style-type: none"> <li>1) 301 – Right against self-incrimination</li> <li>2) 302 – Evidence discovered during a mental health evaluation of the accused</li> <li>3) 303 – Degrading questions</li> <li>4) 412 – Victim’s sexual behavior or sexual predisposition</li> <li>5) §5 – Privileged Communications a) 502 – Lawyer-client</li> <li>b) 503 – Clergy</li> <li>c) 504 – Husband-wife</li> <li>d) 505 – Classified information e) 513 – Psychotherapist-patient</li> <li>f) 514 – Victim advocate-victim</li> </ol> <p>As this pertains to civilian witnesses (RCM 405(g)(2)(B)), since the IO does not have the authority to subpoena civilian witnesses, they can only be invited to testify at the hearing. Therefore, a civilian victim may choose not to testify. Likewise, even if the victim chooses to testify, he or she may refuse to answer any question. If so, he or she is not reasonably available for the purposes of the Article 32 hearing.</p> <p>Lastly, in the Air Force, victims of sexual assault are entitled to be represented by victims’ counsel at an Article 32 hearing. SVCs assist sexual assault victims in asserting their privacy rights during the hearing.</p>
USN	<p>Military Rule of Evidence 412 prohibits any party from introducing evidence in any proceeding involving an alleged sexual offense that is offered to prove an</p>

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	<p>alleged victim engaged in other sexual behavior or to prove an alleged victim's sexual predisposition.</p> <p>Likewise, Military Rule of Evidence 303 prohibits parties from asking degrading questions, providing that "[n]o person may be compelled to make a statement or produce evidence before any military tribunal if the statement or evidence is not material to the issue and may tend to degrade that person."</p> <p>Pursuant to Rule for Courts-Martial (RCM) 405(h)(3), the commander who directed the investigation or the investigating officer may restrict or close all or part of the hearing with the understanding that Article 32 hearings are public hearings and should remain open to the public when possible. In making their determination, the commander or investigating officer should consider whether an overriding interest exists that outweighs the value of an open investigation. If an overriding interest exists, they can close it to spectators; however, any closure must be narrowly tailored to achieve the overriding interest that justified the closure. Factors to consider include, preventing psychological harm or trauma to a child witness or an alleged victim of a sexual crime, protecting the safety of a witness or alleged victim, protecting classified material, and receiving evidence where a witness is incapable of testifying in an open setting.</p> <p>Section 0143 of the Manual of the Judge Advocate General further addresses the issue of spectators at a proceeding. Specifically, it states that RCM 806(b)(2) applies not only to courts-martial, but also, to Article 32 hearings. RCM 806(b)(2), which addresses closure at courts-martial, is consistent with R.C.M. 405(h)(3), and states that "the hearing should be open to the public unless (1) there is a substantial probability that an overriding interest will be prejudiced if the proceedings remain open; (2) closure is no broader than necessary to protect the overriding interest; (3) reasonable alternatives to closure were considered and found inadequate; and (4) the case-specific findings on the record justify the closure."</p> <p>Finally, certain communications made by a victim to his or her victim advocate, victim legal counsel, or mental health provider may be privileged and protected under Military Rules of Evidence 514, 502 and 513 respectively.</p>
USMC	<p>The rules for Article 32 Investigations flow from three major sources: (1) the statute itself, (2) Rules for Court Martial (RCM) 405, and (3) case law. The purposes of an Article 32 Investigation are specifically set out in R.C.M. 405(a) discussion and R.C.M. 405(e). Currently, there are four generally recognized purposes: (1) to inquire into the truth of the matter alleged in the charges, (2) to consider the form of the charges, (3) to make a recommendation as to disposition of the charges and (4) discovery.</p> <p>The Military Rules of Evidence (MRE) generally do not apply to Article 32 Investigations. However, MRE 301 (privilege concerning compulsory self-incrimination), MRE 302 (privilege concerning mental examination of an accused), MRE 303 (degrading questions), MRE 305 (warnings about rights), MRE 412 (sex</p>

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	<p>offense cases; relevance of victim’s sexual behavior or sexual predisposition – military’s equivalent of rape shield) and the rules of evidence regarding privileges (lawyer-client privilege, communications to clergy, psychotherapist-patient privilege, victim advocate-victim privilege to name a few) do apply.</p> <p>A victim’s rights in the military justice system are analogous to those in Federal Court under the Crime Victims’ Rights Act and are governed by regulation through the military’s Victim and Witness Assistance Program (VWAP). Furthermore, MRE 412 precludes questioning for the sole purposes of embarrassment or harassment of the alleged victim. MRE 412 was specifically modeled after Federal Rule of Evidence 412 and provides a similar level of protection. MRE 412 provides that a party intending to offer evidence of prior sexual behavior of a victim must file notice with the military judge (made applicable to the Article 32 Investigating Officer by RCM 405) and notify the alleged victim. In addition, prior to admitting evidence under MRE 412 the Investigating Officer must conduct a closed hearing. During this hearing the alleged victim must be afforded a reasonable opportunity to attend and be heard. The MRE 412 related papers must be sealed and remain under seal unless the court orders otherwise.</p> <p>Beginning November 1, 2013, the Marine Corps attained initial operating capability for its Victims Legal Counsel (VLC) program. The VLC program will be fully operational on January 14, 2014 and provides victims legal representation to further protect their privacy rights throughout the entire military justice process, including Article 32 Investigations. See the response to Question 4 for more information about the VLC program.</p>
USCG	<p>As a general matter, the Military Rules of Evidence do not apply at an Article 32. However, Rules 301, 302, 303, 305, 412, and Section V, do apply in pretrial hearing, several of which protect the victim's privacy.</p> <p>MRE 412, the "rape shield" rule, directly applies during an Article 32 investigation. MRE 412 is' designed to protect the victim's privacy and limiting the introduction of evidence of the victim's sexual history.</p> <p>MRE 303 provides that "No person may be compelled to make a statement or produce evidence before any military tribunal if the statement or evidence is not material to the issue and may tend to degrade that person." This rule, when properly administered, should protect victims from answering questions that are immaterial and/or used simply to humiliate.</p> <p>Military Rules of Evidence codify specific privileges, many deriving from the common law. These include a lawyer client privilege under MRE 502, a privilege for communications to clergy under MRE 503, a husband-wife privilege under MRE 504, psychotherapist-patient privilege under MRE 513, and more recently victim advocate-victim privilege under MRE 514.</p>

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	<p>Military case law recognizes that commanders and investigating officers have the authority to close Article 32 hearings under certain circumstances. RCM 405(h)(3) states: "Access by spectators to all or part of the [Article 32] proceedings may be restricted or foreclosed in the discretion of the commander who directed the investigation or the investigating officer." When closing an Article 32 hearing, commanders or investigating officers are required to balance safety and health of a victim or witness, as well as the Constitutional rights of the accused, the public, and the press.</p>
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