(6) An attempt or conspiracy to engage in conduct described in paragraphs (1)-(5).

(e) For purposes of this rule, the term *sexual act* means:

(1) Contact between the penis and the vulva or the penis and the anus, and for purposes of this rule contact involving the penis occurs upon penetration, however slight;

(2) Contact between the mouth and the penis, the mouth and the vulva, or the mouth and the anus;

(3) The penetration, however slight, of the anal or genital opening of another by hand or finger or by any object, with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person; or

(4) The intentional touching, not through the clothing, of the genitalia of another person who has not attained the age of 16 years with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person.

(f) For purposes of this rule, the term *sexual contact* means the intentional touching, either directly or through the clothing, of the genitalia, anus, groin, breast, inner thigh, or buttocks of any person with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person.

(g) For purpose of this rule, the term *sexually explicit conduct''* means actual or simulated:

(1) Sexual intercourse, including genital-genital, oral-genital, or oral-anal, whether between persons of the same or opposite sex;

(2) Bestiality;

(3) Masturbation;

(4) Sadistic or masochistic abuse; or

(5) Lascivious exhibition of the genitals or pubic area of any person.

(h) For purposes of this rule, the term "State" includes a State of the United States, the District of Columbia, Puerto Rico, Guam, the Virgin Islands, and any other territory or possession of the United States.

The proposed analysis for the Rules (Appendix 22, M.R.E.) is as follows:

Rule 413. Evidence of Similar Crimes in Sexual Assault Cases

1996 Amendment. This amendment is intended to provide for more liberal admissibility of character evidence in criminal cases of sexual assault where the accused has committed a prior act of sexual assault.

Rule 413 is nearly identical to its Federal Rule counterpart. A number of changes were made, however, to tailor the Rule to military practice. First, all references to Federal Rule 415 were deleted, as it applies only to civil proceedings. Second, military justice

terminology was substituted where appropriate (e.g. accused for defendant, court-martial for case). Third, the fiveday notice requirement in Rule 413(b) replaced a fifteen-day notice requirement in the Federal Rule. A fiveday requirement is better suited to military discovery practice. Fourth, Rule 413(d) has been modified to include violations of the Uniform Code of Military Justice. Also, the phrase "without consent" was added to Rule 413(d)(1) to specifically exclude the introduction of evidence concerning adultery or consensual sodomy. Last, all incorporation by way of reference was removed by adding subsections (e), (f), and (g). The definitions in those subsections were taken directly from title 18, United States Code §§ 2246(2), 2246(3), and 513(c)(5), respectively.

Although the Rule states that the evidence "is admissible," the drafters' intend that the courts apply Rule 403 balancing to such evidence. Apparently, this also was the intent of Congress. The legislative history reveals that "the general standards of the rules of evidence will continue to apply, including the restrictions on hearsay evidence and the court's authority under Evidence Rule 403 to exclude evidence whose probative value is substantially outweighed by its prejudicial effect." 156 F.R.D. 51 (1995) (Reprint of the Floor Statement of the Principal House Sponsor, Representative Susan Molinari, **Concerning the Prior Crimes Evidence** Rules for Sexual Assault and Child Molestation Cases).

When "weighing the probative value of such evidence, the court may, as part of its Rule 403 determination, consider proximity in time to the charged or predicate misconduct; similarity to the charged or predicate misconduct; frequency of the other acts; surrounding circumstances; relevant intervening events; and other relevant similarities or differences." 156 F.R.D. 51, 55 (1995) (Report of the Judicial Conference of the United States on the Admission of Character Evidence in Certain Sexual Midconduct Cases).

Rule 414. Evidence of Similar Crimes in Child Molestation Cases

1996 Amendment. This amendment is intended to provide for more liberal admissibility of character evidence in criminal cases of child molestation where the accused has committed a prior act of sexual assault or child molestation.

Rule 414 is nearly identical to its Federal Rule counterpart. A number of changes were made, however, to tailor the Rule to military practice. First, all

references to Federal Rule 415 were deleted, as it applies only to civil proceedings. Second, military justice terminology was substituted where appropriate (e.g. accused for defendant, court-martial for case). Third, the fiveday notice requirement in Rule 414(b) replaced a fifteen-day notice requirement in the Federal rule. A fiveday requirement is better suited to military discovery practice. Fourth, Rule 414(d) has been modified to include violations of the Uniform Code of Military Justice. Last, all incorporation by way of reference was removed by adding subsections (e) (f), (g), and (h). The definitions in those subsections were taken directly from title 18, United States Code §§ 2246(2), 2246(3), 2256(2), and 513(c)(5), respectively.

Although the Rule states that the evidence "'is admissible," the drafters' intend that the courts apply Rule 403 balancing to such evidence. Apparently, this was also the intent of Congress. The legislative history reveals that "the general standards of the rules of evidence will continue to apply, including the restrictions on hearsay evidence and the court's authority under Evidence Rule 403 to exclude evidence whose probative value is substantially outweighed by its prejudicial effect." 156 F.R.D. 51 (1995) (Reprint of the Floor Statement of the Principal House Sponsor, Representative Susan Molinari, Concerning the Prior Crime Evidence Rules for Sexual Assault and Child Molestation Cases).

When "weighing the probative value of such evidence, the court may, as part of its Rule 403 determination, consider proximity in time to the charged or predicate misconduct; similarity to the charged or predicated misconduct; frequency of the other acts; surrounding circumstances; relevant intervening events; and other relevant similarities or differences." 156 F.R.D. 51, 55 (1955) (Report of the Judicial Conference of the United States on the Admission of Character Evidence in Certain Sexual Misconduct Cases.).

EFFECTIVE DATE: These amendments would apply, upon approval by the President, only in cases in which arraignment has been completed on or after the effective date.

ADDRESSES: Copies of the proposed changes may be examined at the Office of the Judge Advocate General, Criminal Law Division, Building 111, Washington Navy Yard, Washington, DC 20374. A copy of the proposed changes may be obtained by mail upon request from the foregoing address, ATTN: LT J. Russell McFarlane.