Lore of the Corps

The Military Rules of Evidence: A Short History of Their Origin and Adoption at Courts-Martial

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The Military Rules of Evidence (MRE) have been a permanent feature of courts-martial practice for more than thirty years. While practitioners today are comfortable with the rules and accept their permanence in military criminal trials, their adoption in 1980 was the end result of a long and contentious struggle. This is the story of the origin of the MRE and their adoption at courts-martial.

Prior to 1975, when the Congress enacted legislation establishing the Federal Rules of Evidence (FRE), the admissibility of evidence in U.S. courts was governed by Federal common law. Similarly, evidentiary rules at courts-martial were governed by a common law of evidence that had emerged from successive decisions from the Court of Military Appeals (COMA) and, to a lesser extent, the inferior service courts. The 1969 Manual for Courts-Martial (MCM), contained these judicial decisions, but it was difficult to know whether the MCM was adopting these "decisions as positive law or merely setting them forth for the edification of the reader."[1]

Under the Uniform Code of Military Justice (UCMJ), Article 36, courts-martial "shall, so far as . . . practicable, apply the principles of law and rules of evidence generally recognized in the trial of criminal cases in the United States district courts."[2] Recognizing that the codification of the Federal common law rules of evidence meant that the Armed Forces should consider codifying military evidentiary rules, Colonel (COL) Wayne E. Alley, the then-Chief of Criminal Law in the Office of The Judge Advocate General, decided that "Military Rules of Evidence" should be created and adopted by the Armed Forces.

With the concurrence of Major General (MG) Wilton B. Persons, The Army Judge Advocate General, COL Alley put his idea in a written memorandum, which he submitted to the Department of Defense (DoD) Joint Service Committee on Military Justice (known colloquially as the "JSC").[3] Colonel Alley, who had recently assumed the chairmanship of the JSC, "formally proposed" that the services "revise the Manual for Courts-Martial to adopt, to the extent practicable, the new civilian rules."[4]

Colonel Alley's chief argument was that Article 36 required a codification of the military rules to bring courts-martial practice in line with federal civilian practice under the new FRE. A second important reason, as already indicated, was that the evidentiary language contained in the 1969 MCM was not necessary binding, making its usefulness doubtful. But Alley also had a third reason, which grew out of his experience as a military judge wrestling with evidentiary issues at trial. In a recent e-mail, he explained:

> I was the only [JSC] member whose mid-career years were spent in the judiciary. I dealt with evidentiary issues on an almost daily basis. I found the best source of helpful case law was in Article III court decisions, which, I believed, *would be less and less helpful for military judges as the cases came more and more to be explications of FREs.* This was particularly important because of the FRE clarity about the necessity to preserve issues by timely objection. Military practice was wishy-washy as to this, and military case law seemed to support bailing out counsel who didn't do his objecting job.[5]

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[1] Fredric I. Lederer, *The Military Rules of Evidence: Origins and Judicial Implementation*,, 130 MIL. L. REV. 5, 8 (1990). Lederer is now the Chancellor Professor of Law and Director, Center for Legal and Court Technology, College of William and Mary; he also is a retired reserve judge advocate colonel.

[2] UCMJ art. 36(a) (2008).

[3] The Joint Service Committee on Military Justice (JSC) consists of an Army, Navy, Air Force, Coast Guard, and Marine Corps representative, usually in the grade of O-6. Department of Defense Directive 5500.17, which governs the operation of the JSC, sets out the committee's duties and responsibilities. Its principal mission is to "conduct an annual review of the Manual for Courts-Martial (MCM) in light of judicial and legislative developments in civilian and military practice." As a practical matter, this means deciding if changes are needed to the Military Rules of Evidence (MRE)—and the Punitive Offenses and Rules for Courts-Martial—in light of changes in civilian criminal law. U.S. DEP'T OF DEF., DIR., THE ROLES AND RESPONSIBILITIES OF THE JOINT SERVICE COMMITTEE ON MILITARY JUSTICE (3 May 2003), *available at* http://www.dod.gov/dodgc/images/jsc_mission.pdf (last visited Jan. 13, 2012).

[4] Lederer, *supra* note 1, at 6.

[5] E-mail from Brigadier General (Retired) Wayne E. Alley, to Fred L. Borch, Regimental Historian and Archivist, The Judge Advocate General's Legal Ctr. & Sch., (7 Dec. 2011, 11:23:00 EST) (emphasis added) (on file with author).

Despite COL Alley's arguments, the Navy opposed the idea of creating MRE. "If it isn't broken, don't fix it" seems to have been the basic reason for the sea service's opposition, but the Office of the Judge Advocate General of the Navy later articulated at least four reasons why "relatively low priority" should be "given to [the FRE's] quick implementation in the military." First, the MCM's rules of evidence were "a well thought out set of rules located in one convenient place." Second, new MRE necessarily would result in "a substantial amount of litigation." Third, it would be difficult to transform the FRE into MRE because these "civilian rules would have to be scrutinized and adapted" to the needs of the military. Fourth and finally, the Navy argued that creating the MRE probably would require special training in order to educate judge advocates about the new rules—training that would be unnecessary if the services simply retained the existing MCM evidentiary rules with which practitioners were already familiar and comfortable.[6]

It is likely that opposition to implementing the FRE at courts-martial also grew out of a general unhappiness with the increasing "civilianization" of the UCMJ advocated by the COMA Chief Judge, Albert B. Fletcher, Jr., and others. The Military Justice Act of 1968 had already introduced extraordinary changes into the UCMJ, and it may have seemed to the Navy that adopting the FRE in military practice was too much civilianization, and too soon. Those opposed to this continued civilianization believed that it ultimately would remove the military character of the military justice system—which they believed was essential if the system was to remain a tool of discipline for commanders.

Since the JSC operates on consensus, the Navy's opposition to COL Alley's idea meant that his proposal went nowhere. By 1977, little had been done on the project. But, as is often the case in a bureaucracy, a new personality's arrival resulted in the revival of a shelved idea. A new DoD General Counsel, Ms. Deanne C. Siemer, had recently arrived in the Pentagon[7] and began asking questions about military justice. Colonel Alley quickly capitalized on Siemer's newfound interest to "break the logjam" and recommended to her that the FRE be adopted, with suitable changes, into the MCM as MRE.[8]

The DoD General Counsel embraced COL Alley's idea, created an "Evidence Project as a DoD requirement," and tasked the JSC with drafting a comprehensive MRE package. Beginning in early 1978, the JSC Working Group, consisting of lower-ranking judge advocate representatives from all the services, two attorneys from COMA, and a member of the DoD General Counsel's office, began drafting the rules. Colonel Alley's instructions to the Working Group were that it "was to adopt each Federal Rule of Evidence verbatim, making only the necessary wording changes needed to apply it to military procedure. . . ."[9]

While COL Alley departed for a new military assignment in mid-1978,[10] his earlier instructions continued to be followed by the Working Group, as its members generally embraced the philosophy that each FRE should be adopted as an MRE "unless it is either contra to military law . . . or was so poorly drafted as to make its adoption almost an exercise in futility."[11] Although many judge advocates were involved in drafting the new proposed rules, the principal co-author was then-Major (MAJ) Fredric I. Lederer, who was the Army representative on the JSC Working Group.[12]

The end result was that some FRE were adopted without change, while others were modified to fit better with military practice. Military Rules of Evidence 803(6) and (8), for example, were both modified to "adapt" them "to the military environment" so as to permit the admissibility of laboratory reports as an exception to the hearsay rule.[13]

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[6] Lederer, *supra* note 1, at 8 (quoting Memorandum from William M. Trott, to Code 20, JAG:204.1: WMT:lkb (17 Mar. 1975)).

[7] Deanne C. Siemer was nominated by President Carter to be the DoD General Counsel. After her confirmation by the Senate, she served from April 1977 to October 1979, http://csis.org/files/publication/111129_DOD_PAS_Women_History.pdf (last visited Jan. 13, 2012).

[8] Lederer, *supra* note 1, at 10.

[9] *Id.* at 13.

[10] Alley had been promoted to Brigadier General (BG) and reassigned to be the Judge Advocate, U.S. Army Europe and 7th Army. He retired four years later to become the Dean, University of Oklahoma School of Law. Brigadier General Alley subsequently was nominated and confirmed as a U.S. District Judge for the District of Oklahoma, becoming only the second Army lawyer in history to retire from active duty and then serve as an Article III judge. For more on Alley's remarkable career, see Colonel George R. Smawley, *In Pursuit of Justice, A Life of Law and Public Service: United States District Court Judge and Brigadier General (Retired) Wayne E. Alley, U.S. Army, 1952–1954, 1959–1981*, 208 MIL. L. REV. 213 (2011).

[11] Lederer, *supra* note 1, at 14 n.33.

[12] Others who deserve credit for drafting the proposed MREs are Navy Commander Jim Pinnell, Army Major John Bozeman, Air Force Major James Potuck, and Coast Guard Lieutenant Commander Tom Snook. Mr. Robert Mueller and Ms. Carol Scott, both civilian attorneys at COMA and Captain (CPT) Andrew S. Effron, then assigned to the DoD General Counsel's office, also participated in the drafting. Captain Effron was the principal drafter of the proposed privilege rules (MRE Section V). He later served on the Court of Appeals of the Armed Forces and retired as its Chief Judge in 2011. *Id.* at 11 n.21. *See also* MANUAL FOR COURTS-MARTIAL, UNITED STATES app. 22, sec. 1 (2012) [hereinafter MCM]. Lederer was the primary drafter of the original analysis to the MREs. *Id.*

[13] MCM, *supra* note 12, MIL. R. EVID. 803 (6), (8) analysis.

The largest difference between the FRE and MRE was the creation of Sections III and V, which for the first time codified, in binding form, evidentiary rules on search and seizure, confessions and interrogations, eyewitness identification, and privileges. All of these rules had to be created from scratch, as there was no FRE counterpart.[14]

As the MRE drafting process continued, the services continued to disagree strenuously about adopting some of the FRE. The Air Force, for example, considered FRE 507, Political Vote, (today's MRE 508) to be "ridiculous" and "unnecessary."[15] It also bitterly opposed the codification of search and seizure rules ultimately adopted as MRE 311–317. The Air Force argued that these rules should be rejected because "in the military environment, search and seizure is a very fluid area of the law," and the adoption of MRE governing search and seizure might bind the Air Force more restrictively than case law. The Air Force's objections ultimately were overruled by a majority of the JSC; the DoD General Counsel also approved the proposed MRE 311–317 as written by the Working Group.[16]

Ms. Siemer forwarded the completed MRE to the Office of Management and Budget on 12 September 1979. That office, in turn, shared the MRE with the Department of Justice (DOJ) and the Department of Transportation (DOT) (under whose auspices the Coast Guard then operated). After the DOJ and DOT gave their approval, President Jimmy Carter signed an executive order promulgating the new MRE on 12 March 1980.

The new MRE became effective on 1 September 1980, which meant a significant revision of criminal law instruction. This included a round-the-world series of trips by MAJ Lederer and Commander Pinnell to explain the new MRE to Army, Navy, Marine Corps, and Coast Guard judge advocates in the field. At the Army's The Judge Advocate General's School in Charlottesville, Virginia, the teaching of evidence was revamped; the 94th Judge Advocate Officer Basic Course, which started in October 1980, was the first class to receive instruction in the new MRE. While newly minted judge advocates readily accepted the MRE as a permanent part of court-martial practice, it took some time for seasoned practitioners, especially in the judiciary, to accept them.

The COMA wrestled with the new rules in a number of cases. In *Murray v. Haldeman*, for example, the COMA ruled that it was "*not necessary—or even profitable—to try to fit compulsory urinalysis*" into the MRE.[17] This was simply wrong: the COMA should have found that the fruits of the compulsory urinalysis were lawful under MRE 313, as it would do seven years later in *United States v. Bickel.*[18]

But, while avoiding the application of MRE 313 in *Murray v. Haldeman*, the court did correctly conclude that the results of the urinalysis were admissible under MRE 314(k) as a new type of search.

Similarly, in *United States v. Miller*, the Air Force Court of Military Review examined MRE 614(b)'s requirement that court members who desire to question a witness "shall submit their questions to the military judge in writing." The Air Force court said that the rule was only a suggestion, and a foolish suggestion at that.[19]

Military judges in the field were no different. The author remembers an attempted rape prosecution at Fort Benning, Georgia in the early 1980s. The military judge, a senior colonel with extensive experience on the bench, was uncomfortable with the trial counsel's explanation that the crying victim's claim of sexual assault was admissible as an excited utterance under MRE 803(2). Instead, ignoring trial counsel's rationale, the judge ruled that the statements were admissible as "fresh complaint" under paragraph 142*b* of the 1969 MCM. While this trial judge understood that the MRE were in effect, he nevertheless frequently told counsel in other courts-martial—but off the bench and off the record—that he did not like the MRE and would continue to look to the 1969 MCM for guidance on the admissibility of evidence.

This Fort Benning-based judge was not alone in his view. Other trial judges comfortable with the pre-MRE rules also resisted following the MRE, with sometimes disastrous results for the government. But this disinclination to follow the MRE—and any incorrect evidentiary ruling that adversely affected the prosecution's case—went unchecked until government appeals were permitted by the Military Justice Act of 1983.

[14] While Section III had to be created from scratch, there was a proposed Federal Rules of Evidence (FRE) Section V that CPT Effron and his colleagues could use for some of the proposed provisions in MRE Section V. While the FRE Section V had been rejected by Congress when it enacted the FREs in 1975, this did not prevent its use by the JSC Working Group. *See id.* app. 22, sec. V, analysis, at A22-38 (Privileges).

[15] Lederer, *supra* note 1, at 13 n.32.

[16] *Id.* at 16 n.45. *See id.* at 15–19 (providing more on opposition to specific MREs).

[17] 16 M.J. 74, 82 (C.M.A. 1983) (emphasis added).

[18] 30 M.J. 277 (C.M.A. 1990).

[19] 14 M.J. 924, 925 n.1 (A.F.C.M.R. 1982) (The court held that the military judge, at his discretion, may permit oral questions by the court members and sarcastically stated that the new rule "improves efficiency only to the extent that it discourages questions from court members. . . .").

Judge advocates today are comfortable with the MRE, and also accept that the rules will be modified on a regular basis to conform to changes in both the FRE and case law from the U.S. Supreme Court and Court of Appeals for the Armed Forces. But while practitioners today are sanguine about the MRE, history shows that their origins and early years were somewhat tumultuous.

More historical information can be found at

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https://www.jagcnet.army.mil/8525736A005BE1BE