



THE DEFENSE ADVISORY COMMITTEE ON
INVESTIGATION, PROSECUTION, AND DEFENSE OF
SEXUAL ASSAULT IN THE ARMED FORCES

December 12, 2022

Colonel Elizabeth Hernandez, U.S. Air Force
Chair, Joint Service Committee on Military Justice
Department of Defense
Office of the Assistant to the Secretary of Defense
For Privacy, Civil Liberties, and Transparency,
Regulatory Directorate
4800 Mark Center Drive, Mailbox #24, Suite 08D09
Alexandria, Virginia 22350-1700

Dear Colonel Hernandez:

The Defense Advisory Committee on Investigation, Prosecution, and Defense of Sexual Assault in the Armed Forces (DAC-IPAD) provides the enclosed public comment, including five recommendations for amending Rule for Courts-Martial (R.C.M.) 1001(c), to the Joint Service Committee on Military Justice for consideration.

Thank you for your consideration of the Committee's comments and recommendations.

Sincerely,

A handwritten signature in black ink that reads "Karla N. Smith". The signature is fluid and cursive, with the first name "Karla" being the most prominent.

Karla N. Smith, Chair

Enclosure

Enclosure: DAC-IPAD Public Comment Regarding Rule for Courts-Martial 1001

Public Comment:

The DAC-IPAD Committee members heard from stakeholders and reviewed numerous courts-martial cases involving victim impact statements.

Based on the testimony and case reviews, the Committee found that victims are subject to routine editing of their impact statements: either before trial by well-meaning victims' counsel and trial counsel who pre-edit the impact statements to avoid objections in court, or by military judges in the courtroom, or a combination. The result is the same – crime victims are not able to fully describe the impact on them of the accused's crimes. This is very different from civilian jurisdictions in which crime victims are largely able to express impact without such editing.

The Committee has concluded that a primary source of the problem is that R.C.M. 1001(c) is too narrow in scope. The following five recommendations to expand the scope of the rule coincide with the requirement that military judges serve as sentencing authorities in all but capital cases. Military judges, by virtue of their training, experience, and temperament, are trusted to appropriately assess the information provided in victim impact statements according to the rules.

Recommendations:

Recommendation #1:

The Joint Service Committee on Military Justice (JSC) draft an amendment to R.C.M. 1001(c)(2)(B) adding the words “or indirectly” to the definition of victim impact, amending the section as follows:

“For purposes of this subsection, victim impact includes any financial, social, psychological, or medical impact on the crime victim directly *or indirectly* relating to or arising from the offense of which the accused has been found guilty.”

This proposed change recognizes that victim impact statements are not presented for evidentiary purposes and allow the victim to discuss more attenuated impact from the crime similar to many civilian jurisdictions.

Recommendation #2:

The JSC draft an amendment to R.C.M. 1001(c)(3) by adding a sentence stating that a victim impact statement may include a recommendation of a specific sentence.

The JSC's draft change to R.C.M. 1001(c)(3) in the 2023 draft Executive Order removes the restriction against crime victims recommending a specific sentence for the accused in all but capital cases and appears to expand what victims may say in their impact statements; however, without an explicit provision allowing the victim to make a specific sentence recommendation, a military judge could reasonably prohibit a victim from doing so if the military judge does not consider the recommendation to be “victim impact” or “matters in mitigation,” per the language of the rule. This additional language would mirror the language in R.C.M. 1001(d)(2)(A).

Recommendation #3:

The JSC draft an amendment to R.C.M. 1001(c)(5)(A) allowing submission of the unsworn victim impact statement by audiotape, videotape, or other digital media, in addition to providing the statement orally, in writing, or both.

R.C.M. 1001(c)(5)(A) currently allows a victim to provide an unsworn victim impact statement orally, in writing, or both. Addition of the language makes it clear that digital media is a permissible means to submit a victim impact statement; aligns courts-martial with a number of states that allow victims to provide impact statements through audio or video recordings or other digital media; and importantly, provides victims the ability to submit impact statements when they are not available or do not wish to speak during the presentencing proceedings.

Recommendation #4:

The JSC draft an amendment to R.C.M. 1001(c)(5)(B) to remove the “upon good cause shown” clause to be consistent with the JSC’s proposed change to R.C.M. 1001(c)(5)(A).

R.C.M. 1001(c)(5)(A) states that a victim may provide an unsworn victim impact statement. The JSC’s proposed change to this section adds a sentence stating that the crime victim’s unsworn statement “may be made by the crime victim, by counsel representing the crime victim, or both.” However, R.C.M. 1001(c)(5)(B) still includes the limitation “Upon good cause shown, the military judge may permit the crime victim's counsel, if any, to deliver all or part of the crime victim's unsworn statement.” It appears the draft change was intended to remove the requirement that the victim show good cause for the victim’s counsel to deliver the victim impact statement.

Recommendation #5:

The JSC draft an amendment to R.C.M. 1001(c)(5)(B) to remove the requirement that the victim provide a written proffer of the matters addressed in their unsworn statement to trial and defense counsel after the announcement of findings.

R.C.M. 1001(c)(5)(B) currently requires a crime victim who makes an unsworn statement to provide a written proffer of the matters to be addressed in the statement to trial counsel and defense counsel after the announcement of findings. The rule provides that the military judge may waive this requirement for good cause shown. Often, victims’ written statements are “redlined” by military judges or by well-meaning victims’ counsel or trial counsel prior to their delivery. In most civilian jurisdictions, victims deliver their impact statements unedited.

The JSC’s proposed change to R.C.M. 1001(c)(5)(B) would remove the following sentence from the discussion section: “Upon objection by either party or *sua sponte*, a military judge may stop or interrupt a victim’s statement that includes matters outside the scope of R.C.M. 1001(c)(3).” The proposed removal of this sentence is consistent with the pending change to judge-alone sentencing and will allow crime victims more latitude in their impact statements. Trial and defense counsel will still have the opportunity to rebut factual matters in the victim’s unsworn statement and to object to information outside the scope of R.C.M. 1001(c)(2)(B).