



JUDICIAL PROCEEDINGS PANEL SUBCOMMITTEE
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ARLINGTON, VA 22203-1995

March 2, 2017

MEMORANDUM FOR MEMBERS OF THE JUDICIAL PROCEEDINGS PANEL

SUBJECT: Report of the Subcommittee

On April 9, 2015, the Secretary of Defense established this Subcommittee to support the Judicial Proceedings Panel in its duties under Section 576(d) of the National Defense Authorization Act for Fiscal Year 2013. Following the Secretary's objectives and at the request of the Judicial Proceedings Panel, the Subcommittee conducted military installation site visits throughout the United States and Asia. The Subcommittee consolidated the information received during these site visits on the topics of initial disposition withholding policy, Military Rules of Evidence 412 and 513, and training and experience of trial counsel and special victims' counsel / victims' legal counsel and submits to the Judicial Proceedings Panel three papers on these topics.


Barbara S. Jones
Subcommittee Chair

Judicial Proceedings Panel Subcommittee

Initial Disposition Withholding Policy

The Judicial Proceedings Panel Subcommittee (Subcommittee) conducted site visits between July and September 2016 at installations across the United States and Asia. During those visits, the Subcommittee spoke with more than 280 individuals from the Services involved in the military justice process, including military prosecutors, defense counsel, special victims' counsel / victims' legal counsel, paralegals, investigators, commanders, sexual assault response coordinators, victim advocates, and victim-witness liaisons.

During the site visits, the Subcommittee asked questions about the implementation of the Department of Defense Initial Disposition Withholding Policy.¹ Under the previous policy, any commander had the authority to determine the initial disposition of a case. Under the new policy, in effect since June 28, 2012, the Secretary of Defense directed that “commanders within the Department of Defense who do not possess at least special court-martial convening authority and who are not in the grade of O-6 (i.e., colonel or Navy captain) or higher,” may not determine the initial disposition of alleged offenses involving the following:

- (i) rape, in violation of Article 120 [of the Uniform Code of Military Justice (UCMJ)];
- (ii) sexual assault, in violation of Article 120 of the UCMJ;
- (iii) forcible sodomy, in violation of Article 125 of the UCMJ; and
- (iv) all attempts to commit such offenses, in violation of Article 80 [of the UCMJ].”²

Counsel universally stated that this policy has had very little, if any, impact on the processing of sexual assault cases.

Some counsel noted that the implementation of the withholding policy has resulted in minor administrative burdens. For example, some commented that the policy has led to slight delays in the military justice process, because of the difficulty of scheduling a meeting with a senior officer.

However, many observed positive effects of the withholding policy. Some trial counsel noted that an O-6 typically has more military justice experience. In addition, lower-level commanders generally supported elevating the decision to a higher-level commander. In the view of other counsel, the policy has improved the public perception of the military's handling of sexual assault cases.

¹ The National Defense Authorization Act for Fiscal Year 2013, Public Law 112-239, Section 576(d)(2)(I), directed the Judicial Proceedings Panel to “Monitor the implementation of the April 20, 2012, Secretary of Defense policy memorandum regarding withholding initial disposition authority under the UCMJ in certain sexual assault cases.”

² SECRETARY OF DEFENSE, MEMORANDUM ON WITHHOLDING INITIAL DISPOSITION AUTHORITY UNDER THE UNIFORM CODE OF MILITARY JUSTICE IN CERTAIN SEXUAL ASSAULT CASES (Apr. 20, 2012), *available at* http://www.dod.gov/dodgc/images/withhold_authority.pdf.

Judicial Proceedings Panel Subcommittee

Military Rules of Evidence 412 and 513

The Judicial Proceedings Panel Subcommittee (Subcommittee) conducted site visits between July and September 2016 at installations across the United States and Asia. During those visits, the Subcommittee spoke with more than 280 individuals from the Services involved in the military justice process, including military prosecutors, defense counsel, special victims' counsel (SVCs) / victims' legal counsel (VLCs), paralegals, investigators, commanders, sexual assault response coordinators, victim advocates, and victim-witness liaisons.

The Subcommittee asked participants about their experiences with Military Rule of Evidence (M.R.E.) 412, which addresses the rape-shield rule of evidence, and 513, which addresses psychotherapist-patient privilege.

Most counsel noted that there have been no recent changes of significance in M.R.E. 412 litigation, but many commented that M.R.E. 412 issues arise in almost every court-martial involving a sexual assault offense. SVCs and VLCs routinely represent clients on M.R.E. 412 issues and often take a position aligned with that of the prosecution. At times, however, the position of the SVC or VLC diverges from that of the prosecution; such divergence is most common when the prosecution believes that the admission of M.R.E. 412 evidence will make the case stronger, but the victim opposes the presentation of any additional information concerning his or her sexual history.

SVCs and VLCs felt that procedures for making objections, particularly when M.R.E. 412 and 513 evidence comes in during trial, should be standardized among the Services. Trial and defense counsel concurred that the procedures used by SVCs/VLCs to make objections should be standardized so that all counsel have the same expectations. Several SVCs and VLCs mentioned a problem some of them have faced or potentially could face in which a military judge has ruled in a pretrial motion to exclude certain M.R.E. 412 or 513 evidence, but the excluded evidence is inadvertently introduced at trial. In that situation, the SVCs and VLCs said there is no standard practice among the Services or even among different judges within the same Service as to how, logistically, the SVC or VLC should voice his or her objection at trial. Some SVCs and VLCs noted that they had been asked to sit in the gallery and raise their hand if they objected to material being presented, while others were permitted to object for the record from the well of the courtroom without raising their hand. Some counsel reported that in the former situation, a military judge may not see their raised hand and stop the testimony before the objectionable material has been completely stated in open court.

While the text of M.R.E. 412, and practitioners' experiences litigating M.R.E. 412 issues have not changed significantly, the landscape of M.R.E. 513 litigation has shifted dramatically, according to the information obtained at site visits. The FY 2015 National Defense Authorization Act (NDAA) increased the burden on the party seeking production or admission of records protected by M.R.E. 513. Under the new test, a military judge may conduct an *in camera* review of records or communications only if the military judge finds by a preponderance of the evidence that the moving party has shown (1) that there exists "a specific factual basis demonstrating a

reasonable likelihood that the records or communications would yield evidence admissible under an exception to the privilege,” (2) that “the requested information meets one of the enumerated exceptions to the privilege,” (3) that “the information sought is not merely cumulative of other information available,” and (4) that “the party made reasonable efforts to obtain the same or substantially similar information through non-privileged sources.”¹ Many defense counsel observed that these changes to the rule have made it much more difficult to obtain the mental health records of a sexual assault victim, as they are not able to make the threshold showing required for an *in camera* review. Several defense counsel explained that they have difficulty in obtaining factual information that could potentially support the threshold showing in part because they do not have access to investigative support.² Judges routinely rule that the defense has not presented a sufficient factual basis demonstrating that the records likely contain relevant evidence.

In addition, defense counsel noted that in light of the provision in the FY 2015 NDAA removing the “constitutionally required” exception previously enumerated under M.R.E. 513(d),³ trial judges have taken different positions on whether M.R.E. 513 must be read in light of the Constitution. Some judges have found that the constitutional exception no longer applies to the rule. Given these inconsistent judicial interpretations, counsel told the Subcommittee, they are awaiting further guidance from the Services’ appellate courts.

Many trial counsel and SVCs/VLCs viewed the changes to M.R.E. 513 positively, commenting that the rule now works as was intended—to keep mental health records out of the courtroom. According to these counsel, the stricter burden offers much better protection for the victim. One trial counsel noted that before the current changes to M.R.E. 513, trial counsel would typically ask for mental health records in advance in anticipation of a request from the defense counsel and were more likely to agree to produce mental health records to facilitate the military judge’s *in camera* review of the mental health information at issue. Another trial counsel said that as practices around the new M.R.E. 513 evolve, she sees defense counsel seeking mental health records less frequently than in the past, because they do not think there is any chance for an *in camera* review.

¹ National Defense Authorization Act for Fiscal Year 2015, PUB. L. NO. 113-291, § 537, 128 Stat. 3292 (2014).

² Defense counsels’ need for and lack of investigative support is discussed more fully in the JPP Subcommittee’s Report on Military Defense Counsel Resources and Experience in Sexual Assault Cases, which was presented to the JPP on December 9, 2016. This report can be found at: http://jpp.whs.mil/Public/docs/08-Panel_Reports/JPP_SubcommReport_DefResources_Final_20161208.pdf.

³ National Defense Authorization Act for Fiscal Year 2015, PUB. L. NO. 113-291, § 537, 128 Stat. 3292 (2014).

Judicial Proceedings Panel Subcommittee

Training and Experience of Trial Counsel and Special Victims' Counsel / Victims' Legal Counsel

The Judicial Proceedings Panel Subcommittee (Subcommittee) conducted site visits between July and September 2016 at installations across the United States and Asia. During those visits, the Subcommittee spoke with more than 280 individuals from the military Services involved in the military justice process, including prosecutors, defense counsel, special victims' counsel (SVCs) / victims' legal counsel (VLCs), paralegals, investigators, commanders, sexual assault response coordinators, victim advocates, and victim-witness liaisons.

At every site visited, the Subcommittee asked counsel about their training and level of military justice experience. This paper addresses the training and experience levels of trial counsel and SVCs/VLCs. The training and experience of defense counsel are addressed separately in the Subcommittee's *Report on Military Defense Counsel Resources and Experience in Sexual Assault Cases*, issued on December 9, 2016.¹

Trial counsel stated that they receive adequate and appropriate training. All trial counsel attend the basic course for judge advocates at their respective judge advocate schools, and select attorneys receive additional advanced instruction, such as trial advocacy courses, advanced sexual assault investigations training, and specialized sexual assault courses. Several counsel also indicated that they had attended training on sexual assault investigations with sexual assault investigators. Some offices offer continuous hands-on training, such as murder boards for counsel with upcoming trials. A number of prosecutors also noted that they receive training and guidance from more experienced attorneys in their Trial Counsel Assistance Programs.

However, the Subcommittee found that the experience levels of trial counsel vary considerably depending on Service and location. Many trial counsel do not have much experience trying sexual assault cases and feel that the extensive training they receive does not make up for their lack of in-court experience. Each military Service has made significant efforts to overcome the relative inexperience of junior prosecutors by having counsel with sufficient training and experience on every sexual assault case. The Subcommittee heard that the Services designate senior trial counsel with specialized experience in trying sexual assault cases to serve as the lead prosecutor in sexual assault cases. The appendix details the training and experience of each of the Service's senior trial counsel appointed to prosecute most sexual assault cases. However, some site visit participants told the Subcommittee that these senior counsel do not get involved in a case until just a few days before trial, leaving much of the trial preparation to be performed by junior counsel.

SVCs and VLCs, like their trial counsel counterparts, also believe that they receive appropriate and adequate training. In addition to attending the basic course for judge advocates, SVCs/VLCs from all of the Services attend a certification course held by either the Army or the Air Force.

¹ The JPP Subcommittee's Report on Military Defense Counsel Resources and Experience in Sexual Assault Cases, which was presented to the JPP on December 9, 2016. This report can be found at: http://jpp.whs.mil/Public/docs/08-Panel_Reports/JPP_SubcommReport_DefResources_Final_20161208.pdf.

SVCs and VLCs noted that in practice, they do not always have the opportunity to attend the certification class before they are detailed. Overall, SVCs and VLCs appeared satisfied with their training, and some noted that should questions about their cases arise, they can consult direct supervisors who have extensive military justice experience.

Many SVCs and VLCs commented that they had prior litigation experience, which they believe is important to successfully carry out their responsibilities. The Subcommittee heard from a number of prosecutors and investigators who felt that some SVCs and VLCs still lack military justice or litigation experience. They expressed concern that SVCs and VLCs who lack such experience may be limiting prosecutors' and investigators' access to victims and advising their clients not to turn over their cell phones which may contain information valuable to the investigation. Prosecutors and investigators felt that limiting access to the victim resulted in a lack of rapport-building opportunities and sometimes led to negative results at trial.²

The Subcommittee heard that in a few instances, SVCs and VLCs serve in their positions for 12 months or less. The Subcommittee found that such short tours may hinder the ability of an SVC/VLC to develop the experience and relationships necessary to properly serve their clients.

² Problems associated with SVCs and VLCs limiting investigators' access to their clients are discussed more in depth in the JPP Subcommittee's Report on Sexual Assault Investigations in the Military, which was presented to the JPP on February 24, 2017.

Appendix

Organization and Authorizations	Selection and Experience	Specialized Education and Training
<p>U.S. Army</p> <p><i>Special Victim Prosecutor (SVP)</i>³</p> <ul style="list-style-type: none"> • 25 Special Victim Prosecutors geographically distributed to installations worldwide. • Army SVPs work with Criminal Investigation Division (CID) special agents and Special Victim Unit (SVU) investigative teams. 	<ul style="list-style-type: none"> • Individually selected from the Army’s most experienced trial lawyers. • Demonstrated court-martial experience. • Experience with sexual assault and special victim cases. • General expertise in criminal law. • Interpersonal skill in handling sensitive victim cases. • Both prosecution and defense experience are not required for selection, but such experience is preferred. 	<ul style="list-style-type: none"> • Sexual Assault Trial Advocacy Course. • NDAA Career Prosecutor Course. • Specialized military and civilian courses. • Two weeks “on the job” with a civilian district attorney’s office. • Special training on victim care and interviewing. • Training with CID.
<p>U.S. Air Force</p> <p><i>Special Victims Unit–Senior Trial Counsel (SVU-STC)</i>⁴</p> <ul style="list-style-type: none"> • 16 Senior Trial Counsel, including 10 who are members of the SVU. • Work alongside 24 Air Force Office of Special Investigations (AFOSI) special investigators. • Located at 16 Air Force installations with a high number of reported sexual offenses. 	<ul style="list-style-type: none"> • Senior Trial Counsel (STC) litigate the Air Force’s most difficult cases, including the vast majority of sexual assault prosecutions. • STC typically have at least three years of experience, preferably in both trial and defense. • A subset of STCs are members of the Special Victims Unit (SVU-STC) and specialize in the prosecution of sexual assault and family violence cases. 	<ul style="list-style-type: none"> • Air Force lawyers selected for litigation positions attend the Trial and Defense Advocacy Course (TDAC) and the Advanced Trial Advocacy Course (ATAC). • All SVU-STC attend the Advanced Sexual Assault Litigation Course (ASALC), focused on sexual assault, domestic violence, and child abuse. • SVU judge advocates also regularly attend various advanced training courses. • Training with AFOSI.

³ Transcript of JPP Public Meeting 111 (May 13, 2016) (testimony of Lieutenant Colonel Bret Batdorff, U.S. Army Chief Trial Counsel Assistance Program).

⁴ Transcript of JPP Public Meeting 87–91 (May 13, 2016) (testimony of Colonel Katherine Oler, U.S. Air Force, Government Trial and Appellate Counsel Division).

Organization and Authorizations	Selection and Experience	Specialized Education and Training
<p>U.S. Navy</p> <p><i>Military Justice Litigation Career Track (MJLCT) and Senior Trial Counsel (STC)</i>⁵</p> <ul style="list-style-type: none"> • 9 regionally- based Senior Trial Counsel. • Collaborate with Naval Criminal Investigative Service (NCIS) special investigators to investigate, review, and prosecute special victim cases. 	<ul style="list-style-type: none"> • With demonstrated aptitude and a desire to further specialize in litigation, may apply for inclusion in the MJLCT. • MJLCT officers spend most of their career in litigation-related billets as trial counsel, defense counsel, and military judges. 	<ul style="list-style-type: none"> • An MJLCT officer can advance from Specialist I to Specialist II to Expert. • Most MJLCT officers also receive an advanced law degree (a Master of Laws or LL.M.) in trial advocacy or litigation from a civilian institution. • Prosecute special victim cases. • Prosecute alcohol-facilitated sexual assaults. • Complete a follow-on tour in a courtroom-intensive billet with leadership requirements. • Training with NCIS.
<p>U.S. Marine Corps</p> <p><i>Special Victim Qualified Trial Counsel (SVTC) and Complex Trial Teams (CTT)</i>⁶</p> <ul style="list-style-type: none"> • Specially qualified, geographically assigned Complex Trial Teams led by experienced Regional Trial Counsel. • Provide special victim prosecutorial expertise and support. 	<ul style="list-style-type: none"> • Prosecute a contested special or general court-martial in a special victim case as an assistant trial counsel. • Be a General Court-Martial Qualified trial counsel (experience requirement). • Receive written recommendation from the Regional Trial Counsel regarding expertise to try a special victim case. • Demonstrate requisite expertise, experience, education, innate ability, and disposition to competently try special victim cases (as approved by an O-6 level Officer-in-Charge). 	<ul style="list-style-type: none"> • Complete the Marine Corps basic judge advocate training requirements, including courses at the Naval Justice School. • Attend an intermediate-level trial advocacy training course for the prosecution of special victim cases.

⁵ Transcript of JPP Public Meeting 100–106 (May 13, 2016) (testimony of Commander Michael Luken, U.S. Navy, Chief, Trial Counsel Assistance Program).

⁶ Transcript of JPP Public Meeting 121–22 (May 13, 2016) (testimony of Major Jesse Schweig, U.S. Marine Corps, Officer-in-Charge, Trial Counsel Assistance program).