

Judicial Proceedings Panel Subcommittee Site Visits

In order to assess the effects of numerous changes in law and policy on the investigation, prosecution, and defense of sexual assault offenses in the military, the Judicial Proceedings Panel (JPP) tasked the JPP Subcommittee with conducting site visits to military installations to talk to the men and women who work in the military justice system.

From July through September 2016, members of the JPP Subcommittee visited military installations throughout the United States and Asia. They spoke to more than 280 individuals representing 25 military installations and all of the Services, including prosecutors, defense counsel, special victims' counsel/victims' legal counsel, paralegals, commanders, investigators, and sexual assault response coordinators and other victim support personnel. These individuals spoke without attribution so that the JPP Subcommittee could gain an unfiltered, candid assessment of how changes in sexual assault laws and policies have affected the military justice system.

To ensure anonymity, the JPP Subcommittee Site Visit Reports do not identify the branch of Service, installation, command, or name of participating individuals.

The following chart outlines the installations visited and the members of the Judicial Proceedings Panel Subcommittee who conducted the site visits.

Installation Site Visits Attended by Members of the JPP Subcommittee

Dates	Installations Represented	Subcommittee Members
July 11–12, 2016	Naval Station Norfolk, VA¹ Joint Base Langley-Eustis, VA	Hon. Elizabeth Holtzman Dean Lisa Schenck BGen (R) James Schwenk
July 27–28, 2016	Fort Carson, CO Peterson Air Force Base, CO Schriever Air Force Base, CO U.S. Air Force Academy, CO	Ms. Lisa Friel Ms. Laurie Kepros Professor Lee Schinasi Ms. Jill Wine-Banks
August 1–2, 2016	Fort Bragg, NC Camp Lejeune, NC	Ms. Laurie Kepros Professor Lee Schinasi BGen (R) James Schwenk
August 8–9, 2016	Naval Station San Diego, CA Marine Corps Recruiting Depot San Diego, CA Marine Corps Air Station Miramar, CA Camp Pendleton, CA	Hon. Barbara Jones Ms. Laurie Kepros Ms. Jill Wine-Banks
August 22–23, 2016	Marine Corps Base Quantico, VA Joint Base Andrews, MD U.S. Naval Academy, MD Navy Yard, Washington, DC	Dean Lisa Schenck BGen (R) James Schwenk Ms. Jill Wine-Banks
September 12–14, 2016	Osan Air Base, South Korea Camp Humphreys, South Korea Camp Red Cloud, South Korea Camp Casey, South Korea U.S. Army Garrison Yongsan, South Korea Camp Butler, Japan Camp Zama, Japan Kadena Air Base, Japan Yokota Air Base, Japan	Hon. Elizabeth Holtzman Ms. Jill Wine-Banks

¹ Installations in bold type are the actual meeting locations for the site visits.

JPP Subcommittee Site Visit
Tabulation of Interviews Conducted

Overall Total Interviewed – 284

Trial Counsel – 56	Defense Counsel/Defense Paralegals – 47
SVCs/VLCs/Paralegals – 36	Investigators – 43
SARCs/VAs/VWAPs – 62	Commanders – 19
SJAs – 6	Others – 15

1. Site Visit A

Trial Counsel – 6 (2 were senior trial counsel/special victim prosecutors)
Defense Counsel – 6 (1 was a senior defense counsel)
SVC/VLC/Paralegal – 2 and 1 paralegal
MCIO Investigators – 2
SARCs/VAs/VWAPs – 10
Commanders – 1

Total Interviewed – 28

2. Site Visit B

Trial Counsel – 2 (1 was a senior trial counsel/special victim prosecutor)
Defense Counsel – 2 (1 was a senior defense counsel)
SVC/VLC – 3 (1 was a supervisor)
MCIO Investigators – 3
SARCs/VAs/VWAPs – 3
Commanders – 1
Company Grade Officers – 2

Total Interviewed – 16

3. Site Visit C

Trial Counsel – 3 (1 was a senior trial counsel/special victim prosecutor)
Defense Counsel – 5
SVC/VLC – 3
MCIO Investigators – 5
SARCs/VAs/VWAPs – 4
Commanders – 1

Total Interviewed – 21

4. Site Visit D

Trial Counsel – 2
Defense Counsel – 2 (both were senior defense counsel)
SVC/VLC – 4 (1 was a senior SVC/VLC)
MCIO Investigators – 3
SARCs/VAs/VWAPs – 5
Commanders – 1

Total Interviewed – 17

5. Site Visit E

Trial Counsel – 4
Defense Counsel – 3
SVC/VLC – 3
MCIO Investigators – 3
SARCs/VAs/VWAPs – 4
Commanders – 1
SJAs – 1

Total Interviewed – 19

6. Site Visit F

Trial Counsel – 7 (2 were senior trial counsel/special victim prosecutors)
Defense Counsel – 6 and 1 paralegal
SVC/VLC/Paralegal – 3 and 1 paralegal
MCIO Investigators – 7
SARCs/VAs/VWAPs – 8
Commanders – 3
SJAs – 2 SJAs and 10 judge advocates

Total Interviewed – 48

7. Site Visit G

Trial Counsel – 7 (3 were senior trial counsel/special victim prosecutors)
Defense Counsel – 4 (1 was a senior defense counsel)
SVC/VLC – 4
MCIO Investigators – 5
SARCs/VAs/VWAPs – 8
Commanders – 1

Total Interviewed – 29

8. Site Visit H

Trial Counsel – 7 (1 was a senior trial counsel/special victim prosecutor)

Defense Counsel – 4 (1 was a senior defense counsel)

SVC/VLC – 4

MCIO Investigators – 4

SARCs/VAs/VWAPs – 12

Commanders – 1

Total Interviewed – 32

9. Site Visit I

Trial Counsel – 11 (3 were senior trial counsel/special victim prosecutors)

Defense Counsel – 9 (most had prior experience)

SVC/VLC – 4

MCIO Investigators – 6 and 1 civilian PD detective

SARCs/VAs/VWAPs – 5

Commanders – 2

SJAs – 2

Total Interviewed – 40

10. Site Visit J

Trial Counsel – 7 (3 were senior trial counsel/special victim prosecutors)

Defense Counsel – 5 (1 was a senior defense counsel)

SVC/VLC – 3 and 1 paralegal

MCIO Investigators – 4

SARCs/VAs/VWAPs – 3

Commanders – 7

SJAs – 1

Military Judges – 3 former military judges

Total Interviewed – 34

Judicial Proceedings Panel Subcommittee Site Visit D

The Judicial Proceedings Since Fiscal Year 2012 Amendments Panel (JPP) is a federal advisory committee established pursuant to Section 576(a)(2) of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2013, as amended by Section 1731(b) of the NDAA for FY 2014 and Section 546 of the NDAA for FY 2015, and in accordance with the Federal Advisory Committee Act of 1972, the Government in Sunshine Act of 1976, and governing federal regulations.

At the Secretary of Defense's (the Secretary's) direction, the JPP Subcommittee (the Subcommittee) was established under the JPP. The Subcommittee is to support the JPP by assisting with the Secretary's objectives for an independent review of the judicial proceedings conducted under the Uniform Code of Military Justice (UCMJ) involving adult sexual assault and related offenses since the amendments made to the UCMJ by Section 541 of the NDAA for FY 2012.

Participating JPP Subcommittee Members

Three members of the JPP Subcommittee conducted a site visit to gather information, conduct research, and analyze relevant issues and facts in preparation for future JPP meetings. The site visit started at 8:30 a.m. and concluded at 5:30 p.m.

Participating JPP Staff Members

LTC Patricia Lewis, JPP Deputy Director
Ms. Nalini Gupta, JPP Attorney Advisor
Ms. Julie Carson, JPP Attorney Advisor
Ms. Stayce Rozell, JPP Senior Paralegal and Session Recorder

Participants are not listed by name as all discussions were conducted in a non-attribution environment. The information below contains opinions expressed by the presenters and does not represent the views of the Department of Defense or the Services.

Command Brief

Senior judge advocates welcomed the Subcommittee and provided the members with an organizational overview of the local legal offices.

Roundtable with Victims' Counsel

The Subcommittee members spoke with four Victims' Counsel (VCs), including the region's senior VC and one VC from a different Service.

Training and Experience. Each of the VCs had at least two years of experience in the position.

- VC Role in the Courtroom. A VC indicated that one of the biggest challenges faced by VCs has been the lack of court rules and standard operating procedures including how to make objections. This has caused situations where judges do not know what to do with the VCs. He/she noted that some VCs are sitting in front of the bar in court and can request Article 39(a) hearings before the military judge when issues arise. The other VCs reported that their Service's rules of trial practice now address the roles of VCs; therefore, procedural issues are no longer as big of a problem.

A VC stated that one of the VCs' key roles is to help manage the expectations of the victim and explain the process so that victims are not "blindsided." He/she noted that VCs offer a "social work" aspect to representing victims that trial counsel cannot provide. The VC also noted that VCs have become such an integral part of the process that judges often ask VCs if they have anything to add.

- Military Rules of Evidence (MREs). The VCs indicated that their biggest role is assisting clients with MRE 513 (mental health records) issues. One VC reported having never lost a MRE 513 hearing resulting in the records not be ordered and the court conducting no *in camera* reviews. They reported that one major issue causing problems for victims is the gap in disability evaluations and mental health records protections. The problem arises when victims seek medical disability benefits related to sexual assault. Defense counsel are using this at trial to demonstrate "motive to fabricate" the alleged sexual assault. As a result, some victims are delaying filing their disability claims. Even in these situations, however, one VC shared stories of success at obtaining the records prior to *in camera* review and having an opportunity to file an *ex parte* motion arguing why the records should not be released.

The VCs also raised a concern that some of their clients are receiving a diagnosis of "adjustment disorder," which precludes victims from receiving benefits. The participants indicated that VCs are sometimes able to intervene in and delay the process and ask for additional evaluation before an adjustment disorder diagnosis is made. One VC with significant experience with medical boards noted that most VCs do not have this background and thought VCs benefited last year from a joint conference in which disability lawyers were able to educate the VCs on the joint DOD/VA disability system.

Additionally, a conflict has arisen with trial counsel over *Brady* obligations and whether government-held records are in trial counsel's possession. In one Coast Guard case, this issue is being appealed.

- Keeping Victims' Careers on Track. The participants told the Subcommittee that it is difficult to keep a victim's career on track after a sexual assault. Often commands try to help victims by sending them to "limited duty" while the case is progressing and the victims seek medical or behavioral health services. However, victims rarely return to full service after going on limited duty, in part because they become less engaged in their specialty, stop gaining career experience, and often decide they just want to leave the Service.

- Acquittal Rate. So far in 2016, the acquittal rate for sexual assaults in the region has been 100%. The VCs told the Subcommittee that many weak cases are going forward to trial. The

VCs also noted that juries usually will not return a guilty verdict when the case involves alcohol. The VCs said that juries are finding it too hard to determine whether the defendant knew or should have known the victim was incapable of consenting. However, the VCs reported that there have been acquittals even in cases that were thought to be strong that did not involve alcohol. When the VCs speak with juries after trials, the juries often say that they believed the victim but that there still was not enough evidence to convict.

Additionally, VCs report that from 30% to 50% of their clients decline to participate in the military justice prosecution, with most dropping out of the process early and before they have participated in the law enforcement investigation. One VC shared that once clients talk to the MCIO, they usually stay involved.

- Case Disposition. A VC explained that the senior trial counsel makes a recommendation about whether there is probable cause to go forward and that commanders rely heavily on trial counsel recommendations. The TCAP standard is probable cause plus whether there is a reasonable likelihood of success at trial. The VCs observed that there are many cases with little to no corroboration of the victim's statement and that these are unlikely to proceed to a general court martial. The cases with some corroboration, like a text message or pretext call, tend to go forward although there is usually not enough evidence to persuade the members beyond a reasonable doubt.

The VC reported that "9 out of 10 times" the sexual assault report follows the recommendation of the prosecutor. However, one VC indicated that he/she has seen cases where the trial counsel does not think a case should go forward, but the convening authority refers the case anyway if the victim wants to go forward. One VC expressed frustration that commanding officers defer to other subject matter experts and should do the same with trial counsel when they recommend a case not proceed.

A VC reported that defense counsel have argued that for commanders to send these cases forward is unlawful command influence ("UCI") but acknowledged that there is risk to convening authorities who do not proceed with Article 120 allegations. Another VC opined that at times going forward can be bad for the victim.

A VC highlighted that in one region, their Service is now utilizing reservists with extensive civilian criminal justice experience to assist with prosecution memos, which has been very beneficial.

Of the cases that have proceeded to trial, one VC thought half involved penetration allegations and the other half sexual contact. Reporting that he/she has seen "a few" contact cases go to trial, a VC noted that even when there is a conviction, there is little to no punishment. The VC also stated that typically there must be some level of corroboration for a case to be prosecuted. One VC reported that the touching cases going to trial are more than a "butt grab" and usually involve more than one victim or an ongoing problem.

Another Service's VC stated that cases frequently go forward when the victim wants it to.

- Article 32 Hearings. A VC with experience under the prior version of Article 32 said that it used to be a fair, independent evaluation of the evidence. The new Article 32 process is just a file review akin to what prosecutors already do and it is not helping to develop information about what happened in a case. One VC indicated that Article 32 hearings over the last year have been better because there has been a more in-depth look at the strength of a case; however, VCs from two different Services are seeing a lot of Article 32 waivers under the new system.

A VC commented that more cases are being pushed to Article 32s even when they are not winning and speculated that perhaps the motivation is to have the case examined by an independent person. The VC thought this might give their clients false hope in a case that is unlikely to result in conviction and said it was “not a great practice.” Clients prefer it when the trial counsel give a more honest assessment of the case upfront.

- Victim Satisfaction. A VC said that victims are usually satisfied as long as they feel like they are heard and that there is a fair process. They have a victim satisfaction survey; however, the survey deals more with VC services than with the military justice process as a whole, and victims do not frequently fill out the survey. The VCs reported the other Services are also conducting similar surveys.

- Delays in the Process. One problem noted by a VC is the length of time it takes to get cases through the process, which is often six months or more. A VC added that the MCIO, which is now required to fully investigate Article 120 allegations, is not usually the cause of the delay. Instead, cases often get delayed at the legal office, since it takes a long time to prepare prosecution memos, or they get delayed at the United States Army Criminal Investigation Laboratory (USACIL) (hereinafter lab). The prosecutors are working hard but it now takes a lot of paperwork to decline an Article 120 case and the processes are more arduous and formal than they were before. A VC reported that in their Service, the Commanders feel it is safer to push cases forward and get a prosecutorial memo but the MCIO and the trial counsel doing the prosecutorial memos are “overloaded.”

The VCs shared that often the desired outcome is simply for the offender to be accountable or to kick the accused out of the military but the MCIO and prosecution review processes take too long. Despite the MCIOs’ diligence, they are having to thoroughly investigate too many cases that will never go to trial. One VC observed that, after six (6) months of investigation, the separation fails to send a meaningful message – compared to what Service members would see if action was taken two (2) weeks after an incident.

In some cases, the commander can be a solution to this problem by bypassing the prosecution process and taking action. This is not a process most commanding officers are comfortable with, however, and their reactions vary based on the case. It would be useful to have an expedited track for investigation and prosecution review in the less serious cases.

- VC Contact with Victims. Because of the nature of the Service, the VC reported that initial face-to-face contact with victims is not always possible. If an incident happens at a remote location, the VC can speak with the victim by phone. Sometimes the victim can also receive an expedited transfer, be sent back to a less remote duty station, or go to a different department.

Many victims do not want to be removed because there is a stigma to leaving an assignment and it looks like they are being punished for something. Consequently, the availability of an expedited transfer can give rise to a motive to fabricate. The VC will also ask victims if they want the accused moved instead however that usually does not address the victim's problems since this issue is not just the presence of the accused at a location, but also his/her friends, a toxic environment, and victim concerns about peer retaliation.

Roundtable with Defense Counsel

The Subcommittee members spoke with two senior defense counsel.

The defense counsel emphasized that they face resourcing issues. Defense counsel are required to go through the trial counsel or the court to obtain experts. Though they sometimes have success with these requests, it requires them to reveal their case to the government. In addition, if they go through the judge, they have to spend a considerable amount of time preparing a detailed request and must be denied by the prosecution first. The defense counsel noted that they have been able to get experts through the court because the judges recognize the need for them and they attribute that to judges' experience in military justice. Defense counsel also observed that trial counsel are less likely to object when they recognize the judge is likely to approve the request for a defense expert. They indicated that obtaining approval for "common experts" like forensic toxicologists and psychologists is generally easier than obtaining experts for phone-related issues. When the expert relates to a niche issue in the case, defense counsel are reluctant to disclose their theory of defense in their expert request and, so far, have been unsuccessful in being allowed to make their requests *ex parte*. They also added that it is easier to get the experts approved than to get them paid.

In major cases, defense counsel estimated that civilian defense counsel represent the accused approximately 40% of the time although sometimes the client requests military defense counsel to represent them alongside the civilian defense counsel.

- VC Program. The defense counsel generally believe that the VC program has been beneficial in providing a representative for victims. They also find it helpful to have someone to go through to get information to and from a victim; in the past, defense counsel had to go through trial counsel. The defense counsel reported that they are sometimes able to interview victims and this has increased with the VCs compared to when they had to go through trial counsel.

- New Article 32 Procedures. The defense counsel reported that the new Article 32 proceedings have had a dramatic impact on their ability to call witnesses and, consequently, have impaired their ability to anticipate or illustrate the weaknesses of a case when doing so might create opportunities for resolution short of court martial. They also noted that Article 32 proceedings are waived much more often than before the changes were implemented because defense counsel are now unable to learn new information at the proceeding, therefore they have little incentive to show their cards and reveal deficits in the government's case against the accused. They reported that cases are going to trial based on probable cause being found at the Article 32; however, often, even in cases with probable cause, there is not enough evidence to show a reasonable likelihood of conviction.

One of the defense counsel noted that they are seeing victims testify more often at Article 32 hearings. The reason offered for this recent change is that trial counsel have begun to notice that unrehearsed victims testify poorly at trial and benefit from the practice.

Additionally, in the current environment, a defense counsel noted that it is meaningless if a preliminary hearing officer (“PHO”) finds probable cause but warns trial counsel that they are unlikely to prevail at trial. The convening authority may say “what’s the harm in letting a court decide?”

- Acquittal Rate. A defense counsel stated that they are generally seeing more Article 120 cases and more acquittals in those cases. The counsel noted that weak cases are going to trial, leading to an increased acquittal rate. A defense counsel noted that he believes that the acquittal rate is a multi-dimensional problem involving weak cases, victims’ wishes to go to trial, and political pressure. Additionally, the defense counsel noted that over the last year there have been more “defense-friendly” cases, *i.e.* cases involving alcohol and no corroborating evidence.

Defense counsel noted that most non-Article 120 charges are resolved through plea bargaining but most Article 120 cases go to trial.

- Military Rules of Evidence. With respect to MRE 513, a defense counsel reported that courts are not doing the constitutional analysis that they used to do and that some judges believe that that the constitutional exception no longer applies as it has been “written out” of the rule. Judges have been inconsistent in how they interpret the rule change. In a Coast Guard case pending further appellate review, the courts have expanded the reach of the 513 privilege to include whether a person ever visited a mental health practitioner, the diagnosis, and the dates of treatment. A defense counsel also reported that they are not seeing a lot MRE 412 issues.

- Juries/Panels. A defense counsel stated that because regions handle most of the cases, the members who are being put on panels typically come from a very small group. The defense counsel noted that commanders do not want to send their best officers to be members. Defense counsel also noted that there are a disproportionate number of victim advocates and other victim-focused personnel being put on panels. Problematically, this can also create scenarios where some people have a vested interest in being a member because of their own biases.

Roundtable with Law Enforcement Personnel

The Subcommittee members met with three MCIO investigators.

- Caseload. The MCIO agents have 78 active cases, nine of which are child cases. An agent stated that the average caseload per investigator is 10-12 cases and that they are notified of a new allegation every single day. Investigators usually hear about sexual assault cases from SARCs. An investigator indicated that the caseload has increased over the last few years and that the majority of cases are contact cases. One agent reported that he/she currently has seven or eight contact cases and four penetrative cases.

- Contact Cases. One of the investigators reported that he/she did not know of any abusive sexual contact case that had gone to court-martial, adding that the majority of his abusive contact cases go to non-judicial punishment (NJP). He/she noted that investigating each of these cases usually involves interviewing 20-30 witnesses and is very time consuming. The agent stated that once complete, the investigation report will go to the legal office and then back to the command.

The investigators reported that as a result of the 2012 version of Article 120 they have opened investigations on attempted kisses, hugging, and hand holding. One investigator stated he/she believes that that abusive sexual contact cases should be handled as sexual harassment or as misdemeanors and should be investigated by the police investigators or by commanders. These contact case investigations take time away from working on more intrusive sexual assault cases. An investigator suggested that the UCMJ should be brought in line with state and federal laws with respect to felony versus misdemeanor level offenses.

- Training. An agent reported that the vast majority of the MCIO field offices have taken the Advanced Adult Sexual Assault Program.

One investigator expressed concern about sexual assault training currently provided to Service members. He/she noted that the information that is taught varies depending on who is doing the training. The investigator said that Service members are being told that if a person consumes even one alcoholic drink and they have sex with someone, even if consensual, it is sexual assault.

- Investigation Process. An agent explained that investigators must notify the legal office that a case has been opened within 24 hours of a report. The investigators provide a report on the investigation within 30 days of the sexual assault report and then every 60 days thereafter. The investigator told the Subcommittee members that once the process is started, the command cannot take action and an accused will be on legal hold throughout the process.

- Probable Cause Determination. When asked whether investigators determine probable cause, an investigator told the Subcommittee that the SJA for the MCIO provides an opinion about probable cause.

- Non-participating Victims. An investigator reported that the MCIO has stopped pursuing cases with non-participating victims and that they have these victims sign declination forms.

-VCs. Depending on the victim's preference, they will wait for the VC to establish a relationship with the victim before conducting an interview.

Roundtable with Trial Counsel

The Subcommittee members met with two trial counsel.

- Training. The trial counsel believe that it is important for judge advocates to be trial counsel before becoming defense counsel because trial counsel learn a lot more about the overall process; furthermore, the risk of error is borne by the government rather than the accused.

- Caseload. One trial counsel reported that not all sexual assault cases are going to trial. The counsel noted that there are currently 160-180 cases in the region managed between four counsel and the senior trial counsel. One of the trial counsel reported that he/she had 20 cases that are likely going to trial.

-MCIO. Trial counsel indicated that the MCIO is now investigating all Article 120 cases including those that will be resolved through NJP because the offense is minor or the case is so weak it is unlikely to go to court martial. If anything could be changed, trial counsel would suggest the elimination of mandatory MCIO investigations for all Article 120 cases because it significantly slows down the process. They are spending a lot of time investigating “nut taps” and “butt grabs” which could be appropriately resolved within the commanding officer’s discretion. The high volume leaves the MCIO overwhelmed. A trial counsel said police investigators could handle the abusive sexual contact cases if they were properly trained to do so.

Trial counsel noted that the MCIO is prohibited from investigating for defense counsel and opined that it would be appropriate for defense counsel to get another investigator of their own.

- Non-participating Victims. A trial counsel noted that if a victim declines to participate the trial counsel must still prepare a prosecution memo. A trial counsel reported having seen zero cases where the command disagreed with the probable cause opinion in the prosecution memo.

- Acquittal Rate. A trial counsel told the Subcommittee members that to convict the accused, panel members want the evidence to include eyewitnesses, video evidence, or a confession. The counsel added that panels do not value victim testimony standing alone. The counsel said that the juries have been “saturated” with all the SAPR training and jury members may know people who have been accused of sexual assault or have made accusations that they believe are false. A trial counsel reported that there is a perception among Service members that people are making reports just to get benefits when the reports are untrue. The trial counsel referred to one case where the victim admitted that she completely made up the accusation. Trial counsel will prosecute that fabricator if the commanding officer approves because that revelation has delegitimized real victims.

- VC Program. The trial counsel had very positive views of the VC program; one trial counsel stated that the biggest improvement to the military justice system has been the advent of the VC program. The counsel reported that the VCs understand their purpose and represent victims well. A trial counsel also noted that the success of a VC is very personality driven. The counsel told the Subcommittee members that many VCs previously have been trial counsel and defense counsel and are therefore already accepted as part of the military justice community.

One counsel stated that he/she believes that VC do not interfere with the defendant’s right to a fair trial. He/she added, however, that VCs make the job of a defense counsel harder because victims now know their rights and can no longer have their rights “trampled.” VCs have also removed the burden on trial counsel of having to worry about the victim’s rights, especially in the MRE 513 context. The counsel noted that the VC program forces everyone to be better at their jobs.

A trial counsel told the Subcommittee members that VCs are not purposefully impeding the prosecution but sometimes it may take three months to interview a victim because of the logistics of coordinating among so many people who may be in different geographic locations.

Trial counsel have had to warn VCs that pursuing an expedited transfer will significantly impact the case, especially if defense counsel can point to an improved assignment for the victim. They recommend that it is usually less suspicious if a Service member moves laterally compared to someone returning to live with their fiancé. One trial counsel was glad the military has taken sexual assault so seriously but said things are going too far with the expedited transfers.

- Article 32. A trial counsel stated that if there is no corroborating evidence, the counsel always invites the victim to testify at the Article 32. The counsel reported that there is a 95% participation rate by victims and that they advise a victim to testify when it will help the case survive the Article 32 hearing. The counsel added that they never put a victim at an Article 32 hearing just to test how good they are at testifying. One trial counsel reported that when it seems unlikely the case will proceed past the Article 32 hearing, victims are invited to testify and go on the record describing what the accused did to them. In that circumstance, victim participation has been 50/50. One victim regretted not testifying at the Article 32 because he/she felt it would have helped him/her know what to expect. A trial counsel added that Article 32 hearings used to be 3-4 days long but that they are now much shorter with the prosecutor focused on the limited scope of the hearing. The trial counsel believes the new Article 32 “has hindered the defense.”

One counsel reported that they have taken a lot of cases to trial that do not have a reasonable likelihood of conviction.

- Pretrial Agreements (PTAs). A trial counsel reported that, generally, as a policy, the senior trial counsel will not endorse a pretrial agreement if a victim does not agree with it. However, the trial counsel has seen cases where the PTA was accepted even when the victim did not agree with it.

- Military Rule of Evidence 513. A trial counsel asserted that the protections afforded victims under MRE 513 are very good. The counsel feels that defense counsel can still put on a good case.

Roundtable with Sexual Assault Response Coordinators (SARCs), Victim Advocates (VAs), and Victim Witness Assistance Program (VWAP) Personnel

- Relationship with VCs. The SAPR personnel reported that the VCs are instrumental to victims in many ways and are helpful for ensuring offender accountability.

One participant noted that SARCs do not always get case updates and VCs tend to have better communication with the civilian victim advocates than with the SARCs. A participant also noted that SARCs must work with VCs all over the world because of expedited transfers.

- Acquittals. A participant stated they believe that the high number of acquittals is due to problems with juries understanding the big picture of sexual assault. The participant noted that there has also been a backlash against expedited transfers.

- Sexual Assault Training. One participant stated that sexual assault training should be tailored to the target audience, rather than Service members of all ranks receiving the same training. The participants all agreed that there is no consistent message about the definition of what constitutes “too intoxicated to consent.”

A participant reported that SAPR personnel conduct their sexual assault training using the general military training curriculum developed by the Service; the curriculum contains facilitator guides with notes.

- Contact Cases. One participant reported that they receive reports of about six new abusive contact cases a month. He/she believed that the MCIO should not be handling contact cases; instead, these types of cases should be handled at the discretion of the commander.

Certification

I hereby certify, to the best of my knowledge, that the foregoing is accurate and complete.

//signed//

Member, Judicial Proceedings Panel Subcommittee