

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 H

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 session started at 8:20 a.m. and concluded at 3:15 p.m.

Participating JPP Staff Members

Captain Tammy Tideswell, U.S. Navy, JPP Staff Director
Lieutenant Colonel Glen Hines, U.S. Marine Corps, JPP Attorney Advisor
Mr. Dale Trexler, JPP Chief of Staff
Ms. Jan Chayt, JPP Investigator 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 participants and do not represent the views of the Department of the Defense or the Services.

Installation Command Brief

A senior officer from the command welcomed the participants. He provided the members with an overview on how the Service is currently dealing with the problem of sexual assault. He felt comfortable that the Service was approaching the problem aggressively, was providing Service members with the training to make them aware of available services, and made them comfortable with reporting offenses. He stated there is a fine line between never letting up in the military's efforts to address the problem and oversaturating personnel with training on the issue, adding that training must be relevant and taught at the proper level. He added that retaliation is of concern, but he has seen instances where what was perceived to be retaliation was actually the unintentional result of actions taken by service members.

Roundtable with Trial Counsel

The Subcommittee spoke with seven trial counsel stationed in and around the installation. The group included one O-4 and six O-3s.

- Training. Everyone in the group attended the Basic Lawyer Course (BLC). Several had attended the Special Victims Unit training for judge advocates and agents at Fort Leonard Wood, Missouri and a number had attended the Advanced Sexual Assault Investigations Training for military criminal investigative organization (MCIO) agents at the Federal Law Enforcement Training Center (FLETC). Both of these courses are geared towards investigations vice the prosecution of cases, but did provide a good overview of how agents investigate sexual assault allegations and conduct witness interviews. Those who trained at FLETC were concerned by what they thought was anti-victim sentiment expressed by some of the agents during off-line conversations and remarks. The trial counsel opined that their entry-level attorney training was helpful, but they were more impressed by the subsequent training at civilian sponsored courses since their instructors had over 30 years of experience prosecuting sexual assault cases. A few attended training at the Department of Justice's National Advocacy Center and cited it as being exceptional.

The participants expressed some concern that being on the military justice litigation track may harm their chances for promotion, but this was not a major concern. (Note: A review of the instructions to the promotion board revealed this was not an issue.)

- Initial Disposition Withholding Policy. The requirement for an O-6 to take action on sexual assault cases has resulted in a slight delay in the process since it is more difficult to schedule a meeting with a senior officer. Most O-5s were relieved to pass on the responsibility. Officers in the paygrade of O-5 take action on most non-penetrative cases, but they and the MCIOs are frustrated because of the time it takes to complete a full investigation for these cases. They now see cases reported as sexual assaults when they appear to be nothing more than awkward dating situations (i.e., someone trying to kiss someone).

- New Article 32 Procedures. Trial counsel stated that the new Article 32 procedures no longer have any real value. A lot of defendants are waiving the Article 32, and although there is some overall value to the process, it is merely a "rubber stamp" before forwarding the case to general court-martial. Also, there seems to be an unnecessary delay locating an Article 32 officer for the hearing. Several thought having a sitting magistrate would improve the process.

- Victims' Counsel (VC) Program. Trial counsel held mostly very positive views of the VC program. They greatly appreciate having an attorney explain the military judicial system to victims. They expressed that the main drawback of the program is the need to coordinate another lawyer's schedule when setting up interviews and court sessions.

The participants did not see any issues with the recent modifications to Military Rules of Evidence 412 or 513 or the requirement for a mandatory dishonorable discharge for certain offenses – the defense already contests charges because the accused does not want to register as a sex offender; the accused is less concerned about the dishonorable discharge. Trial counsel also

suggested adopting the Military Justice Review Group (MJRG) magistrate proposal, which would place new judges in a magistrate position before presiding over courts-martial. The magistrate judges could also serve as Article 32 Preliminary Hearing Officers.

The participants also stated that the expedited transfer policy has occasionally been abused. They believe transfers should be done to a lateral command, and not to a more desirable position or geographic location. If the move is not perceived as lateral, defense counsel can cross-examine the victim to show a motive to lie.

Roundtable with Defense Counsel

- Training. The Subcommittee spoke with four defense counsel consisting of one O-4, and two O-3s, all of whom attended their Service's BLC. The Defense Counsel Assistance Program (DCAP) offers a "Defending Sexual Assault Cases Course" which most had attended. The participants spoke highly of training provided by their Service judge advocate school, the National Criminal Defense College, and Brooklyn Defenders. The Service course was sexual assault specific, while the civilian courses included attorneys with vast experience defending clients accused of different types of crimes.

- Initial Disposition Withholding Policy. The change in the withholding policy has had no significant impact on defense practices.

- New Article 32 Procedures. The change in the Article 32 process has greatly impacted defense practices. Some defense counsel believe the change provided an unintended benefit to the defense – without testimony at an Article 32, the first time an alleged victim testifies is during the court-martial. The victim often comes across as unprepared and seems more vulnerable during an aggressive cross-examination. Defense counsel did not think there had been a change in the conviction rate. Many defense counsel waive the Article 32 preliminary hearing as they believe there is no real benefit to their client. Participants felt that staff judge advocates (SJAs) often recommend referring charges even though the Article 32 Preliminary Hearing Officer recommended dismissing the charges or seeking an alternative disposition. The participants were concerned that some VCs were supporting or recommending that their clients pursue weak cases, leading to an increased number of acquittals and not meeting victim expectations.

The defense office, overall, does not have sufficient personnel (counsel or support staff) to keep up with the demand. The defense counsel expressed that even highly skilled and motivated personnel can only accomplish so much in a day.

Roundtable with Victims' Counsel

- Training. The Subcommittee spoke with four VCs – two O-4s and two O-3s. All VCs had attended the basic course and one of the Special Victims' Counsel courses. The VCs had all attended victim advocate training. All VCs agreed there is a need for more training on handling the emotional side of working with victims. At the time they attended their initial VC certification course there was no module on "vicarious trauma." They recommended that this topic be made a part of all VC training. They also agreed that having prior litigation experience

was important to successfully serving as a VC. Attorneys do not keep cases when they rotate to a new assignment, which can be upsetting to the client.

- Working Relationships. Most VCs expressed that they have a good working relationship with trial counsel, defense counsel, and the investigators. The success of those relationships depends on the individuals in the positions and their willingness to work collaboratively.

- Retaliation. The participants did not feel that their clients were retaliated against by the chain of command. However, they did observe issues with retaliation at the peer-to-peer level. The expedited transfer policy is a good tool to remove a client from a bad situation.

One concern expressed by the VCs is the overtraining of young enlisted members. For instance, Sexual Assault Prevention and Response (SAPR) has become a verb, with service members threatening to “SAPR” someone who has treated someone poorly. It is now a joke and is no longer taken seriously. The VCs suggested that training is beginning to fall on “deaf ears.”

- New Article 32 Procedures. While generally in favor of the new Article 32, VCs expressed concern that trial counsel may not be spending the requisite time with victims to prepare them for trial. They felt trial counsel were quick to blame the VC for lack of access to the victim-witness before trial, but some VCs opined that many trial counsel are now inexperienced and do not contact them to interview and prepare the victim until shortly before trial. Some clients may decline to move forward to trial for many reasons. At trial, VCs thought that the members often want more evidence than what has been presented by the government, which may be one reason for the perceived high acquittal rate.

There are still issues regarding the role of the VC in the case and the court, and some judges still apply different rules to what the VC is permitted to do in any given case.

Roundtable with Law Enforcement Personnel

- Training. The Subcommittee spoke with four MCIO agents. There is a one-week Sexual Assault Investigations Course (SAIC) at FLETC. Seventy-five percent of the material in that course is also taught at FLETC’s basic agent course. The additional training module at SAIC is about how to conduct a trauma-informed interview. The MCIO is now looking at adding that module to the basic course. In spite of the repetition, the course has value in that agents are briefed on new policies and legislative changes. Agents who are recently assigned to the MCIO seem to be much more receptive to the information than agents with more experience. There are some characteristics that are unique to a sexual assault case, one being investigator bias. That is addressed in the course. When the requirement came out to have specially trained agents, many agents found that it was a burden both in time and money. Now the majority of the agents have been trained.

The agents felt they work well with trial counsel, bringing them into the case early and coordinating with them often. They see a lot of the VCs and have experienced delays in being able to interview the victim. They also are concerned that the VC may over-prepare their clients for the interview. All MCIO agents inform victims of their right to a VC. The agents are also

concerned about the information they are asked to provide for the Defense Sexual Assault Incident Database (DSAID). Much of the information now required is not data routinely collected by the MCIO; additionally, if civilian law enforcement is involved, the data is typically difficult to obtain. The agents also raised another issue of concern: individuals who are the alleged offenders sometimes come forward claiming they were the victim.

The agents stressed that they investigate all reports of sexual assault received, which is a burden on their limited resources. Often cases occurring off base are initially pursued by the local police, only to be declined much later, leaving the MCIO with little or no evidence to pursue in an attempt to build a good case. The cases that have some of the longest delays are from forward deployed commands. Incidents of “phantom fondlers” are very difficult to investigate and often the victim requests an expedited transfer.

Roundtable with Sexual Assault Response Coordinators (SARCs) and Victim Advocates (VAs)

- Training. The Subcommittee spoke with six individuals in victim assistance roles, four SARCs, and two VAs. All of these individuals were certified as VAs at different levels based on training and experience through the National Organization for Victim Assistance (NOVA). SARCs are required to complete a 40-hour online course. VAs must also complete a 40-hour course.

Several VAs had attended other training. They are required to have 32 hours of continuing education to maintain their certification. Several had attended the annual SARC/VA conference, which was not held this year due to lack of funding. They feel this training is essential and allows them to learn best practices from others. All participants commented that the online training was out of date and of little value.

An issue the VAs and SARCs are facing is the lack of clarity on their position and of others in the SAPR community. For some commands it can be difficult to establish an individual’s chain of command, which can be problematic when obtaining an expedited transfer or a military protective order.

The participants wanted a mechanism to share best practices and to seek help and advice from their peers.

The session concluded at 3:15 p.m.

Certification

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

//signed//

Member, Judicial Proceedings Panel Subcommittee