

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



**Report on the Advisability and Feasibility of  
Establishing a Guardian ad Litem Appointment  
Process for Child Victims of an Alleged Sex-  
Related Offense in the Military**

**June 2020**



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# **Defense Advisory Committee on Investigation, Prosecution, and Defense of Sexual Assault in the Armed Forces**



**Report on the Advisability and Feasibility of Establishing a  
Guardian ad Litem Appointment Process for Child Victims  
of an Alleged Sex-Related Offense in the Military**

**June 2020**





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

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June 17, 2020

The Honorable James Inhofe  
Chairman  
Committee on Armed Services  
United States Senate  
Washington, DC 20510

The Honorable Jack Reed  
Ranking Member  
Committee on Armed Services  
United States Senate  
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The Honorable Adam Smith  
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The Honorable Mac Thornberry  
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The Honorable Mark T. Esper  
Secretary of Defense  
1000 Defense Pentagon  
Washington, DC 20301

Dear Chairs, Ranking Members, and Mr. Secretary:

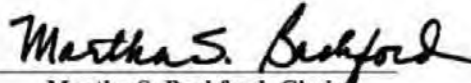
We are pleased to provide you with the *Defense Advisory Committee on Investigation, Prosecution, and Defense of Sexual Assault in the Armed Forces [DAC-IPAD] Report on the Advisability and Feasibility of Establishing a Guardian ad Litem Appointment Process for Child Victims of an Alleged Sex-Related Offense in the Military* in accordance with the request of the Armed Services Committee of the U.S. House of Representatives [HASC] in its 2019 report accompanying H.R. 2500.

To address the HASC's request, the Committee conducted comprehensive research on civilian and military practices regarding appointment of guardians ad litem for child victims. This report summarizes the Committee's research—which included extensive interviews of experts in the area of child victims' rights and review of civilian and military statutes, rules of professional conduct, and court practices—and sets forth the Committee's 42 findings and eight recommendations resulting from this research.

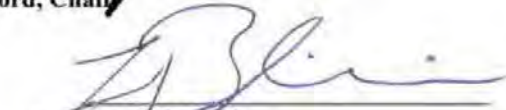
While the Committee found that there are some rare circumstances in which it is appropriate for military judges to appoint either a victims' attorney or best interests advocate for a child victim, the Committee concludes that it is neither advisable nor necessary to implement a designated guardian ad litem program in the Military Services, whether in the form of instituting a new program to protect the best interests of child victims of sexual offenses or of allowing special victims' counsel to act as guardians ad litem for child victims. In reaching this conclusion, the Committee assumes that the Department of Defense will implement this report's recommendations designed to address the gaps in current services for child victims.

The members of the DAC-IPAD would like to express our sincere gratitude and appreciation for the opportunity to make use of our collective experience and expertise in this field to develop recommendations for improving the military's response to sexual misconduct within its ranks.

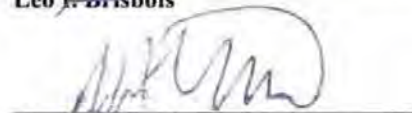
Respectfully submitted,


  
Martha S. Bashford, Chair

  
Marcia M. Anderson

  
Leo L. Brisbois

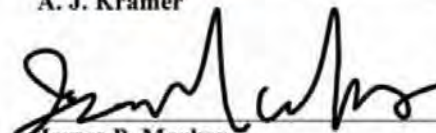
  
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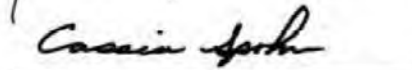
  
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## EXECUTIVE SUMMARY

In its 2019 report accompanying H.R. 2500, the Armed Services Committee of the U.S. House of Representatives (HASC) acknowledged the extensive efforts of the Department of Defense (DoD) to implement and expand services to support Service members and dependents who are victims of sexual assault. However, the HASC also noted its continuing concern for the welfare of minor military dependents who are victims of these crimes. Specifically, the HASC expressed concern regarding the possible lack of an adequate mechanism within the military justice system to represent the best interests of minor victims following an alleged sexual offense. To address this concern, the HASC requested that the Defense Advisory Committee on Investigation, Prosecution, and Defense of Sexual Assault in the Armed Forces (DAC-IPAD or Committee) evaluate the advisability and feasibility of establishing a process under which a guardian ad litem (GAL) may be appointed to represent the interests of a child victim of an alleged sex-related offense in a court-martial.

To fully address the HASC's request, the Committee identified a series of questions that would guide its research and deliberations:

- First, what services does the military currently provide to child victims of sex-related offenses?
- Second, how do civilian jurisdictions represent the interests of child victims?
- Third, are there gaps in the military's services, and, if so, is a GAL the best practice to fill them?
- Finally, and underlying its inquiry more generally, do all child victims require the same approach?

### *Current Services for Child Victims of Alleged Sex-Related Offenses*

To evaluate the services currently provided by the military to support child victims of sexual offenses and to obtain statistics involving child victims of sexual offenses in 2018 and 2019, the DAC-IPAD submitted written requests for information (RFIs) to the Military Services' Special Victims' Counsel and Victims' Legal Counsel (SVC/VLC) Programs,\* Family Advocacy Programs (FAPs), and Trial Judiciaries. The Committee also conducted interviews with the program managers and other experts from these organizations.

As the HASC correctly noted, DoD has established a multitude of programs to assist and support Service members and their dependents who are victims of sexual offenses. Its flagship victims'

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\* Since 2014, victims of alleged sexual offenses who are Service members and their dependents have been entitled to representation by a military attorney—known as a special victims' counsel (SVC) in the Army, Air Force, and Coast Guard and a victims' legal counsel (VLC) in the Navy and Marine Corps.

service—the SVC/VLC Programs—was implemented in 2014 across all of the Military Services. Specially trained, government-funded military attorneys are available to all Service members, their dependents, and, on a case-by-case basis, others who are victims of alleged sexual offenses committed by Service members. An SVC/VLC enters into an attorney-client relationship with the victim to represent them in court-martial proceedings and to protect their legal rights under Article 6b of the Uniform Code of Military Justice (UCMJ)—the military’s version of the Crime Victims’ Rights Act. The SVC/VLC Programs reflect the national trend toward having an attorney represent the expressed interests of a child victim within the criminal justice system.

For crime victims who are under the age of 18, Article 6b, UCMJ, provides that a military judge may designate a suitable individual to “assume the rights of the victim.” This Article 6b, UCMJ, representative is typically the non-offending parent or another family member or legal guardian of the child. When no suitable family member or guardian is available, the military judge may appoint another adult—such as a civilian guardian ad litem—as the Article 6b, UCMJ, representative.

In addition to SVC/VLC and Article 6b, UCMJ, representation, the military also provides special victim unit investigators, special victim prosecutors, and special victim witness liaisons who are specifically trained to support victims of sexual offenses, including children. The Military Services’ FAPs offer counseling services, coordinate with local child protective services agencies and child advocacy centers, and provide domestic abuse victim advocates (DAVAs) who support adults and non-offending parents in cases of domestic violence and child abuse and neglect. However, no victim advocates currently are dedicated to child victims of sexual offenses.

### ***Civilian Practices***

The Committee next identified the best practices for representing the interests of child victims in civilian jurisdictions. To do so, the Committee evaluated state and federal statutes, case law, scholarly articles, relevant policies and initiatives of the American Bar Association, and the Model Rules of Professional Conduct. The Committee staff also conducted numerous interviews with some of the country’s leading practitioners and experts on representing children and on child victims’ rights.

Civilian academics, practitioners, and legal organizations have studied and debated best practices for representing child victims of crime for more than 30 years, devoting much detailed scholarship and analysis to this issue. Two models of representation for child victims developed over time. In the first model, which originated in civil child abuse and neglect proceedings, a guardian ad litem serves the court as an independent voice on behalf of the “best interests” of the child. A GAL is not always required to be an attorney, and the qualifications for GALs vary widely across civilian jurisdictions. In the second model, an attorney forms a traditional attorney-client relationship with the child and represents the child’s considered, “expressed interests.” Typically, civilian jurisdictions follow one model or the other in criminal cases: only in very rare circumstances will both an attorney and a GAL be appointed or necessary in a criminal case.

The consensus view today is that client-directed representation by an attorney is the best practice for child victims of abuse, neglect, and other crimes. Even very young children are capable of expressing their views on many issues. Under the client-directed representation model, when a child is not capable of directing their representation, the attorney should gather information about the child's family, community, and culture in order to arrive at the decision the child would make if they were capable, looking in particular to the non-offending parent for insight and support, as long as no conflict with that parent exists. The "best interests" model is not recommended by experts in criminal cases, except as a last resort in very limited circumstances—when there is risk to the child of substantial physical or other harm, the child cannot act in their own interest, and all other potential remedies have been exhausted.

### ***Gaps in Services Provided and Recommendations***

After examining the services currently provided by the military to child victims of alleged sex-related offenses and evaluating civilian best practices for representing child victims, the Committee identified several gaps. While determining that all child victims do not require the same services, the Committee noted the particular vulnerability of certain types of child victims, such as those who are incapable of directing their own representation and those who do not have a supportive family member. Targeting these gaps, the Committee makes eight recommendations in this report.

**SVC/VLC Experience and Expertise.** First, the Committee found that legal representation of child victims is very challenging and requires specialized training and practice. To address this gap, the DAC-IPAD recommends enhanced funding and training for SVCs/VLCs who represent child victims, development of a cadre of SVCs/VLCs with such expertise, and the addition of highly qualified experts (HQEs) within the SVC/VLC Programs with expertise in representing child victims to train and assist SVCs/VLCs in handling these cases.

**Eligibility and Use of SVCs/VLCs.** A second gap identified by the Committee pertains to eligibility for and use of SVC/VLC services. Non-dependent child victims of sexual offenses are not eligible for SVCs/VLCs under current policy—though case-by-case exceptions to this policy are permitted and routinely granted. Furthermore, even in situations in which children are eligible for SVC/VLC representation, the Committee found that only a small percentage of them were using SVC/VLC services. For example, in the Army only about 10% of the 787 child victims who reported a sexual offense in 2018 and 2019 were represented by SVCs, even though more than 60% of those 787 victims were eligible for representation.

**Expand SVC/VLC Eligibility.** To address this gap, the Committee recommends that every child victim of a sex-related offense in the military justice system be eligible to receive the services of an independent, competent, and zealous attorney who has specialized training on sexual assault and child advocacy, as well as adequate time and resources to handle the case.

**Improve Notification of SVC/VLC Eligibility.** In addition, to determine why the use of SVC/VLC services is so low among child victims of sexual offenses, the Committee recommends that the Department of Defense Office of the Inspector General and the Secretaries of the Military Departments assess whether the military criminal investigative organizations (MCIOs) and FAPs

are currently providing accurate and timely notification to child victims of their right to request SVC/VLC representation as soon as an allegation of a sexual offense is reported; if not, they should take necessary corrective action. The Committee further notes that an expansion of the SVC/VLC program would require an increase in funding to accommodate the increased caseload.

*Authorize Appointment of an SVC/VLC and/or a Best Interest Advocate in Limited Circumstances.* No mechanism currently exists for a military judge to appoint an SVC/VLC for a child, or to appoint an independent best interest advocate to report to the court when the military judge determines that the child victim's interests would otherwise not be adequately protected—for example, when the child lacks a supportive parent. In those rare circumstances, the Committee recommends that Congress amend the UCMJ to authorize military judges to appoint SVCs/VLCs and/or best interest advocates. An SVC/VLC, if appointed, would first need to assess the child's capacity to form an attorney-client relationship and, if they are capable, to determine whether the child's decision regarding representation is distorted by the lack of a supportive parent or guardian. In some cases, a civilian GAL already may have been appointed to represent the child in the civil system—typically as part of a child abuse and neglect or custody proceeding. If so, that same person could be appointed by the military judge as the independent best interest advocate. The appropriate convening authority would provide funding for the best interest advocate, much as prosecution and defense expert consultants and witnesses are currently funded.

**Child Victim Advocates.** A third gap in services available to child victims of sexual offenses identified by the Committee is the lack of a victim advocate program dedicated to child victims of sexual offenses. Although FAPs have victim advocates who support adults and non-offending parents in cases of domestic violence and child abuse and neglect, the military does not assign victim advocates to child victims. To remedy this gap, the Secretary of Defense and the Secretaries of the Military Departments should develop a child victim advocate capability within each of the SVC/VLC Programs in each of the Military Services to support child victims of sexual offenses. A child victim advocate would not be necessary in every criminal case, as every child victim would not require the same services; they would be particularly beneficial when the victim cannot express an interest and/or no supportive parent is present to inform the SVC's/VLC's representation of the child client.

The child victim advocate, who would work within the SVC/VLC organizations, should possess expertise in social work, child development, and family dynamics. They would partner with the SVC/VLC to enhance the lawyer's representation of the child victim. For example, the child victim advocate would collaborate with the SVC/VLC to determine the child's developmental age, their capacity to form an attorney-client relationship, and the potential impact of legal proceedings on their mental and emotional state. In cases in which the child lacks SVC/VLC representation, the child victim advocate would be available to help them navigate the criminal justice system.

**Responsibility of an Article 6b, UCMJ, Representative.** The fourth and final gap identified by the Committee is that Article 6b, UCMJ, does not require that a representative appointed by a military judge to assume the rights of a victim must act in the victim's interest. The military judge currently has discretion to replace an Article 6b, UCMJ, representative for good cause. However, it is possible for a non-supportive parent to undermine the rights and privileges of the child victim by exercising the child's legal rights in an objectively unreasonable manner likely to cause harm to the child. To address this gap, the Committee recommends that Congress amend Article 6b, UCMJ, to require that any representative who assumes the rights of the victim shall act to protect the victim's interests. The Committee found that in any case in which a child victim either has the capacity to direct their legal representation or, if not represented, has the capacity to exercise their rights under Article 6b, UCMJ, designation of a representative to assume the right of the child is not necessary or desired.

**Conclusion Regarding Military Guardian ad Litem Program.** The Committee concludes that it is neither advisable nor necessary to implement a guardian ad litem program in the Military Services, whether in the form of instituting a new program to protect the best interests of child victims of sexual offenses or of allowing SVCs/VLCs to act as GALs for child victims. Although the addition of a child victim advocate is not necessary in all cases, for those child victims who cannot direct their own legal representation or who lack a supportive family member, a trained child victim advocate working in collaboration with the SVC/VLC is the best option for ensuring that a child's interests are protected in the courtroom. In reaching this conclusion, the Committee assumes that the Department of Defense will implement this report's recommendations designed to address the gaps in current services for child victims.

## SUMMARY OF FINDINGS AND RECOMMENDATIONS

### Introductory Findings\*

- **Finding 47:** The Military Services currently use a multidisciplinary, victim-centered approach to respond to allegations of sex-related offenses committed against children by an individual subject to the Uniform Code of Military Justice (UCMJ) and to ensure that the child victim's legal, social, emotional, and physical needs are met.
- **Finding 48:** The Military Services' response to a child's allegations of sex-related offenses includes providing a special victims' counsel (SVC) (known as a victims' legal counsel (VLC) in the Navy and Marine Corps) upon request to all eligible victims of sex-related offenses, including children; however, only about 10% of child victims who reported sex-related offenses committed by Service members had SVC/VLC representation in 2018 and 2019.
- **Finding 49:** The national trend, reflected in the SVC/VLC Programs and the Rules of Professional Conduct, is for an attorney to represent the expressed interests of a child victim within the criminal justice system. Child victims' rights experts believe that children as young as five or six are capable of expressing their wishes to an attorney on many issues relevant in a criminal trial and that in most cases a child's considered, expressed interests *are* their best interests.
- **Finding 50:** The SVC/VLC enters into an attorney-client relationship with their child victim clients when the child has the capacity to undertake such a relationship, which is considered a best practice. Legal ethics standards recognize that young children are regarded as having opinions that are entitled to weight in legal proceedings, and that a child may be able to articulate a position with regard to their representation in some matters but not others.
- **Finding 51:** The Military Services report that in the majority of child-victim cases, either a child victim of a sex-related offense is capable of expressing their wishes to an SVC/VLC or the trial counsel, if there is no SVC/VLC representing the child, or the child victim has a supportive, non-offending family member who can adequately advocate for their interests.
- **Finding 52:** Appointing the SVC/VLC as a guardian ad litem or best interest advocate under limited circumstances is not considered a best practice. SVCs/VLCs are trained attorneys, not experts in child development and behavior, and they have no experience or expertise as best interests advocates. In addition, appointing the SVC/VLC as a hybrid counsel/guardian ad litem or best interest advocate could result in conflicts of interest if

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\* Findings 1–46 were included in previous DAC-IPAD Reports *available at* <https://www.dacipad.whs.mil>.



the child's expressed interest and best interest diverged, possibly delaying the criminal proceedings and resulting in confusion for the child victim.

- **Finding 53:** When a child victim lacks capacity to exercise their rights under Article 6b, UCMJ, the military judge is authorized to appoint a supportive adult to assume the rights of the victim. This Article 6b, UCMJ, representative is typically a supportive parent or other family member, but it can be another adult if necessary—for example, when there is no supportive, non-offending parent to assume those rights.
- **Finding 54:** In 2018 and 2019, military judges exercised their discretion to appoint an Article 6b, UCMJ, representative to assume the rights of a child victim of a sex-related offense in 86 out of 1,348 reports of alleged sexual offenses committed by service members. By Service, the percentage of cases involving a child victim of a sex-related offense in which an Article 6b, UCMJ, representative was appointed was 2% in the Army, 9% in the Navy, 15% in the Marine Corps, 13% in the Air Force, and 0% in the Coast Guard.
- **Finding 55:** There currently is no statutory requirement that an Article 6b, UCMJ, representative who assumes the rights of a child victim of a sex-related offense exercise those rights in their best interests, although the military judge has the authority to replace the representative for good cause.
- **Finding 56:** Rule 1.14 of Professional Conduct (Client with Diminished Capacity) for attorneys, as adopted by the Military Services, permits an attorney to take actions that are reasonably necessary to protect a client, including seeking the appointment of a guardian ad litem, in very limited circumstances: when the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical or other harm, and cannot adequately act in their own interest. “Reasonably necessary” protective action is generally the least restrictive action under the circumstances, and appointment of any guardian is considered a serious deprivation of the client's rights and ought not be undertaken if other, less drastic, solutions are available.
- **Finding 57:** In cases that involve an SVC/VLC and/or a supportive parent, regardless of whether the child victim has the capacity to direct their legal representation, appointment of an independent guardian ad litem or other best interest advocate not only is unnecessary but could introduce new problems, particularly if the appointed person disagrees with the supportive parent on an issue.
- **Finding 58:** The Military Services currently have memoranda of understanding with local civilian services to coordinate obtaining guardian ad litem services for a child victim of a sex-related offense when necessary, but a guardian ad litem or other best interest advocate is unnecessary in most cases. In those cases that are the rare exceptions,

the military judge appoints the guardian ad litem as the Article 6b, UCMJ, representative to assume the rights of the child victim.

- **Finding 59:** In the 1,348 military cases involving child victims of an alleged sex-related offense reported in 2018 and 2019, the Military Services used a civilian guardian ad litem as the Article 6b, UCMJ, representative once in the Army, once in the Air Force, twice in the Marine Corps, and never in the Navy or Coast Guard.
- **Finding 60:** Military dependents who allege a sex-related offense while living overseas are typically returned to the United States to access civilian child protective services, child advocacy centers, and other social services in those cases in which there is no supportive or non-offending family member.
- **Finding 61:** In the overwhelming majority of cases, the Military Services provide dependent child victims of sexual offenses the services sufficient to address their legal and social needs, in conjunction with state child protective agencies. However, additional funding and personnel will enhance the protections needed for minors who are the victims of sexual assault committed by members of the Armed Forces. The DAC-IPAD makes the following recommendations to improve the delivery of these services and to address observed gaps.

### *SVC/VLC Eligibility and Expertise in Representing Child Victims of Sex-Related Offenses*

**DAC-IPAD Recommendation 24:\*** Secretaries of the Military Departments (and the Secretary of Homeland Security with respect to the Coast Guard when not operating as a service in the Navy) enhance funding and training for SVCs/VLCs appointed to represent child victims, including authorization to hire civilian highly qualified experts (HQEs) with experience and expertise in representing child victims, including expertise in child development, within the SVC/VLC Programs.

- **Finding 62:** One or more HQEs who are experienced specialists in child sexual abuse and in representing and advocating on behalf of child crime victims could advise and train SVCs/VLCs and support SVC/VLC program managers. This proposed support is similar to that currently provided by HQEs in the Military Services Trial Counsel Assistance Programs to the special victims' prosecutors who prosecute these cases, and the support provided by the Defense Counsel Assistance Programs to defense counsel who defend those accused of sexual and other criminal offenses.
- **Finding 63:** HQEs could also assist the assigned SVC/VLC to determine whether a child has the capacity to direct their own representation.

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\* Recommendations 1–23, which were included in previous DAC-IPAD Reports, are provided in Appendix E.

**DAC-IPAD Recommendation 25:** In conjunction with Recommendation 24, the Judge Advocates General of the Military Services including the Coast Guard and the Staff Judge Advocate to the Commandant of the Marine Corps develop a cadre of identifiable SVCs/VLCs who have specialized training, experience, and expertise in representing child victims of sex-related offenses by utilizing military personnel mechanisms such as Additional Skill Identifiers.

- **Finding 64:** Specialized training and practice are critical for attorneys to effectively represent child victims. Experts recommend that a child victim's attorney should be competent in understanding child and adolescent development, communication and confidentiality issues, and issues relating to the child-parent relationship.

**DAC-IPAD Recommendation 26:** The Department of Defense Office of the Inspector General and the Secretaries of the Military Departments (and the Secretary of Homeland Security with respect to the Coast Guard when not operating as a service in the Navy) assess whether the military criminal investigative organizations (MCIOs) and Family Advocacy Programs (FAPs) currently are providing accurate and timely notification to child victims of their right to request SVC/VLC representation as soon as an allegation of a sexual offense is reported, and if necessary take corrective action.

- **Finding 65:** The majority of child victims of sex-related offenses do not use the services of SVCs/VLCs.
- **Finding 66:** MCIO and FAP personnel should inform child victims of sex-related offenses of their ability to request an SVC/VLC at the time the crime is reported.
- **Finding 67:** The notification should emphasize that the decision whether to request SVC/VLC assistance is the child's, and that the SVC's/VLC's duty is to represent the child, not any parent or guardian. When the child is incapable of forming an attorney-client relationship, a Service practice is to execute a letter of representation with the non-offending parent, although the letter makes clear that the SVC/VLC represents the child and not the parent.

**DAC-IPAD Recommendation 27:** Congress amend 10 U.S.C. § 1044e to expand SVC/VLC eligibility to any child victim of a sex-related offense committed by an individual subject to the UCMJ.

- **Finding 68:** Every child victim of a sex-related offense in the military justice system should be eligible to receive the services of an independent, competent, and zealous attorney with specialized training on sexual assault and child advocacy, and with adequate time and resources to handle the case. Currently, SVC/VLC services for child victims of sex-related offenses are limited to military dependents.
- **Finding 69:** The American Bar Association recognizes that only an attorney can ensure that a child victim's rights are protected, can ensure that age-appropriate accommodations

are made, and can petition the court for relief in cases in which the court finds that the child's interests are not otherwise protected.

- **Finding 70:** The Military Services are now authorized to grant exceptions to policy to appoint SVCs/VLCs upon request for child victims of sex-related offenses who are not currently eligible. Each Military Service reports that such exceptions are routinely granted when requested.
- **Finding 71:** The Military Services' statistics indicate that in 2018 and 2019, most child victims of sex-related offenses were not represented by an SVC/VLC. For example, the Army, which has the greatest number of cases, reported that of 787 child victims of sex-related offenses in 2018 and 2019, 481 were military dependents eligible for SVC/VLC services. Of that number, 73 child victims—approximately 15% of eligible victims and 9% of total victims—were represented by an SVC/VLC.
- **Finding 72:** A statutory change to 10 U.S.C. § 1044e likely would require an accompanying increase in appropriations to fund the anticipated increase in case load for SVC/VLC Programs.

**DAC-IPAD Recommendation 28:** Congress amend the UCMJ to authorize the military judge to direct the appointment of an SVC/VLC for a child victim of a sex-related offense and/or of an independent best interest advocate to advise the military judge when they find that the child's interests are not otherwise adequately protected.

- **Finding 73:** The fact that only a fraction of child victims of sex-related offenses are represented by an SVC/VLC may indicate the need for a new authority.
- **Finding 74:** When a child has declined or has failed to request SVC/VLC representation, there currently is no mechanism to assign an attorney in order to ascertain whether their decision was voluntary. An attorney would first need to assess the child's capacity to form an attorney-client relationship and, if they are capable, to determine whether their decision regarding representation was distorted by the lack of a supportive parent or guardian.
- **Finding 75:** Under this proposal, the SVC/VLC could consult with the child, who, if they possess the capacity to do so, could exercise a knowing and voluntary waiver of their right to legal representation.
- **Finding 76:** For children with a supportive parent, the presumption is that an independent best interest advocate would not be necessary or helpful. Indeed, a best interest advocate could undermine the attorney-client relationship and generate conflicts as well as additional litigation. In most cases in which the child is represented by an SVC/VLC, the SVC/VLC is fully trained to represent the child's legal interests and already works with

FAP to coordinate social services to assist the child in coping with the impacts of the criminal proceedings. In most cases, the supportive parent also works to protect the child's best interest.

- **Finding 77:** In some cases, a civilian guardian ad litem already may have been appointed to represent the child in the civil system—typically as part of a child abuse and neglect or custody proceeding. If so, that same person could be appointed by the military judge as the best interest advocate.
- **Finding 78:** The appropriate convening authority would be responsible for funding the cost of any best interest advocate appointed by the military judge, much as prosecution or defense expert witnesses and consultants are currently funded.

### *Dedicated Victim Advocate for Child Victims of Sex-Related Offenses*

**DAC-IPAD Recommendation 29:** The Secretary of Defense and the Secretaries of the Military Departments (and the Secretary of Homeland Security with respect to the Coast Guard when not operating as a service in the Navy) develop a child victim advocate capability within each of the Services to support certain child victims of sexual offenses. The child victim advocate should reside within the SVC/VLC Programs and work as part of the SVC/VLC team in order to ensure that the child's legal interests are fully represented and protected. The child victim advocate should have expertise in social work, child development, and family dynamics.

- **Finding 78:** The military does not have a victim advocate program dedicated to support child victims of sex-offenses. Although FAPs have victim advocates (VAs) and domestic abuse victim advocates (DAVAs) who support adults and non-offending parents in cases of domestic violence and child abuse and neglect, VAs and DAVAs are not assigned to children.
- **Finding 79:** In order to enjoy privileged communications with child victims under Military Rule of Evidence 514, the child victim advocate would reside within the SVC/VLC organizations rather than within the FAP or the prosecution.
- **Finding 80:** The child victim advocate would not serve as an independent “best interest” advocate charged with representing the best interests of the child. Instead, the child victim advocate would work in conjunction with the SVC/VLC to enhance their representation of the child victim. The child victim advocate, who would possess training, expertise, and experience in social work, child development, and family dynamics, as well as familiarity with the military justice system, could help support the legal interests of the child victim.

- **Finding 81:** Among other tasks, the child victim advocate would collaborate with the attorney so that both understand the child's developmental age and would assist the SVC/VLC in assessing the potential impact of legal proceedings and options on the child's mental and emotional state.
- **Finding 82:** While a child victim advocate may not be necessary in every criminal case, this capability is most beneficial in cases when the child victim cannot express an interest and/or no supportive parent is present to inform the SVC's representation of the child client. In these cases, the child victim advocate would assist the SVC/VLC in gathering information from a wide range of sources on the child's history, family, community, and culture. This information would enable the SVC/VLC to make a substituted judgment determination for the client who lacks capacity to direct their representation.
- **Finding 83:** In cases without SVC/VLC representation, the child victim advocate would be available to help the child navigate the criminal justice system.

***Responsibility of the Article 6b, UCMJ, Representative to Act in the Child Victim's Interest***

**DAC-IPAD Recommendation 30:** Congress amend Article 6b, UCMJ, to require that any representative who assumes the rights of the victim shall act to protect the victim's interests; any such representative should be appointed as early as possible in the military justice process.

- **Finding 84:** In any case in which a child victim has the capacity to direct their legal representation or, if not represented, has the capacity to exercise their rights under Article 6b, UCMJ, designation of a representative to assume the right of the child is not necessary or desired.
- **Finding 85:** This amendment ensures that the Article 6b, UCMJ, representative does not undermine the rights and privileges of the victim or exercise the child's legal rights in a manner that is objectively unreasonable and likely to cause harm.
- **Finding 86:** In the majority of cases in which the military judge exercises their discretion to designate an individual to assume the rights of the victim under Article 6b, UCMJ, the representative is the non-offending parent or another family member who supports the child victim of a sexual offense and acts in the child's interests when exercising the victim's rights guaranteed by Article 6b.
- **Finding 87:** The military judge currently has discretion to remove and replace an Article 6b, UCMJ representative for good cause.

*Conclusion Regarding a Military Guardian ad Litem Program*

**DAC-IPAD Recommendation 31:** Provided that the Department of Defense adopts and implements DAC-IPAD Recommendations 24–30, it is not advisable or necessary to establish a military guardian ad litem program within the Department of Defense for child victims of alleged sex-related offenses in courts-martial.

# REPORT ON THE ADVISABILITY AND FEASIBILITY OF ESTABLISHING A GUARDIAN AD LITEM APPOINTMENT PROCESS FOR CHILD VICTIMS OF AN ALLEGED SEX-RELATED OFFENSE IN THE MILITARY

## I. INTRODUCTION

In its report accompanying H.R. 2500, the Armed Services Committee of the U.S. House of Representatives (HASC) acknowledged the extensive efforts of the Department of Defense (DoD) to implement and expand services to support Service members and dependents who are victims of sexual assault. However, the HASC also noted its continuing concern for the welfare of minor military dependents who are victims of these crimes. Specifically, the HASC highlighted the possible lack of an adequate mechanism within the military justice system to represent the best interests of minor victims following an alleged sexual offense. To address this concern, the HASC requested that the Defense Advisory Committee on Investigation, Prosecution, and Defense of Sexual Assault in the Armed Forces (DAC-IPAD or Committee) evaluate the advisability and feasibility of establishing a process under which a guardian ad litem (GAL) may be appointed to represent the interests of a child victim of an alleged sex-related offense in a court-martial.<sup>1</sup>

The military currently employs a multidisciplinary, victim-centered approach to respond to sexual offenses and to provide legal and social services to victims of these crimes. Congress first directed the Secretary of Defense to establish victim advocacy programs within the Military Departments to assist members of the Armed Forces and their dependents who are victims of crime—including intrafamilial sexual, physical, and emotional abuse—in 1995.<sup>2</sup> However, no victim advocates are dedicated to child victims of sexual offenses. Since 2014, victims of alleged sexual offenses who are Service members and their dependents have also been entitled to representation by a military attorney—known as a special victims’ counsel (SVC) in the Army, Air Force, and Coast Guard and a victims’ legal counsel (VLC) in the Navy and Marine Corps.<sup>3</sup> SVCs and VLCs enter into attorney-client relationships with their clients, including children, and

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<sup>1</sup> H.R. REP. NO. 116-120, at 124–25 (2019). While this provision from the House Report was not part of the final National Defense Authorization Act for Fiscal Year 2020 (FY20 NDAA), the DAC-IPAD is following the Department of Defense policy of responding to all requests for reports made by Congress. The final FY20 NDAA contained a slightly different provision directing the Secretary of Defense to also submit a report to Congress “setting forth an assessment of the feasibility and advisability of establishing a guardian ad litem program for military dependents . . . who are a victim or witness of an offense under [the Uniform Code of Military Justice], that involves an element of abuse or exploitation in order to protect the best interests of such dependents in a court-martial of such offense.” *See* National Defense Authorization Act for Fiscal Year 2020, Pub. L. No. 116-92, 133 Stat. 1198, § 540L (2019).

<sup>2</sup> *See* National Defense Authorization Act for Fiscal Year 1995, Pub. L. No. 103-337, 108 Stat. 2663, § 534 (1994).

<sup>3</sup> 10 U.S.C. § 1044e (Special Victims’ Counsel for victims of sex-related offenses).



are authorized to represent the expressed interests of their clients. Depending on the branch of service, SVCs and VLCs have limited or no ability to identify and represent the child victim's "best interests." An SVC or VLC does not function in the same way as a guardian ad litem, who is "charged with forming the client's position by using his/her own judgment."<sup>4</sup> The military's approach is consistent with the decades-long evolution in the civil courts toward a model that allows a child to direct their own representation and away from the guardian ad litem model.

For crime victims who are under the age of 18 or who lack the capacity to direct their own legal representation, Article 6b of the Uniform Code of Military Justice (UCMJ)—the military's version of the Federal Crime Victim Rights Act—provides that a military judge may also designate a suitable individual to "assume the rights of the victim."<sup>5</sup> This Article 6b representative is typically the non-offending parent or another family member or legal guardian of the child.

In addition to creating SVCs/VLCs and Article 6b representatives, Congress directed the Military Departments to establish a Special Victim Capability—which includes special victim unit investigators, special victim prosecutors, special victim witness liaisons, and other victim witness assistance personnel—to work in concert with the staff judge advocate and prosecutor's office in supporting victims of sexual offenses and conducting investigations.<sup>6</sup> Child victims of sexual offenses in the military may also receive services from civilian child advocacy centers, which enter into memoranda of understanding (MOUs) with the military's Family Advocacy Programs (FAPs).

In evaluating whether a "best interest advocate"<sup>7</sup> is needed for child victims of sexual offenses in the military justice system, the DAC-IPAD sought to identify gaps in the military's current support systems and to study the circumstances under which guardians ad litem and victims' attorneys are used in civilian jurisdictions. In order to help it identify such gaps, the Committee developed three hypothetical scenarios involving child victims of sexual offenses committed by Service members to determine whether the victim services and legal representation currently provided by the military would be adequate.

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<sup>4</sup> National Crime Victim Law Institute, *Child-Victims: Better Served by a Traditional Attorney or by a Guardian ad Litem?* 3 (2011), available at <https://law.lclark.edu/live/files/8373-child-victimsbetter-served-by-a-traditional> (quoting National Association of Counsel for Children, *NACC Recommendations for Representation of Children in Abuse and Neglect Proceedings* 5 (2001), available at [https://www.naccchildlaw.org/resource/resmgr/Standards/NACC\\_Standards\\_and\\_Recommend.pdf](https://www.naccchildlaw.org/resource/resmgr/Standards/NACC_Standards_and_Recommend.pdf)).

<sup>5</sup> 10 U.S.C. § 806b(c) (UCMJ art. 6b(c)).

<sup>6</sup> National Defense Authorization Act for Fiscal Year 2013, Pub. L. No. 112-239, 126 Stat. 1632, § 573 (2013).

<sup>7</sup> The American Bar Association noted that it had jettisoned the term "guardian ad litem" because the role of a GAL "has become too muddled through different usages in different states, with varying connotations. It is a venerable legal concept that has often been stretched beyond recognition to serve fundamentally new functions, such as parenting coordinator, referee, facilitator, arbitrator, evaluator, mediator and advocate. Asking one Guardian Ad Litem to perform several roles at once, to be all things to all people, is a messy, ineffective expedient." American Bar Association, *Standards of Practice for Lawyers Representing Children in Custody Cases* (Aug. 2003), at Sec. II.B. (Commentary).

*Case Example 1:* “Child A,” a 12-year-old military dependent, alleges sexual abuse by their stepfather, an Army soldier. Child A reports the allegation to the Army Criminal Investigation Command (CID), which opens an investigation. After CID informs Child A about the SVC program, Child A requests and obtains representation by an SVC. The SVC conducts a capacity determination and concludes that Child A is competent to direct their own representation. The SVC explains the investigative and court-martial processes to Child A, including the possibility that Child A’s stepfather might be offered a plea agreement, the possibility that Child A might be asked to testify in one or more court proceedings, and the possibility that Child A might be asked to make a statement if the case proceeds to sentencing. After discussing the process and these decision points with Child A, the SVC identifies Child A’s desires and develops a strategy, based on Child A’s expressed interests, to vigorously advocate for and protect Child A’s legal rights.

*Case Example 2:* “Child B,” a 3-year-old military dependent, alleges sexual abuse by their stepfather, a Marine. Child B first makes the allegation to their mother, a civilian. Child B’s mother immediately contacts the Naval Criminal Investigative Service (NCIS), which opens an investigation. Child B’s mother requests a VLC to represent her child. The VLC conducts a capacity determination and concludes that because of their age, Child B is not competent to direct their own representation. The VLC, with the assistance of Child B’s mother, explains the investigative and court-martial processes to Child B in an age-appropriate manner, including Child B’s potential involvement in those processes. The VLC works with Child B’s mother to try to discern whether Child B is willing and able to testify and what accommodations might make the child feel more comfortable. In addition, the military judge appoints Child B’s mother as the Article 6b representative. Child B’s mother expresses extreme remorse about not recognizing the abuse earlier. She meets with FAP and is able to arrange for mental health treatment for Child B through FAP’s partnership with the local child advocacy center.

*Case Example 3:* “Child C,” a 3-year-old military dependent, alleges sexual abuse by their stepfather, a Navy sailor. Child C’s mother reports the allegation to NCIS. Child C’s mother initially requests a VLC to represent her child, who determines that Child C is not capable of directing their own representation. Child C’s mother then decides that Child C is making up the allegations. She stops responding to the VLC’s phone calls and does not bring Child C to any scheduled appointments. Child C has no other family members involved in their life.

The Military Services reported to the Committee that in most child-victim cases, the circumstances resemble Case Examples 1 and 2 in that either a child victim is capable of expressing their wishes to an SVC/VLC or to the trial counsel or they have a supportive, non-offending family member who can adequately advocate for their interests. For purposes of this report, a supportive, non-offending family member is defined as a family member who does not have a conflict of interest with the child and who acts in a way that protects the child’s safety and well-being.<sup>8</sup> In cases such as Case Examples 1 and 2, an independent best interest advocate is

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<sup>8</sup> In contrast, examples of situations in which a non-offending family member has a conflict of interest that prevents them from providing appropriate support to the child include those in which (1) a non-offending parent is financially dependent on the offender and does not want anything to occur that could jeopardize the relationship, or (2) a non-offending parent expresses intense jealousy over the relationship between the child and the offender. *See* Susanne Walters, *Working with the Non-Offending Caregiver*, National Center for Prosecution of Child Abuse 15, no. 11 (2002).

both unnecessary and could even introduce new problems—for example, by disagreeing with the supportive parent on a particular issue.

The problems with child-victim support in the military justice system arise in circumstances like those identified in Case Example 3: a child victim is incapable of directing or even requesting their own legal representation—or the child does not qualify for military legal representation—and no family member or legal guardian is available whose interests are not in conflict with the child's. While the Military Services report that such situations are relatively rare, these are the child victims most in need of support and advocacy. It is on such cases that the Committee focuses its recommendations.

Section II of this report outlines the DAC-IPAD's methodology for gathering information about civilian and military practices regarding the representation of child victims in criminal cases. Section III provides a comparison of models for the representation of child victims and how they have evolved over the past several decades. Section IV describes services currently provided by the military for child victims of sexual offenses in criminal investigations and courts-martial proceedings. Section V discusses civilian approaches to support child victims in criminal cases and identifies best practices. Finally, Section VI presents the Committee's conclusion.

## II. METHODOLOGY

Because of social distancing restrictions implemented in response to the COVID-19 pandemic, the DAC-IPAD members could not receive in-person testimony from experts on the advisability and feasibility of instituting a guardian ad litem process in the military justice system. In lieu of this testimony, at the direction of the Committee, the DAC-IPAD's professional staff contacted various military and civilian organizations to discuss the services currently provided to child victims of sexual offenses in state and federal courts as well as courts-martial.

In order to gain perspectives from multiple stakeholders in the military, the DAC-IPAD submitted written requests for information (RFIs) to three groups within each of the Military Services: the SVC/VLC Programs, the Family Advocacy Programs, and Trial Judiciaries.<sup>9</sup> The staff conducted follow-up calls with personnel from the Air Force FAP, the Army FAP, the Marine Corps FAP, and the SVC and VLC Programs of the Military Services. The staff also reviewed the Services' written policies on child-victim services and legal representation. In addition, the staff spoke with faculty at the Criminal Law Department at the U.S. Army Judge Advocate General's Legal Center and School, as well as with special victim litigation experts at the Army Trial Counsel Assistance Program, all of whom provided valuable insights on practices and issues concerning child victims of sexual offenses and the courts-martial of the alleged offenders.

The DAC-IPAD's professional staff also contacted a number of civilian organizations to learn about representation of child victims in criminal cases in federal and state jurisdictions. They received valuable information from Frank Cervone, Jodi Schatz, and Margie Gualtieri at the Support Center for Child Advocates in Philadelphia, Pennsylvania; Sharon Marcus-Kurn, Chief of the Sex Offense and Domestic Violence Section at the United States Attorney's Office for the District of Columbia; Colleen Clase, Chief Counsel at the Arizona Voice for Crime Victims in Scottsdale, Arizona; Victor Vieth and Robert Peters of the Zero Abuse Project in St. Paul, Minnesota; Erica Fischer-Kaslander at the Passaic County (NJ) CASA; Russell Butler, former Executive Director of the Maryland Crime Victims' Resource Center; and Jay Howell, a Florida attorney who represents victims of crime.

Finally, the DAC-IPAD's professional staff reviewed the academic literature on representation of child victims of abuse, neglect, and violent crime in the civilian sector, as well as major policies adopted by the American Bar Association (ABA) concerning representation of child victims; Model and Service Rules of Professional Conduct addressing representation of clients with diminished capacity; current state and federal statutes providing guardians ad litem, counsel, or other advocates for child victims; and relevant case law.<sup>10</sup>

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<sup>9</sup> See Appendix I for Services' Responses to DAC-IPAD Request for Information Set 15 (Jan. 28, 2020) [RFI 15], Appointment of Guardians ad Litem for Minor Victims of Sex-Related Offenses (SVC/VLC); Services' Responses to DAC-IPAD Request for Information Set 16 (Mar. 19, 2020) [RFI 16], Appointment of Guardians ad Litem for Minor Victims of Sex-Related Offenses (Family Advocacy Programs); and Services' Responses to DAC-IPAD Request for Information Set 17 (Mar. 19, 2020) [RFI 17], Appointment of Guardians ad Litem for Minor Victims of Sex-Related Offenses (Trial Judiciary).

<sup>10</sup> A full list of sources consulted for this report is provided in Appendix K.

The DAC-IPAD's professional staff presented its research to the Committee members at a telephonic public meeting on May 15, 2020. The members deliberated and voted on policy proposals and adopted this report, along with 42 findings and 8 recommendations.

### III. OVERVIEW OF REPRESENTATION OF CHILD VICTIMS

Over the past few decades, academics, practitioners, and legal organizations have engaged in in-depth examination of how best to represent child victims. One of the most detailed areas of study and debate involves the pros and cons of different models of representation in civil proceedings for children who are victims of abuse and neglect, including sexual abuse. Much of the debate and resulting policy initiatives have emerged in the context of these civil child abuse and neglect proceedings; having routinely represented children in civil cases for many years, attorneys have developed deep expertise in the difficult issues that arise in such representation. They have studied, confronted, and addressed many of the same issues that arise when representing child victims of sexual offenses in criminal cases.

Accordingly, an awareness of the debates, recommendations, and solutions achieved in the context of representing victims of civil child abuse and neglect is necessary for those seeking to analyze whether and how the same considerations might apply to representing child victims of sexual offenses in military cases. An understanding of the issues faced and solutions proposed will help illuminate whether the services of a guardian ad litem, best interest advocate, or some other person is desirable in courts-martial involving a child victim.

#### A. Models of Representation

##### 1. *Guardian ad Litem Model*

In 1982, the President’s Task Force on Victims of Crime noted the particular vulnerability of child victims of crime: “First, the criminal system distrusts them, and puts special barriers in their path of prosecuting their claims to justice. Second, the criminal justice system seems indifferent to the legitimate special needs that arise from their participation.”<sup>11</sup>

Recognizing this vulnerability, in 1987 Mark Hardin, a child welfare expert at the ABA Center on Children and the Law, examined the use of GALs for child victims in criminal proceedings. Hardin defined a GAL as “an independent voice on behalf of the child” who makes an “independent assessment of the best interests of the minor”; an attorney representing a child, in contrast, “pursues the wishes and objectives of the child where the child is capable of making considered decisions in his own interest.”<sup>12</sup> Hardin added that a GAL “participates on behalf of a minor because the minor cannot represent himself. . . . [A] minor cannot initiate, defend or function as a party in litigation without adult assistance.”<sup>13</sup>

Hardin noted that GALs in criminal proceedings can be attorneys working alone, attorneys working with social workers or volunteers, social workers or volunteers without legal

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<sup>11</sup> PRESIDENT’S TASK FORCE ON VICTIMS OF CRIME: FINAL REPORT 51 (1982), *available at* <https://www.ovc.gov/publications/presdntstskforcprpt/87299.pdf>; *see also* National Crime Victim Law Institute, *supra* note 4, at 1–2.

<sup>12</sup> Mark Hardin, *Guardians ad Litem for Child Victims in Criminal Proceedings*, 25 J. FAM. L. 687, 689–90 (1987).

<sup>13</sup> *Id.* at 689.

representation, or social workers or volunteers who are represented by counsel.<sup>14</sup> He cautioned that the role of a GAL in a criminal proceeding must be “carefully circumscribed,” as he differentiated between a civil child protection proceeding—which “is exclusively concerned with the protection and interests of the child”—and a criminal proceeding, which “is brought to punish the perpetrator and to safeguard the interests of society at large.”<sup>15</sup>

One year later, Debra Whitcomb of the National Institute of Justice (NIJ), a research branch of the Department of the Justice, published a report on the use of GALs in criminal courts. The report explored five potential roles for GALs in criminal proceedings:

- First, as a counselor and interpreter for the child, the GAL can learn about the child’s intellectual, emotional, and physical development and share this information with investigators and prosecutors to determine the best way to elicit effective testimony from the child.<sup>16</sup>
- Second, as a protector against system-induced trauma, the GAL can shield the child from additional anxiety by limiting unnecessary interviews, monitoring case developments, and advising about accommodations to make the child feel more comfortable.<sup>17</sup>
- Third, as a “linchpin” coordinating the actions of multiple agencies and court systems, the GAL can monitor the child through the duration of the various criminal and civil proceedings involving the family.<sup>18</sup>
- Fourth, as a voice for the child, the GAL can speak for the best interests of the child at different stages of the litigation, including during plea negotiations, at sentencing, and at parole or probation revocation hearings. The GAL can also assist the child in writing a victim impact statement or submit their own statement on behalf of the child.<sup>19</sup>
- Fifth, as an advocate for the child’s legal rights, the GAL can prevent disclosure of the child’s medical or school records and, in rare cases, can take a more active role at trial.<sup>20</sup>

In 1988, when the NIJ published Whitcomb’s study, at least six states had statutes explicitly requiring the appointment of GALs or other independent legal representatives for child victims

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<sup>14</sup> *Id.* at 695.

<sup>15</sup> *Id.*

<sup>16</sup> Debra Whitcomb, *Guardians Ad Litem in the Criminal Courts*, 12–15 (U.S. Department of Justice, National Institute of Justice, 1988), available at <https://www.ncjrs.gov/pdffiles1/Digitization/110006NCJRS.pdf>.

<sup>17</sup> *Id.* at 15–17.

<sup>18</sup> *Id.* at 17–19.

<sup>19</sup> *Id.* at 19–22.

<sup>20</sup> *Id.* at 22–25.

in criminal proceedings, and two additional states had court rules authorizing the appointment of GALs for child victims.<sup>21</sup>

## ***2. Client-Directed Representation Model***

In 1996, following the Conference on Ethical Issues in the Legal Representation of Children at Fordham University, the children's attorneys' community published a set of recommendations to guide the representation of children in all types of legal proceedings.<sup>22</sup> These recommendations signaled a shift away from the guardian ad litem model of representation and toward a model that allows a child to direct their own representation.

Among the key takeaways of the Fordham recommendations is that a lawyer appointed to serve a child in a legal proceeding "should assume the obligations of a lawyer, regardless of how the lawyer's role is labelled, be it as guardian *ad litem* . . . or other."<sup>23</sup> Thus, when a child is not impaired and has the capacity to direct their own representation, they must be allowed to set the goals of that representation. The recommendations note that "the profession has reached a consensus that lawyers for children currently exercise too much discretion in making decisions on behalf of their clients including 'best interests' determinations," adding, "Nothing about legal training or traditional legal roles qualifies lawyers to make decisions on behalf of their clients."<sup>24</sup>

The recommendations acknowledge the unique circumstances of representing impaired and preverbal children, and they outline a process for identifying and pursuing the child's legal interests in such cases. Among the steps in this process are to "focus on the child in her context"—that is, the lawyer must carry out a full factual investigation "with the goal of achieving a detailed understanding of the child client's unique personality, her family system, history, and daily life."<sup>25</sup> The recommendations posit that "[e]ven where the lawyer has determined that the child cannot fully understand or express desires about the legal issues of the case, there will be very few verbal children who cannot express some views about their own lives."<sup>26</sup>

The Fordham recommendations were developed in tandem with the research of Jean Koh Peters, Clinical Professor of Law at Yale Law School, who wrote that every client, even a newborn, "can contribute some amount to his lawyer's representation," including information about the child's personality, family, and health.<sup>27</sup> She explained:

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<sup>21</sup> *Id.* at 5.

<sup>22</sup> *Recommendations of the Conference on Ethical Issues in the Legal Representation of Children*, 64 FORDHAM L. REV. 1301 (1996).

<sup>23</sup> *Id.* at 1301.

<sup>24</sup> *Id.* at 1309.

<sup>25</sup> *Id.* at 1310.

<sup>26</sup> *Id.*

<sup>27</sup> Jean Koh Peters, *The Roles and Content of Best Interests in Client-Directed Lawyering for Children in Child Protective Proceedings*, 64 FORDHAM L. REV. 1505, 1510 (1996).



Competency, in this context, is a dimmer switch: the client can shed light on some aspects of the representation, even though she cannot participate in all of it. The lawyer must strive to incorporate every percentage of the client's contribution into the representation. . . . Representation of very young and nonverbal clients can and ought to resemble the child's perspective and not those of the adults around him.<sup>28</sup>

Ten years later, at the University of Nevada, Las Vegas (UNLV) Conference on Representing Children in Families, the children's attorneys' community reinforced its commitment to child-directed representation. The UNLV recommendations reiterate that children's attorneys "should not substitute for the child's wishes the attorney's own judgment of what is best for children or for that child."<sup>29</sup> However, for children who lack the capacity to direct their own representation, "the attorney may be required to interpose other viewpoints or even to substitute her judgment for that of the client."<sup>30</sup> Rather than allowing the lawyer to impose their own personal standards or cultural values on the child, this step requires "gathering information from a wide range of sources as well as familiarizing oneself with the child's family, community and culture in order to arrive at or to advocate for a decision the child would make if she or [he] were capable."<sup>31</sup> The lawyer should give special weight to the parent's preference, as long as no conflict between the parent and child is present.<sup>32</sup>

While much of this research was developed in the context of civil proceedings involving children, practitioners continue to emphasize the importance of the attorney's role when a child victim is involved in a criminal proceeding. As the National Crime Victim Law Institute (NCVLI) noted in a 2011 article, "Navigation of the legal systems involved in responding to crime against child-victims is incredibly complex. . . . Without effective legal representation, child-victims and their family members often lack the knowledge and skill to assert and seek the protection of their victims' rights, and these statutory and constitutional entitlements remain largely unfulfilled paper promises."<sup>33</sup> The NCVLI observed that in most circumstances, "the traditional attorney role will best provide child-victims with the advocacy they require to effectuate their rights and empower them to participate in the justice system to the extent they desire."<sup>34</sup> Russell Butler, former Executive Director of the Maryland Crime Victims Resource Center, wrote in 2009 that child's counsel in criminal cases—including those acting as a child's attorney pursuing the expressed interests of the child—have multiple roles, which include

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<sup>28</sup> *Id.* at 1510–11.

<sup>29</sup> *Recommendations of the UNLV Conference on Representing Children in Families: Child Advocacy and Justice Ten Years After Fordham*, 6 NEV. L.J. 592, 609 (2006).

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> *Id.* at 610.

<sup>33</sup> National Crime Victim Law Institute, *supra* note 4, at 1.

<sup>34</sup> *Id.* at 4.

informing the child victim of their rights, preparing the child victim to testify, addressing familial conflicts of interest, determining if privacy and privilege of nondisclosure should be waived, and coordinating between the child welfare proceeding and the criminal proceeding.<sup>35</sup>

## **B. American Bar Association Policies and Initiatives**

In a series of policy initiatives beginning in the mid-1990s through the latest policy promulgated in 2011, the ABA has expressed its clear preference for the client-directed model of attorney representation of children in civil matters involving child abuse and neglect. But despite urging that attorneys, rather than non-attorney guardians ad litem or other lay advocates, should represent child crime victims, the ABA has expressed no preference for either the client-directed or the best-interest model of representation in the criminal courts. Instead, it holds that an attorney should represent the child crime victim either as a guardian ad litem or as lawyer for the child, depending on the circumstances of the individual case. If representing the child as lawyer, the counsel represents the child client's expressed wishes; if acting as guardian ad litem, the lawyer acts in the child's best interest.

The ABA policies addressing the client-directed model of representation in the context of civil child abuse and neglect both illuminate the difficulties involved in representing children who are unable to direct their legal representation and provide concrete guidance on how to address those issues. An understanding of these policies can be helpful in deciding if any changes are needed to the military justice system.

### ***1. ABA Standards of Practice for Lawyers Who Represent Children in Abuse and Neglect Cases***

In 1996, the ABA approved its *Standards of Practice for Lawyers Who Represent Children in Abuse and Neglect Cases*, which recognized that attorneys could be appointed by the court either as the child's attorney or as a guardian ad litem. The "child's attorney" "provides legal services for a child and . . . owes the same duties of undivided loyalty, confidentiality, and competent representation to the child as is due an adult client"; the lawyer appointed by the court as "'guardian ad litem' for a child is an officer of the court appointed to protect the child's interests without being bound by the child's expressed preferences."<sup>36</sup>

The ABA Standards, however, "express a clear preference for the appointment as the 'child's attorney.'"<sup>37</sup> The standards "recognize that the child is a separate individual with potentially discrete and independent views" and that to "ensure the child's independent voice is heard, the

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<sup>35</sup> Russell Butler, *Child Victims Need Lawyers Too: Tips for Child's Counsel in Criminal Cases*, 27 No. 12 CHILD L. PRAC. 177, 182–85 (2009).

<sup>36</sup> American Bar Association, *Standards of Practice for Lawyers Who Represent Children in Abuse and Neglect Cases* (Feb. 5, 1996), Sec. A-1 [ABA Standards or Standards], available at [https://www.americanbar.org/content/dam/aba/administrative/child\\_law/repstandwhole.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/administrative/child_law/repstandwhole.authcheckdam.pdf).

<sup>37</sup> *Id.* at Sec. A-2 at Commentary.

child's attorney must advocate the child's articulated position."<sup>38</sup> They "do not accept the idea that children of certain ages are 'impaired,' 'disabled,' 'incompetent,' or lack capacity to determine their position in litigation," instead taking the position is that "disability is contextual, incremental, and may be intermittent," and that the child may be able to determine some positions in a case and not others.<sup>39</sup>

The heart of the ABA Standards' policy determination concerning the attorney's responsibilities when representing children in abuse and neglect cases is found in Section B-4:

**B-4. Client Preferences.** The child's attorney should elicit the child's preferences in a developmentally appropriate manner, advise the child, and provide guidance. The child's attorney should represent the child's expressed preferences and follow the child's direction throughout the course of litigation.<sup>40</sup>

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<sup>38</sup> *Id.* at Sec. A-1 at Commentary.

<sup>39</sup> *Id.* at Sec. B-3 at Commentary.

<sup>40</sup> *Id.* at Sec. B-4. The Commentary to this subsection states:

The lawyer has a duty to explain to the child in a developmentally appropriate way such information as will assist the child in having maximum input in determination of the particular position at issue. The lawyer should inform the child of the relevant facts and applicable laws and the ramifications of taking various positions, which may include the impact of such decisions on other family members or on future legal proceedings. The lawyer may express an opinion concerning the likelihood of the court or other parties accepting particular positions. The lawyer may inform the child of an expert's recommendations germane to the issue.

As in any other lawyer/client relationship, the lawyer may express his or her assessment of the case, the best position for the child to take, and the reasons underlying such recommendation. A child, however, may agree with the lawyer for inappropriate reasons. A lawyer must remain aware of the power dynamics inherent in adult/child relationships. Therefore, the lawyer needs to understand what the child knows and what factors are influencing the child's decision. The lawyer should attempt to determine from the child's opinion and reasoning what factors have been most influential or have been confusing or glided over by the child when deciding the best time to express his or her assessment of the case.

Consistent with the rules of confidentiality and with sensitivity to the child's privacy, the lawyer should consult with the child's therapist and other experts and obtain appropriate records. For example, a child's therapist may help the child to understand why an expressed position is dangerous, foolish, or not in the child's best interests. The therapist might also assist the lawyer in understanding the child's perspective, priorities, and individual needs. Similarly, significant persons in the child's life may educate the lawyer about the child's needs, priorities, and previous experiences.

The lawyer for the child has dual fiduciary duties to the child which must be balanced. On one hand, the lawyer has a duty to ensure that the child client is given the information necessary to make an informed decision, including advice and guidance. On the other hand, the lawyer has a duty not to overbear the will of the child. While the lawyer may attempt to persuade the child to accept a

(1) To the extent that a child cannot express a preference, the child's attorney shall make a good faith effort to determine the child's wishes and advocate accordingly or request appointment of a guardian ad litem.<sup>41</sup>

(2) To the extent that a child does not or will not express a preference about particular issues, the child's attorney should determine and advocate the child's legal interests.<sup>42</sup>

(3) If the child's attorney determines that the child's expressed preference would be seriously injurious to the child (as opposed to merely being contrary to the lawyer's opinion of what would be in the child's interests), the lawyer may request appointment of a separate guardian ad litem and continue to represent the child's expressed preference, unless the child's

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particular position, the lawyer may not advocate a position contrary to the child's expressed position except as provided by these Abuse and Neglect Standards or the Code of Professional Responsibility.

While the child is entitled to determine the overall objectives to be pursued, the child's attorney, as any adult's lawyer, may make certain decisions with respect to the manner of achieving those objectives, particularly with respect to procedural matters. These Abuse and Neglect Standards do not require the lawyer to consult with the child on matters which would not require consultation with an adult client. Further, the Standards do not require the child's attorney to discuss with the child issues for which it is not feasible to obtain the child's direction because of the child's developmental limitations, as with an infant or preverbal child.

<sup>41</sup> *Id.* The Commentary to this subsection states:

There are circumstances in which a child is unable to express a position, as in the case of a preverbal child, or may not be capable of understanding the legal or factual issues involved. Under such circumstances, the child's attorney should continue to represent the child's legal interests and request appointment of a guardian ad litem. This limitation distinguishes the scope of independent decision-making of the child's attorney and a person acting as guardian ad litem.

<sup>42</sup> *Id.* The Commentary to this subsection states:

The child's failure to express a position is distinguishable from a directive that the lawyer not take a position with respect to certain issues. The child may have no opinion with respect to a particular issue, or may delegate the decision-making authority. For example, the child may not want to assume the responsibility of expressing a position because of loyalty conflicts or the desire not to hurt one of the other parties. The lawyer should clarify with the child whether the child wants the lawyer to take a position or remain silent with respect to that issue or wants the preference expressed only if the parent or other party is out of the courtroom. The lawyer is then bound by the child's directive. The position taken by the lawyer should not contradict or undermine other issues about which the child has expressed a preference.

position is prohibited by law or without any factual foundation. The child's attorney shall not reveal the basis of the request for appointment of a guardian ad litem which would compromise the child's position.<sup>43</sup>

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<sup>43</sup> *Id.* The Commentary to this subsection states:

One of the most difficult ethical issues for lawyers representing children occurs when the child is able to express a position and does so, but the lawyer believes that the position chosen is wholly inappropriate or could result in serious injury to the child. This is particularly likely to happen with respect to an abused child whose home is unsafe, but who desires to remain or return home. A child may desire to live in a dangerous situation because it is all he or she knows, because of a feeling of blame or of responsibility to take care of the parents, or because of threats. The child may choose to deal with a known situation rather than risk the unknown world of foster home or other out-of-home placement.

In most cases the ethical conflict involved in asserting a position which would seriously endanger the child, especially by disclosure of privileged information, can be resolved through the lawyer's counseling function. If the lawyer has taken the time to establish rapport with the child and gain that child's trust, it is likely that the lawyer will be able to persuade the child to abandon a dangerous position or at least identify an alternate course.

If the child cannot be persuaded, the lawyer has a duty to safeguard the child's interests by requesting appointment of a guardian ad litem, who will be charged with advocating the child's best interests without being bound by the child's direction. As a practical matter, this may not adequately protect the child if the danger to the child was revealed only in a confidential disclosure to the lawyer, because the guardian ad litem may never learn of the disclosed danger.

Confidentiality is abrogated for various professionals by mandatory child abuse reporting laws. Some states abrogate lawyer-client privilege by mandating reports. States which do not abrogate the privilege may permit reports notwithstanding professional privileges. The policy considerations underlying abrogation apply to lawyers where there is a substantial danger of serious injury or death. Under such circumstances, the lawyer must take the minimum steps which would be necessary to ensure the child's safety, respecting and following the child's direction to the greatest extent possible consistent with the child's safety and ethical rules.

The lawyer may never counsel a client or assist a client in conduct the lawyer knows is criminal or fraudulent. See ER 1.2(d), Model Rules of Professional Conduct, DR 7-102(A)(7), Model Code of Professional Responsibility. Further, existing ethical rules requires the lawyer to disclose confidential information to the extent necessary to prevent the client from committing a criminal act likely to result in death or substantial bodily harm, see ER 1.6(b), Model Rules of Professional Conduct, and permits the lawyer to reveal the intention of the client to commit a crime. See ER 1.6(c), Model Rules of Professional Conduct, DR 4-101(C)(3), Model Code of Professional Responsibility. While child abuse, including sexual abuse, are crimes, the child is presumably the victim, rather than the perpetrator of those crimes. Therefore, disclosure of confidences is designed to protect the client, rather than to protect a third party from the client. Where the child is in grave danger of serious injury or death, the child's safety must be the paramount concern.

Proponents of the ABA Standards “see the model as the most significant advance in child representation in many years[,] . . . an evolution from the GAL model of the 1970s.”<sup>44</sup> Critics of the standards argue the model does not work well for young children and that the directive to resort to representation of the child’s “legal interests” is in some cases not meaningful: “[F]ocusing on the child’s so-called ‘legal interests’ is unsatisfactory because the legal interests of the child may be unclear or contradictory”; in addition, “the ABA Standards includ[e] broad exceptions to the client-directed ideal and thus giv[e] the lawyer unfettered and unreviewed discretion identifying the goals of the child[.]”<sup>45</sup>

## ***2. ABA Model Act Governing the Representation of Children in Abuse, Neglect, and Dependency Proceedings***

In August 2011, the ABA adopted the *Model Act Governing the Representation of Children in Abuse, Neglect, and Dependency Proceedings*, which built on knowledge gained since the adoption of the ABA Standards in 1996. The Model Act also introduced the concept of “substituted judgment,” exercised by the child’s lawyer for the child client in abuse, neglect, and dependency proceedings in which the child is unable to express a preference regarding the attorney’s representation. The fairly extensive guidance provided by the Model Act on when and how such substituted judgment is appropriately used, in conjunction with the ABA Model Rules of Professional Conduct, can assist SVCs/VLCs representing child victims of sexual offenses, particularly in their determination of whether to request the appointment of a guardian ad litem or best interest advocate.

The ABA Model Act recognizes that a court that adjudicates civil abuse, neglect, and dependency issues may appoint both a “child’s lawyer,” who owes the same duties of loyalty and zealous representation to the child as to an adult client, and a “best interest advocate,” who is not acting as a lawyer and does not represent the child but instead assists the court in determining the best interests of the child<sup>46</sup>—a standard not applied by a military judge in deciding issues in a criminal case. Although the child’s lawyer’s duties include consulting with the best interest advocate “where appropriate and consistent with both confidentiality and the child’s legal

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The lawyer is not bound to pursue the client’s objectives through means not permitted by law and ethical rules. See DR-7-101(A)(1), Model Code of Professional Responsibility. Further, lawyers may be subject personally to sanctions for taking positions that are not well grounded in fact and warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law.

<sup>44</sup> National Association of Counsel for Children, *supra* note 4, at 11. The National Association of Counsel for Children [NACC] currently is in the process of revising its recommendations. See NACC, “Standards of Practice” (2020), <https://www.naccchildlaw.org/page/StandardsOfPractice>.

<sup>45</sup> National Association of Counsel for Children, *supra* note 4, at 11.

<sup>46</sup> American Bar Association, *Model Act Governing the Representation of Children in Abuse, Neglect, and Dependency Proceedings* (Aug. 2011), at Sec. 1(c) and (d) [ABA Model Act], available at [https://www.americanbar.org/content/dam/aba/administrative/child\\_law/aba\\_model\\_act\\_2011.pdf](https://www.americanbar.org/content/dam/aba/administrative/child_law/aba_model_act_2011.pdf).

interests,”<sup>47</sup> the Model Act, like the ABA Standards, chooses the client-directed model of representation: “When the child is capable of directing the representation by expressing his or her objectives, the child’s lawyer shall maintain a normal client-lawyer relationship with the child in accordance with the rules of professional conduct. In a developmentally appropriate manner, the lawyer shall elicit the child’s wishes and advise the child as to options.”<sup>48</sup> The Model Act requires the child’s lawyer to determine whether the child has diminished capacity pursuant to Rule 1.14 of the Model Rules of Professional Conduct. It also provides a mechanism for jurisdictions to establish a presumed age at which a child shall be deemed capable of directing their legal representation, below which there is a rebuttable presumption—within the sole discretion of the child’s attorney—that the child has diminished capacity.<sup>49</sup>

In assessing whether a child has diminished capacity, the ABA Standards make clear that the child’s age is not the sole criterion. The child’s lawyer should “determine whether the child has sufficient maturity to understand and form an attorney-client relationship and whether the child is capable of making reasoned judgments and engaging in meaningful communication,” focusing on “the child’s decision-making process rather than the child’s choices themselves. Lawyers

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<sup>47</sup> *Id.* at Sec. 7(b)(6).

<sup>48</sup> *Id.* at Sec. 7(c). The commentary to this section states:

The lawyer-client relationship for the child’s lawyer is fundamentally indistinguishable from the lawyer-client relationship in any other situation and includes duties of client direction, confidentiality, diligence, competence, loyalty, communication, and the duty to provide independent advice. Client direction requires the lawyer to abide by the client’s decision about the objectives of the representation. In order for the child to have an independent voice in abuse and neglect proceedings, the lawyer shall advocate for the child’s counseled and expressed wishes. Moreover, providing the child with an independent and client-directed lawyer ensures that the child’s legal rights and interests are adequately protected.

The child’s lawyer needs to explain his or her role to the client and, if applicable, explain in what strictly limited circumstances the lawyer cannot advocate for the client’s expressed wishes and in what circumstances the lawyer may be required to reveal confidential information. This explanation should occur during the first meeting so the client understands the terms of the relationship. . . .

The child’s lawyer helps to make the child’s wishes and voice heard but is not merely the child’s mouthpiece. As with any lawyer, a child’s lawyer is both an advocate and a counselor for the client. Without unduly influencing the child, the lawyer should advise the child by providing options and information to assist the child in making decisions. The lawyer should explain the practical effects of taking various positions, the likelihood that a court will accept particular arguments, and the impact of such decisions on the child, other family members, and future legal proceedings. The lawyer should investigate the relevant facts, interview persons with significant knowledge of the child’s history, review relevant records, and work with others in the case.

*Id.* (footnotes omitted).

<sup>49</sup> *Id.* at Sec. 7(d).

should be careful not to conclude that the child suffers diminished capacity from a client's insistence upon a course of action that the lawyer considers unwise or at variance with lawyer's view."<sup>50</sup> Among the criteria for determining diminished capacity are the child's developmental stage, cognitive ability, emotional and mental development, ability to communicate, and ability to understand consequences; the consistency of the child's decisions; the strength of their wishes; and the opinions of others, including social workers, therapists, teachers, family members, and hired experts.<sup>51</sup>

In those instances in which the child's attorney determines that the child client has diminished capacity, the Model Act directs counsel to continue to "make a good-faith effort to determine the child's needs and wishes," maintaining a normal attorney-client relationship with the child "as far as reasonably possible."<sup>52</sup> When it is impossible to maintain such a relationship, "the child's lawyer shall make a substituted judgment determination . . . [which] includes determining what the child would decide if he or she were capable of making an adequately considered decision, and representing the child in accordance with that determination."<sup>53</sup>

The commentary to the Model Act provides guidance on how a child's attorney should exercise "substituted judgment," making clear that "[a] child may be able to direct the lawyer with respect to a particular issue at one time but not another. Similarly, a child may be able to determine some positions in the case, but not others."<sup>54</sup>

- In making a substituted judgment determination, the child's lawyer may wish to seek guidance from appropriate professionals and others with knowledge of the child, including the advice of an expert. A substituted judgment determination is not the same as determining the child's best interests; determination of a child's best interests remains solely the province of the court. Rather, it involves determining what the child would decide if he or she were able to make an adequately considered decision. A lawyer should determine the child's position based on objective facts and information, not personal beliefs. To assess the needs and interests of *this* child, the lawyer should observe the child in his or her environment, and consult with experts.

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<sup>50</sup> *Id.* at Sec. 7(e) at Commentary (footnotes omitted).

<sup>51</sup> *Id.*

<sup>52</sup> *Id.* at Sec. 7(e).

<sup>53</sup> *Id.* at Sec. 7(d). "The lawyer should take direction from the child as the child develops the capacity to direct the lawyer. The lawyer shall advise the court of the determination of capacity and any subsequent change in that determination." *Id.*

<sup>54</sup> *Id.* at Commentary.



- In formulating a substituted judgment position, the child's lawyer's advocacy should be child-centered, research-informed, permanency-driven, and holistic. The child's needs and interests, not the adults' or professionals' interests, must be the center of all advocacy. For example, lawyers representing very young children must truly *see* the world through the child's eyes and formulate their approach from that perspective, gathering information and gaining insight into the child's experiences to inform advocacy related to placement, services, treatment and permanency. The child's lawyer should be proactive and seek out opportunities to observe and interact with the very young child client. It is also essential that lawyers for very young children have a firm working knowledge of child development and special entitlements for children under age five.
- When determining a substituted judgment position, the lawyer shall take into consideration the child's legal interests based on objective criteria as set forth in the laws applicable to the proceeding, the goal of expeditious resolution of the case and the use of the least restrictive or detrimental alternatives available. The child's lawyer should seek to speed the legal process, while also maintaining the child's critical relationships.
- The child's lawyer should not confuse inability to express a preference with unwillingness to express a preference. If an otherwise competent child chooses not to express a preference on a particular matter, the child's lawyer should determine if the child wishes the lawyer to take no position in the proceeding, or if the child wishes the lawyer or someone else to make the decision for him or her. In either case, the lawyer is bound to follow the client's direction. A child may be able to direct the lawyer with respect to a particular issue at one time but not at another. A child may be able to determine some positions in the case but not others.<sup>55</sup>

Finally, the Model Act addresses the very narrow circumstances under which, in its view, a child's lawyer should take "protective action," which includes, "in appropriate cases, seeking the appointment of a best interest advocate or investigator to make an independent recommendation

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<sup>55</sup> *Id.* (emphases in original) (footnotes omitted).

to the court with respect to the best interests of the child.”<sup>56</sup> The child’s lawyer should take such action only “[w]hen the child’s lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken, and cannot adequately act in the client’s own interest[.]”<sup>57</sup>

The Model Act cautions, however, that requesting the court to appoint a best interest advocate “to make an independent recommendation to the court with respect to the best interests of the child should be reserved for extreme cases, i.e. where the child is at risk of substantial physical harm, cannot act in his or her own interest and all protective action remedies have been exhausted.”<sup>58</sup> Reluctance to make such a request is necessary because it “may undermine the relationship the lawyer has established with the child. It also potentially compromises confidential information the child may have revealed to the lawyer,” a risk that explains why the “lawyer cannot ever become the best interest advocate.”<sup>59</sup>

### ***3. ABA Resolution on Child Victims in the Criminal Justice System***

In its midyear meeting in 2009, the ABA endorsed appointing attorneys to represent the interests of children who are victims of crime “if the court makes a finding that the child’s interests are not otherwise adequately protected.”<sup>60</sup> The function of independent attorneys is to assist children

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<sup>56</sup> *Id.* at Sec. 7(e).

<sup>57</sup> *Id.*

<sup>58</sup> *Id.* at Commentary.

<sup>59</sup> *Id.* The Commentary is clear that its guidance to the child’s attorney does not restrict the court from independently appointing a best interest advocate when it deems the appointment appropriate. *Id.*

<sup>60</sup> ABA Crim. Just. Sec., Resolution, Child Victims in the Criminal Justice System, 5 (Feb. 2009) [ABA Resolution]. Adopted by the ABA House of Delegates at its midyear meeting in 2009, the resolution stated:

RESOLVED, That the American Bar Association urges federal, state, tribal, local, and territorial governments to ensure that child victims of criminal conduct have prompt access to legal advice and counsel and to specialized services and protections such as those provided by child advocacy centers approved and accredited by the National Children's Alliance;

FURTHER RESOLVED, That the American Bar Association urges federal, state, tribal, local, and territorial governments including courts, and state and local bar associations:

1. to support legislation or the modification of rules of court to provide that child victims of criminal conduct have independent attorneys who can assist them in accessing applicable victims’ rights (such as those provided by 18 U.S.C. 3771 in the federal system) and age-appropriate accommodations (such as those provided by 18 U.S.C. 3509 in the federal system) established by law in the jurisdiction if the court makes a finding that the child’s interests are not otherwise adequately protected.

in accessing their rights under laws such as the federal Crime Victims' Rights Act, 18 U.S.C. § 3771, and in utilizing age-appropriate accommodations provided by law, such as alternatives to live, in-person testimony during trial.<sup>61</sup> The resolution cites federal law as examples and was drafted in light of it; federal law currently does not provide child victims with attorneys to act as counsel but does authorize the appointment of guardians ad litem, who may or may not be attorneys (and as guardians ad litem would not act as attorneys).<sup>62</sup>

The report accompanying the resolution does not express a preference for whether the lawyer should function as counsel for the child acting in the child's expressed interest or as guardian ad litem acting in the child's best interest. Instead, it states that "only an attorney, acting either as counsel or guardian ad litem, can effectively petition the court for relief. Also, an attorney is better positioned to assist the child to access victims of crime funds, to assess and verify restitution needs, to coordinate representation with related custody or dependency cases, and to work effectively with the Child Advocacy Centers. In addition, only an attorney can offer lawyer-client privilege to the child victim, ensuring that the child is more likely to share the fears that may inhibit testimony and involvement with the proceedings."<sup>63</sup>

#### ***4. ABA Rules of Professional Conduct – Rule 1.14 (Client with Diminished Capacity)***

The ABA Model Rules of Professional Conduct address the representation of clients with diminished capacity, including minors, in Rule 1.14. The rule states:

- (a) When a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.
- (b) When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the

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2. to initiate pilot programs or demonstration projects in which rights and protections for the child victim of criminal conduct are protected and enforced.

FURTHER RESOLVED, That the American Bar Association, state and local bar associations, law schools, victim rights organizations, child rights organizations, and courts are urged to collaborate to develop appointment procedures for courts to appoint attorneys for child victims of criminal conduct and to adopt standards of practice and training requirements for those attorneys appointed for child victims including those regarding the attorneys' roles and responsibilities.

<sup>61</sup> *Id. See, e.g.*, 18 U.S.C. § 3509(b).

<sup>62</sup> *See infra* Section V, discussing 18 U.S.C. § 3509(h), which authorizes a district court judge to appoint a guardian ad litem for a child victim in a federal criminal case.

<sup>63</sup> ABA Resolution, *supra* note 60, at *Report on Child Victims of Crime Resolution*, Sec. III.

client's own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian.

(c) Information relating to the representation of a client with diminished capacity is protected by Rule 1.6. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized under Rule 1.6(a) to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests.<sup>64</sup>

Rule 1.14, as originally promulgated in 1983, referred to the representation of a client “under a disability.”<sup>65</sup> The ABA changed the wording in 2002, broadening it to refer to a client “with diminished capacity” in order to “reflect the continuum of a client’s capacity.”<sup>66</sup> Notably, the ABA also took three steps to address the circumstances under which an attorney may seek appointment of a guardian: first, paragraph (b) of the rule “was expanded to include examples of protection that may be taken short of seeking the appointment of a guardian, and to require a risk of substantial harm before action may be taken”; second, paragraph (c) was added to clarify the lawyer’s confidentiality obligations under Rule 1.6;<sup>67</sup> and finally, “the comment was expanded to give guidance in evaluating a client’s diminished capacity and in determining whether protective action should be taken,” including whether the attorney should seek appointment of a guardian ad litem to represent the client’s best interests.<sup>68</sup>

In assessing whether and to what extent a client has diminished capacity, the lawyer should consider the client’s “ability to articulate reasoning leading to a decision, variability of state of mind and ability to appreciate consequences of a decision; the substantive fairness of a decision; and the consistency of a decision with the known long-term commitments and values of the client.”<sup>69</sup> In considering and balancing these factors, the lawyer may seek guidance from an appropriate diagnostician.<sup>70</sup>

Specifically addressing the representation of children, the comment to Rule 1.14 recognizes that maintaining a normal client-lawyer relationship may not be possible when the client is a minor or

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<sup>64</sup> Center for Professional Responsibility, American Bar Association, ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT § 1.14 (9th ed. 2019) [ANN. MOD. RULES PROF. COND., RULE 1.14].

<sup>65</sup> *Id.* at Annotation Overview.

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*, citing American Bar Association, *A Legislative History: The Development of the ABA Model Rules of Professional Conduct, 1982–2013*, 344–49 (2013).

<sup>69</sup> ANN. MOD. RULES PROF. COND., RULE 1.14, *supra* note 64, at Comment, para. 6.

<sup>70</sup> *Id.*

suffers from a diminished mental capacity, and a severely incapacitated person may lack the ability to make legally binding decisions.<sup>71</sup> “Nevertheless, a client with diminished capacity often has the ability to understand, deliberate upon, and reach conclusions about matters affecting the client’s own well-being. For example, children as young as five or six years of age, and certainly those of ten or twelve, are regarded as having opinions that are entitled to weight in legal proceedings concerning their custody.”<sup>72</sup>

Like the ABA Model Act and Standards, the comment to Rule 1.14 addresses the lawyer’s responsibilities when the lawyer reasonably believes that the “client is at risk of substantial physical, financial or other harm unless action is taken and that a normal client-lawyer relationship cannot be maintained . . . because the client lacks sufficient capacity to communicate or to make adequately considered decisions in connection with the representation[.]”<sup>73</sup> Under such circumstances, Rule 1.14(b) permits the lawyer to take reasonably necessary protective measures, including consulting with family members, professional services, or other individuals or entities that have the ability to protect the client. “Reasonably necessary” protective action is generally the “least restrictive action under the circumstances.”<sup>74</sup> Rule 1.14(b) does not authorize the lawyer to take protective action when the client is not acting in what the lawyer believes to be the client’s best interest; such action can be taken only when the client “cannot adequately act in the client’s own interest.”<sup>75</sup>

In addition, Rule 1.14(b) permits the lawyer to consider whether appointment of a guardian ad litem is necessary to protect the client’s interests. Appointment of any guardian, however, is a “serious deprivation of the client’s rights and ought not be undertaken if other, less drastic, solutions are available.”<sup>76</sup>

All of the Services’ Rules of Professional Conduct have adopted Rule 1.14, with some modifications, as shown in Table 1.<sup>77</sup> The Air Force and Coast Guard have not adopted the comment to the rule, and other Services have amended portions of the comment.<sup>78</sup>

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<sup>71</sup> *Id.* at Comment, para. 1.

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*, at Comment, para. 5.

<sup>74</sup> ABA Formal Op. 96-404 (1996).

<sup>75</sup> *Id.* (footnote omitted).

<sup>76</sup> *Id.*

<sup>77</sup> The Coast Guard adopted Model Rule 1.14 with no changes. COMDTINST M5800.1, *Coast Guard Legal Rules of Professional Conduct* (1 June 2005), Rule 1.14.

<sup>78</sup> See Appendix F for a comparison of the Comment to the Model Rule and each Service’s amendments to the Comment.

**Table 1. Comparison of Military Service Rules of Professional Conduct 1.14**

<b>Model Rule of Professional Conduct 1.14</b>	<b>Army<sup>79</sup></b>	<b>Air Force<sup>80</sup></b>	<b>Navy / Marine Corps<sup>81</sup></b>
(a) When a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.	No changes.	No changes.	No substantive changes.
(b) When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian.	No changes.	No substantive changes.	When the covered attorney reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial, or other harm unless action is taken and cannot adequately act in the client's own interest, the covered attorney may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client.
(c) Information relating to the representation of a client with diminished capacity is protected by Rule 1.6. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized under Rule 1.6(a) to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests.	No changes.	No changes.	No substantive changes.

<sup>79</sup> Army Reg. 27-26, *Rules of Professional Conduct for Lawyers* (June 28, 2018), Rule 1.14.

<sup>80</sup> AFI 51-110, *Professional Responsibility Program* (Dec. 11, 2018), Rule 1.14.

<sup>81</sup> JAGINST 5803.1E OJAG (Code 13), *Professional Conduct of Attorneys Practicing Under the Cognizance and Supervision of The Judge Advocate General* (Jan. 20, 2015), Rule 1.14.

### C. Proposal for GALs in Courts-Martial

In 2017, Major Heather Colacicco, an Army judge advocate, wrote a scholarly paper advocating for the appointment of GALs in courts-martial. Major Colacicco noted “potential conflicts of interest” among some of the current players in a military sexual assault case:

The SVC advocates for the victim’s express wants and has the right to participate in courts-martial on behalf of the victim, but does not do an independent assessment of the victim’s circumstances to determine what is in the victim’s best interest. The Article 6b representative is not an advocate but a representative able to assume the rights of a victim who lacks capacity and has the implied right to participate in courts-martial based on the assumption of the victim’s rights, but he does not conduct an independent assessment of the victim’s circumstances to determine what is in the victim’s best interest.<sup>82</sup>

Suggesting that victims who lack capacity are in need of an additional advocate to ensure that their rights are protected, she argued that the inclusion of a GAL would provide such a victim with a representative “to truly and independently assess his case and act purely in the best interest of the victim in exercising and protecting his rights.”<sup>83</sup>

The Committee reviewed Major Colacicco’s paper as well as the circumstances that have changed since its writing. Notably, it does not address the fact that no federal or state jurisdiction automatically authorizes a paid attorney for a child victim. In addition, her recommendations predate significant changes to the UCMJ. These include amendments to Army Rule for Professional Conduct 1.14 and its comment; to Article 6b, UCMJ; to Rule for Courts-Martial 801; and to the Army Special Victims’ Counsel handbook. In particular, Article 6b, UCMJ, was amended to make the designation of a representative to assume the rights of a minor victim optional, rather than mandatory; therefore, in cases in which a child has capacity to direct their legal representation, an Article 6b representative is unlikely to be necessary, and no conflict between the child, parent, and SVC/VLC would occur.<sup>84</sup> Moreover, in updating its Rules of Professional Conduct, the Army adopted the ABA’s Model Rule with no substantive changes: the revision specifically includes additional guidance addressing the limited circumstances under which an attorney representing a client with diminished capacity should request appointment of a guardian ad litem to represent the best interest of that client.<sup>85</sup>

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<sup>82</sup> Heather Colacicco, *Is There Room for Another Advocate? A Proposal for Incorporating Guardians ad Litem in Military Courts-Martial* 13 (2017) (footnotes omitted), available at [https://dacipad.whs.mil/images/Public/10-Reading\\_Room/00\\_WhatNew/IsThereRoomForAnotherAdvocate\\_Colacicco.pdf](https://dacipad.whs.mil/images/Public/10-Reading_Room/00_WhatNew/IsThereRoomForAnotherAdvocate_Colacicco.pdf).

<sup>83</sup> *Id.* at 25.

<sup>84</sup> National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000, § 5105 (2016).

<sup>85</sup> See *supra* Section IIIB for a discussion of Model Rule 1.14 (Client with diminished capacity) and the Military Services’ versions of the rule and comment.

#### IV. MILITARY SUPPORT FOR CHILD SEXUAL ASSAULT VICTIMS IN CRIMINAL CASES

##### A. Overview of the Current DoD Response System for Child Victims

The military authorizes a multidisciplinary team of professionals to meet the legal, social, and emotional needs of the child victim of a sex-related offense. Each of the following individuals plays a critical role in supporting the child throughout the criminal process (graphically depicted in Figure 1).

**Figure 1. Services Available to Child Victims of Sexual Offenses in the Military**



A guardian ad litem or “best interest advocate” is not automatically a part of the child’s multidisciplinary team, consistent with the national trend favoring the use of an attorney to represent the child’s expressed interests in a criminal case.<sup>86</sup> However, the military has authority

<sup>86</sup> See National Crime Victim Law Institute, *supra* note 4, at 4. The ABA’s position is that only an attorney, acting either as counsel or GAL, can ensure that a child’s rights are protected, can ensure that age-appropriate accommodations are made, and can petition the court for relief in cases in which the court finds that the child’s interests are not otherwise protected. See ABA Resolution, *supra* note 60, and accompanying text. In the military, the attorney role is filled by the SVC/VLC or civilian counsel hired by the family.



to coordinate with a civilian GAL who may have been appointed separately to advocate for the child's interests in a civil abuse or neglect proceeding.<sup>87</sup> For example, if the child's parent or guardian appears to be acting against their interests—taking actions or making decisions that are objectively unreasonable or harmful to the child—the installation Family Advocacy Program may coordinate services with a civilian GAL who has been appointed by a civilian court.<sup>88</sup> In addition, a military judge may designate a civilian GAL to assume the rights of a minor child in a criminal proceeding under Article 6b, UCMJ.<sup>89</sup> However, a civilian GAL appointed as the Article 6b representative does not act as a best interest advocate in that capacity. There is no current policy in the military to appoint an individual to serve as a child's best interest advocate in a military court-martial. The "Findings and Recommendations" section of this report, above, explores a range of opportunities to provide additional support to a child victim in military criminal cases.

## **B. Special Victims' Counsel and Victims' Legal Counsel**

The military SVC and VLC Programs authorize specially trained attorneys to represent child victims of sex-related offenses throughout the entire criminal justice process.<sup>90</sup> SVCs form an attorney-client relationship with the child and provide legal representation, advocacy, and advice. Service regulations carry out this authority and address issues relating to the competency of the child to form the attorney-client relationship as well as to the attorney's ethical obligation to zealously represent the child, even if the child's interests do not align with the interests of the government.<sup>91</sup> SVCs are selected by senior military attorneys for their maturity, good judgment, and experience.<sup>92</sup> Before undertaking representation of a child victim of a sexual offense, the attorney must complete specialized sexual assault courses, including an approved child certification course focused on sexual assault.<sup>93</sup>

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<sup>87</sup> A GAL traditionally has been understood as an individual appointed by the court to advocate for the child according to the guardian ad litem's independent assessment of the best interests of the minor. *See Butler, supra* note 35, at 181 (citing *Hardin, supra* note 12, at 687).

<sup>88</sup> *See* Appendix I for Army Criminal Law Division Response to RFI 15.

<sup>89</sup> 10 U.S.C. § 806b (Article 6b, UCMJ); Rule for Court-Martial 801(a)(6).

<sup>90</sup> 10 U.S.C. § 1044e. In this report, use of the term "SVC" includes VLC programs as well.

<sup>91</sup> *See* JAGINST 5810.3, *Navy Victims' Legal Counsel Program Manual* (July 10, 2015).

<sup>92</sup> Army Special Victims' Counsel Handbook 4th Edition (June 2017) at Chapter 2, "Training and Certification Requirements" [Army SVC Handbook].

<sup>93</sup> *Id.* at 1–8, "Training."

Any child eligible for military legal assistance is entitled to SVC services.<sup>94</sup> Child victims of a sexual offense are entitled to the same legal services as adult victims.<sup>95</sup> Each military service has a process to approve exceptions to this eligibility policy for nondependent victims who seek SVC representation.

Unique considerations arise for attorneys representing child victims of sexual offenses. Military service policies address SVC professional responsibilities and the legal ethics applicable in cases involving children. As previously noted, all Services have adopted Model Rule of Professional Conduct 1.14 (Client with Diminished Capacity) with few substantive changes.

### ***1. The Attorney–Child Client Relationship***

The SVC, as the legal representative, is responsible for protecting the child victim’s legal rights throughout the military criminal justice process. The SVC has an attorney-client relationship with the child, not with the parent or guardian. When the child is the client, the SVC is required to provide legal advice to the child and advocate for their desires, provided that those desires are not illegal or unethical. This is true even if the SVC believes that the child’s desires are not in the child’s best interests.

One of the first obligations of the SVC is to determine whether the child has the capacity to form an attorney-client relationship and direct their legal representation. For younger children this task may be difficult: the military services rely on rigorous additional training and adherence to Rule of Professional Conduct Rule 1.14.<sup>96</sup> If the child lacks the competence or capacity to address these issues, the SVC may look to the appropriate guardian or representative of the child to make decisions on their behalf; that individual may be a parent, a relative, a civilian court-appointed GAL, or an Article 6b representative appointed by the military judge to assume the victim’s rights.

For example, both the Army and the Navy-Marine Corps Rule 1.14 (“Client with Diminished Capacity”) include a comment, adopted from the Model Rule, for situations in which a child has been appointed a legal representative (for example, the Article 6b representative).<sup>97</sup> In such cases, the SVC ordinarily should look to the representative for decisions on behalf of the child. The Army, Air Force, and Navy-Marine Corps rules allow the SVC to take protective action if

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<sup>94</sup> 10 U.S.C. § 1044e; Army SVC Handbook, *supra* note 92, at Chapter 3, “Victim Eligibility”; JAGINST 5810.3, *supra* note 91, at 10-2.d.

<sup>95</sup> Army SVC Handbook, *supra* note 92, at 15.

<sup>96</sup> See *supra* Table 1 for a comparison of each Service’s Rules of Professional Conduct 1.14 with the Model Rule; see Appendix F for a comparison of the Army and Navy-Marine Corps’ Comment to Rule 1.14 to the Model Rule Comment. The Air Force and Coast Guard have not adopted the Comment.

<sup>97</sup> Army Reg. 27-26, *supra* note 79, at Rule 1.14 Comment; JAGINST 5803.1E, *supra* note 81, at Rule 1.14 Comment; ANN. MOD. RULES PROF. COND., RULE 1.14, *supra* note 64, at Comment.

the child is “at risk of substantial physical, financial, or other harm unless action is taken[.]”<sup>98</sup> The Army and Navy-Marine Corps also adopt the comment to the rule so that if protective action is required, “the lawyer should be guided by such factors as the wishes and values of the client to the extent known, the client’s best interests and the goals of intruding into the client’s decision-making autonomy to the least extent feasible, maximizing client capacities, and respecting the family and social connections.”<sup>99</sup> The comment to Rule 1.14 suggests that a GAL be considered if no legal representative has been appointed, but warns: “In many circumstances, however, appointment of a legal representative may be more expensive or traumatic for the client than circumstances in fact require.”<sup>100</sup>

## ***2. Protection of the Child Victim’s Legal Rights in a Criminal Case***

The SVC files a notice of representation and coordinates communications of nonsubstantive/administrative matters with the victim witness liaison or special victim witness liaison who works with the prosecutor.<sup>101</sup> The SVC advises the victim on whether to submit to an interview and attends any interviews with the victim, including by investigators, the trial counsel, and defense counsel. The SVC receives copies of all relevant documents at each stage of the court-martial process. The SVC consults with the victim and represents the victim’s views on critical aspects of the court-martial, including the decision not to prefer charges, dismissal of charges, decisions concerning pretrial restraint of the alleged offender or their release, the terms of pretrial agreements, guilty pleas, opportunities to provide evidence in aggravation at sentencing, and submission of a victim impact statement. The victim also has a right to be heard through their SVC and petition for a writ of mandamus on issues implicating Military Rules of Evidence 412, 513, 514, or 615, as well as any other matter in which their interests or legal rights are at stake.<sup>102</sup> The SVC works with the victim to enforce their right to submit matters for consideration during the post-trial, clemency, and appellate process.

## ***3. “Expressed Interest” Versus “Best Interest” Representation in Criminal Cases***

Traditionally, a GAL and an attorney differ in their respective roles and responsibilities when supporting a child in a civil abuse and neglect proceeding. In many civilian jurisdictions, a GAL is appointed by the court to advocate for the child “according to the guardian ad litem’s

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<sup>98</sup> See Army Reg. 27-26, *supra* note 79, at 49; JAGINST 5803.1E, *supra* note 81, at 65; AFI 51-110, *supra* note 80, at 41.

<sup>99</sup> Army Reg. 27-26, *supra* note 79, at 49; JAGINST 5803.1E, *supra* note 81, at 65; ANN. MOD. RULES PROF. COND., RULE 1.14, *supra* note 64, at Comment, para. 5.

<sup>100</sup> Army Reg. 27-26, *supra* note 79, at 49; JAGINST 5803.1E, *supra* note 81, at 66; ANN. MOD. RULES PROF. COND., RULE 1.14, *supra* note 64, at Comment, para. 7.

<sup>101</sup> Air Force Guidance Memorandum to AFI 51-201, *Administration of Military Justice* 16.9, 16.13 (Apr. 8, 2020), available at [https://static.e-publishing.af.mil/production/1/af\\_ja/publication/afi51-201/afi51-201.pdf](https://static.e-publishing.af.mil/production/1/af_ja/publication/afi51-201/afi51-201.pdf).

<sup>102</sup> Army SVC Handbook, *supra* note 92, at Chapter 6-4, “Victims’ Rights.”

independent assessment of the best interests of the minor.”<sup>103</sup> In the context of civil child abuse and neglect proceedings, the GAL presents to the court what they believe to be the best interests of the child with respect to placement, custody, educational services, and other civil determinations regarding the child’s welfare.<sup>104</sup>

In the context of a criminal case, the best interests of the child involve a different set of considerations. With respect to the victim, the criminal justice system is primarily concerned with the enumerated privileges and rights of victims and the government’s legal obligations toward the victim throughout the process. Notably, at only a few points in the court-martial process is a decision-making authority directed to consider the best interests of an incapacitated or minor victim or is that standard used to decide an issue. These considerations arise primarily in connection to the victim’s decision to testify, the victim’s decisions involving the psychotherapist-patient privilege, plea agreements, and the victim’s statement at sentencing. In the criminal law context, the “best interests” and “expressed interests” of the child often are the same, unlike in civil cases that adjudicate questions involving child custody, abuse, and neglect.

The military’s approach to the legal representation of children in criminal cases reflects the civilian trend toward a client-directed, expressed interest model.<sup>105</sup> SVCs are required by the rules of professional responsibility to represent the child’s “expressed interest,” with very limited ability to consider the child’s “best interest,” as a GAL would do.<sup>106</sup> The policies that guide SVCs also address those exceptional circumstances in which a child client lacks capacity or maturity to make decisions regarding specific issues in a particular case or does not have a supportive parent.<sup>107</sup>

The practice in the Marine Corps, when a child’s incapacity makes necessary the involvement of another person and no family member is available or appropriate, is to seek appointment of a civilian GAL as an Article 6b representative to assist the VLC in representing the client.<sup>108</sup> If a suitable Article 6b representative is not available, the VLC is obligated to inquire thoroughly into all circumstances that a careful and competent person in the client’s position should consider in determining the client’s best decision regarding the issue in question.<sup>109</sup> After consultation with the client, FAP or other mental health counselors or therapists, and VLC leadership, the VLC determines the best legal decision for the client under the circumstances and advocates

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<sup>103</sup> Butler, *supra* note 35, at 181.

<sup>104</sup> JAGINST 5810.3, *supra* note 91, at 10-2.f and g.

<sup>105</sup> See ANN. MOD. RULES PROF. COND., RULE 1.14, *supra* note 64.

<sup>106</sup> See JAGINST 5810.3A, *Navy Victims’ Legal Counsel Program Manual*, 10-4 (Apr. 23, 2018).

<sup>107</sup> See *id.* at 10-1; JAGINST 5803.1E, *supra* note 81, at Rule 1.14.

<sup>108</sup> JAGINST 5810.3A, *supra* note 106, at 10-9(h) (“VLC should consider whether appointment of a civilian guardian *ad litem* or Article 6b representative is necessary to protect the client’s interests.”).

<sup>109</sup> The U.S. Marine Corps Victims’ Legal Counsel Manual at 9008.8, p. 57, (*All Minor or Diminished Capacity Victims of Sexual Offenses*) (June 1, 2018).

accordingly. In such an instance, the client continues to direct the VLC in all other areas in which the client maintains sufficient capacity and considered judgment.

### **C. Article 6b, Uniform Code of Military Justice**

Article 6b, UCMJ, addresses the appointment of an individual to assume the rights of a child victim under age 18.<sup>110</sup> The military judge may designate a legal guardian of the child, a family member, or other suitable person (other than the accused) to assume the victim's rights pursuant to 10 U.S.C. § 806b, as implemented through Rule for Courts-Martial 801(a)(6). When no suitable legal guardian or family member is available, the military judge may appoint a civilian GAL as the Article 6b representative. In such cases, the Article 6b representative may inform the SVC as to their understanding of the child's needs, but they are not acting as a traditional best interest advocate. In other words, a GAL who serves as the Article 6b representative in a case functions quite differently than a GAL in a civil child abuse and neglect proceeding.

In response to the DAC-IPAD's requests for information, the Services indicated that in those rare cases in which a child with diminished capacity is without a non-offending parent, the appointment of a civilian GAL as the Article 6b representative provides expertise that enables the SVC to better represent the child in accordance with their Rules of Professional Conduct.<sup>111</sup> This practice may result from the military's current lack of a designated victim advocate for children who can help the SVC understand the child and their unique needs. In contrast, the military provides adult victims of sex-related offenses with access to a victim advocate (i.e., someone who is not a prosecutor, trial counsel, victim's counsel, law enforcement officer, or military criminal investigator), with whom the adult victim has privileged communications pursuant to Military Rule of Evidence 514.

### **D. Military Service Data on Special Victims' Counsel, Article 6b, UCMJ, and Guardian ad Litem Appointments**

The following table summarizes the Military Services' responses to RFI 15 regarding the number of military investigations involving an alleged sex-related offense against a minor victim closed in the calendar years 2018 and 2019.<sup>112</sup>

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<sup>110</sup> 10 U.S.C. § 806b (Article 6b, UCMJ); Rule for Court-Martial 801(a)(6).

<sup>111</sup> See *supra* Table 1 for a comparison of each Service's Rules of Professional Conduct 1.14 with the Model Rule; see Appendix F for a comparison of the Army and Navy-Marine Corps' Comment to Rule 1.14 to the Model Rule Comment. The Air Force and Coast Guard have not adopted the Comment.

<sup>112</sup> Although the Navy initially reported two GALs in a case, the Navy later clarified that the civilian GAL never participated in the court-martial. The GAL was involved in civilian proceedings, however. In addition, the Marine Corps reported three GALs during the 2018/2019 time period, but that number reflects two different GALs appointed at different times in the same case. See Marine Corps Response to RFI 15.

**Table 2. Military Services' Data on Child Victim Representation in 2018 and 2019**

	Total Child Victims 2018 & 2019	Total Represented by SVC/VLC	Total Not Represented by SVC/VLC	Total Article 6b Representatives	Total GALs Appointed
Army	787	73 (9%)	714 (91%)	17 (2%)	1 (<1%)
Navy	181	28 (15%)	153 (85%)	17 (9%)	0
Marine Corps	144	15 (10%)	129 (90%)	22 (15%)	2
Air Force	231	Data not provided	Data not provided	30 (13%)	1
Coast Guard	5	0 (0%)	5 (100%)	0	0
<b>Totals</b>	<b>1,348</b>	<b>Data incomplete</b>	<b>Data incomplete</b>	<b>86 (6%)</b>	<b>4 (&lt;1%)</b>

### *1. Army Cases in 2018 and 2019*

In calendar years 2018 and 2019, the Army closed 787 military investigations involving an alleged sex-related offense against a person who was under the age of 18 at the time of the offense.<sup>113</sup> Of those 787 cases, 481 victims were eligible for SVC services and 306 were not. Seventy-three of the 481 eligible victims were assigned SVCs, and 714 investigations had no SVC.

The Army reported 17 investigations in which a parent, legal guardian, or other family member was appointed as the Article 6b representative in the case.<sup>114</sup> In 8 of those cases, the victim also had SVC representation; in 9 cases, there was no SVC. The Army reported 1 case in which a GAL was appointed to serve as the Article 6b representative for a minor who was 15 at the time of the offense. An SVC also was assigned to that case. Also in that case, the Army reported that the victim's expressed interests, as represented by the SVC, did not align with prosecution and the case was dropped prior to trial. The GAL in that case never made a contrary argument to the court regarding the "best interests" of the child.

In addition, the Army reported 1 case in which the staff judge advocate's victim witness liaison initially was appointed as the Article 6b representative for a minor who was 13 years old at the time of the offense, but the family of the victim retained counsel and that civilian attorney assumed the role of the Article 6b representative. No SVC was assigned in that case.

<sup>113</sup> In the Army Response to RFI 15, the Army included calendar year 2018 and 2019 statistics for victims who were children at the time of the offense, but older than 18 years old at the time of the report. *See* Appendix I.

<sup>114</sup> In 2 of the 17 cases involving an Article 6b representative, the Army did not identify the nature of the Article 6b representative's relationship to the victim. *See* Appendix I.

## ***2. Navy Cases in 2018 and 2019***

The Navy reported 181 military investigations closed in calendar years 2018 and 2019 that involved sex-related offenses against a person who was under the age of 18 at the time of the offense. A VLC was appointed in 28 of those cases. In 9 of the 28 cases with a VLC, an Article 6b representative also was appointed for the child. In 8 cases in which an Article 6b representative was appointed for the child, there was no VLC. The Navy reported no cases in which a GAL participated in the court-martial process.

## ***3. Marine Corps Cases in 2018 and 2019***

The Marine Corps identified 144 cases involving a minor victim in calendar years 2018 and 2019. A VLC was appointed to represent the child victim in 15 of those 144 cases. The military judge appointed an Article 6b representative in 22 cases: in 20, the parent or legal guardian was the victim's Article 6b representative; in 2, a GAL.<sup>115</sup> In the 2 cases in which the military judge appointed a civilian GAL, the trial counsel worked with local civilian prosecutors to find a suitable representative for the child. The Marine Corps did not report any known conflicts between the child's "expressed wishes" and their "best interests."

## ***4. Air Force Cases in 2018 and 2019***

Air Force data revealed 231 military investigations with child victims in calendar years 2018 and 2019. Of that number, the Air Force identified 16 cases involving child victims ages 1 to 17 who were ineligible for SVC representation.<sup>116</sup> In at least 9 of the cases in which the child victim did not have an SVC, military charges were preferred against the accused. The Air Force reported 20 cases in which a child victim without SVC representation declined to participate in the proceedings. In those 20 cases, the Air Force data do not explain whether the lack of SVC representation was due to ineligibility or to the wishes of the parent/guardian.

The Air Force reported 30 cases in which a person was appointed to assume the Article 6b rights of the child victim. In 19 of them, the Article 6b representative was a family member or legal guardian; in 7 cases, the Article 6b representative was a family friend; in 1 case, the Article 6b representative was a victim witness liaison; in 1 case, the Article 6b representative was the FAP Director; and in 1 case, the identity of the Article 6b representative was unknown. Finally, in 1 case, a civilian GAL was appointed to perform Article 6b duties; there was no SVC. In that case, the GAL's and the trial counsel's accounts of the child's expressed interests were in conflict. According to the GAL/Article 6b representative, the victim supported a discharge in lieu of court-martial and did not want to testify. The trial counsel, who spoke with the victim, said that the victim was willing to testify and did not support a discharge in lieu of court-martial.

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<sup>115</sup> In one of the Marine Corps cases in which a civilian guardian ad litem was appointed as the Article 6b representative, two GALs were involved because a scheduling conflict necessitated replacing the first guardian ad litem.

<sup>116</sup> The actual number of Air Force cases in which a child victim was ineligible for SVC representation is likely higher, because the Air Force did not record eligibility information in most cases involving child victims.

## 5. *Coast Guard Cases in 2018 and 2019*

The Coast Guard reported 5 cases involving a minor victim of a sex-related offense in calendar years 2018 and 2019. No SVC was involved in any of them, and no Article 6b representatives were appointed to assume the rights of the child victim. According to the Coast Guard, it has no policies in place to address a situation in which no suitable Article 6b representative is available.

### E. Family Advocacy Programs

The Department of Defense FAP is the policy proponent for DoD's coordinated community response system to prevent and respond to reports of child abuse, domestic abuse, and problematic sexual behavior in children and youth in military families.<sup>117</sup> DoD's collaborative and victim-centered system involves multiple offices and agencies at military installations working in coordination with the surrounding civilian community.<sup>118</sup> To deliver FAP services DoD funds more than 2,000 positions, including credentialed and licensed clinical providers.<sup>119</sup> Each Military Service develops its own FAP policy to address unique requirements at the various military installations and to ensure partnerships with community organizations and civil authorities such as Child Protective Services.<sup>120</sup>

The FAP mission is to prevent and treat child and intimate partner abuse and neglect.<sup>121</sup> Children who are not dependents of Service members and are thus ineligible for treatment in a military medical facility are referred to the appropriate civilian agency for services and treatment.<sup>122</sup> FAP treatment services are available to eligible beneficiaries both in the United States and overseas.<sup>123</sup> For children who are victims at overseas installations, FAP coordinates alternative

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<sup>117</sup> UNITED STATES GOVERNMENT ACCOUNTABILITY OFFICE REPORT, CHILD WELFARE: INCREASED GUIDANCE AND COLLABORATION NEEDED TO IMPROVE DOD'S TRACKING AND RESPONSE TO CHILD ABUSE, GAO 20-110, at 7 (Feb. 2020) [GAO Report], available at <https://www.gao.gov/assets/710/704556.pdf>.

<sup>118</sup> *Id.* at n.13.

<sup>119</sup> *Id.* at 8.

<sup>120</sup> Unrelated to the issue of GALs, the Government Accountability Office recently released a report with recommendations to ensure that children who are sexually abused overseas receive timely access to a certified pediatric sexual assault forensic examiner to conduct the examination. DoD concurs with the GAO recommendation and is taking steps to ensure that children, regardless of their location, receive child examinations via a provider certified as a Sexual Assault Medical Forensic Examiner-Pediatric. *See* GAO Report, *supra* note 117, at Appendix VI: Comments from the Department of Defense, p. 7.

<sup>121</sup> The DoD Sexual Assault Prevention and Response (SAPR) program does not provide services to military dependents under age 18, as indicated by DoD Instruction 6495.02, *Sexual Assault Prevention and Response (SAPR) Program Procedures* (Mar. 28, 2013, incorporating Change 3, May 24, 2017). Instead, the Family Advocacy Program provides services for children. *See* DoD Instruction 6400.01, *Family Advocacy Program (FAP)* (May 1, 2019).

<sup>122</sup> DoD Instruction 6400.06, *Domestic Abuse Involving DoD Military and Certain Affiliated Personnel*, 6.1.1.8 (Aug. 21, 2007, incorporating Change 4, May 26, 2017).

<sup>123</sup> *See* Appendix I for Navy Response to RFI 16 at Q4.



custody arrangements or an early return for the child to the United States for appropriate services.

FAP services are designed with a clinical focus on child protection and child treatment in cases of child abuse and neglect.<sup>124</sup> When FAP receives a report about a child victim of a sexual offense, it informs the child and non-offending parents of the availability of a special victims' counsel and services such as the Victim Witness Assistance Program (VWAP) for qualifying families.<sup>125</sup> The service FAPs also provide victim advocates (VAs) and domestic abuse victim advocates (DAVAs) to parents, but these services are directed at adults; VAs are not trained to serve child victims specifically.<sup>126</sup> Cases in which a child lacks a non-abusing parent are generally handled in the state court systems, and FAP coordinates with local Child Protective Services to ensure that the child receives the support they need. Although the FAP and criminal system are mutually supportive and inform one another, they operate as parallel processes. In all cases, FAP is focused on support to families.

DoD is in the process of developing a memorandum of understanding with the National Children's Alliance (NCA).<sup>127</sup> The proposed MOU will guide and promote collaboration between military installation FAPs and their local Child Advocacy Centers (CACs) to address the needs of child victims.<sup>128</sup> The NCA is the national association and accrediting body for a network of approximately 900 CACs.<sup>129</sup>

In all 50 states and Washington, DC, CACs provide coordinated, evidence-based support for children who have been abused. Without a CAC, the child may have to tell the worst story of his or her life over and over again, to doctors, police, lawyers, therapists, investigators, judges, and others....With a CAC, when police or Child Protective Services believe that a child is being abused, the child is brought to the CAC—a safe, child-focused environment—by a caregiver or other “safe” adult. At the CAC, the child discloses once to a trained interviewer who knows the right questions to ask. Then, based on the interview, a

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<sup>124</sup> AFI 40-301, *Family Advocacy Program* (Nov. 16, 2015).

<sup>125</sup> *Id.* at 1.15.8 and 2.2.4.4; *see also* Air Force Guidance Memorandum to AFI 51-201, *supra* note 101, at Ch. 16 and 22B.

<sup>126</sup> Army Reg. 608-18, *The Army Family Advocacy Program*, Ch. 3-2 h. (Nov. 20, 2007). *See* Appendix I for Air Force Response to RFI 16 at Q2 and Navy Response to RFI 16 at Q5. Marine Corps counseling services are provided in accordance with DoD Manual 6400.01 V-1, DoD Manual 6400.01 V-4, and Marine Corps Order 1754.11.

<sup>127</sup> *See* Appendix I for Navy Response to RFI 16 at Q5.

<sup>128</sup> For additional information about collaboration between the military FAP and civilian CAC, *see* National Children's Alliance, *Status of CAC-Military Partnerships 2019* (2019), *available at* <https://www.nationalchildrensalliance.org/status-of-cac-military-partnerships-2019/>.

<sup>129</sup> *See* National Children's Alliance, “Support for Military Families” (2019), <https://www.nationalchildrensalliance.org/support-for-military-families/>.

multidisciplinary team (MDT) that includes medical professionals, law enforcement, mental health, prosecution, representatives from child protective services, victim advocacy, and other professionals make decisions together about how to help the child. Finally, CACs offer a wide range of services, like therapy, medical exams, courtroom preparation, victim advocacy, case management and more.<sup>130</sup>

In a recent report to Congress, the NCA made the following observations:

The military response to child maltreatment could be further strengthened by bringing CAC services to military families to provide a coordinated and comprehensive response to child maltreatment. Information from current CAC-military partnership pilot projects indicate that a common barrier to coordination of services is continuity in staffing and leadership for their military counterparts. A base commander's assignment at a post is time-limited, as are some military investigative personnel. These frequent changes in staffing and leadership can result in changes in leadership style, priorities, and methods of operation and can require CACs to continually be in a cycle of building relationships and retooling protocols with their new counterparts on the military installations. Another challenge that is evident from the current pilot projects is that training of personnel that handle child maltreatment investigations and intervention are not consistent between civilian and military authorities.<sup>131</sup>

### ***1. Army FAP and Service Views on Establishing a Military GAL Capability***

Army FAP policy defines a GAL as an individual appointed by a civilian court to represent the interests of a child in a civilian child protective case.<sup>132</sup> FAP staff may coordinate their records with a GAL who has been appointed by a civilian court. However, current Army policy does not authorize FAP staff to request appointment of a GAL by a court.<sup>133</sup>

Without a change in DoD policy, the Army does not believe it would be feasible to create a GAL program within the Army FAP to provide services to a child during a court-martial, pointing to the limited number of cases when a GAL is needed and noting that local civilian community agencies are fully meeting the requirement.<sup>134</sup>

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<sup>130</sup> National Children's Alliance, *supra* note 128, at 5-6.

<sup>131</sup> *Id.*

<sup>132</sup> See Appendix I for Army Response to RFI 16 at Q2.

<sup>133</sup> *Id.*; see also Army Reg. 608-18, *The Army Family Advocacy Program* (Sept. 13, 2011).

<sup>134</sup> See Appendix I for Army Response to RFI 16 at Q2.

## ***2. Air Force FAP and Service Views on Establishing a Military GAL Capability***

Air Force FAP has no policy or process to directly coordinate the services of a GAL for a child victim.<sup>135</sup> When Air Force cases arise in the United States, FAP coordinates with civilian Child Protective Services agencies within the local jurisdiction.<sup>136</sup> When cases arise overseas, the child is often returned to the United States for services. The Air Force identified MOUs with state or local child protection service organizations addressing the appointment of civilian GALs.<sup>137</sup>

The Air Force does not support the creation of a military GAL program within FAP. Air Force installations have too few cases with child victims to justify a full-time military GAL capability. A remote GAL would not be accessible to victims, and new costs for travel would be incurred. Air Force FAP is concerned that the development of a military GAL program would create an additional burden for the Services and add logistical complications to the court-martial. For example, trials could be delayed by the need to accommodate a GAL's schedule and to travel to a GAL from another region. In addition, if a GAL program required attorneys with expertise both in working with children and in military justice, a suitable local civilian GAL might not be found. Though SVCs could in theory be trained to provide GAL services as a separate duty, the Air Force believes that any expansion of SVC caseloads might make it difficult to comply with existing caseload caps. The functional difference between the SVC's obligation to represent "expressed interest" and the GAL's "best interest" standard also could lead to confusion and conflicts of interest.

## ***3. Navy FAP and Service Views on Establishing a Military GAL Capability***

The Navy FAP does not have a policy or process to provide GAL services to a minor victim of a sex-related offense, because FAP is a treatment and assessment program that is not involved in the judicial processing of these cases.<sup>138</sup> FAP ensures reporting to the local civilian child protective agencies, coordinates services with the VLC, and provides victim advocacy to the non-offending parent.

The Navy does not believe that their FAP is a feasible place to implement a proposed military GAL, because their child therapists and victim advocates are not trained to perform legal advocacy or GAL services.<sup>139</sup> A GAL program is geared toward representing a child's best

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<sup>135</sup> See Appendix I for Air Force Response to RFI 16 at Q2.

<sup>136</sup> AFI 40-301, *Family Advocacy Program* (Nov. 16, 2015).

<sup>137</sup> See Appendix I for Air Force Response to RFI 16 at Q1.

<sup>138</sup> OPNAV Instruction 1752.2B, *Family Advocacy Program (FAP)* (Apr. 25, 2008); see also Appendix I for Navy response to RFI 16 at Q2.

<sup>139</sup> See Appendix I for Navy Response to RFI 16 at Q3.

interests in civilian cases of child abuse and neglect. Thus, the Navy believes that their legal services are better suited for such an initiative, if one is undertaken.<sup>140</sup>

#### ***4. Marine Corps FAP and Service Views on Establishing a Military GAL Capability***

The Marine Corps FAP has clinical providers who can meet with children and make recommendations on their behalf, but FAP does not provide a child with their own victim advocate and it has no authority to appoint a GAL. The Marine Corps advised the DAC-IPAD that it would be premature to comment on the benefits of establishing a GAL program in the military because it is studying this question pursuant to Section 540L of the National Defense Authorization Act for Fiscal Year 2020 (FY20 NDAA). However, the Marine Corps observed that in those rare cases when no other suitable person is available for the child, formalizing a process to secure a civilian GAL would benefit the trial counsel by freeing them to focus their energy on litigating the case. Under the current ad hoc system, trial counsel spend a great deal of time and energy finding and securing a suitable civilian GAL in those cases in which the military judge appoints a GAL as the Article 6b representative.

#### ***5. Coast Guard FAP and Service Views on Establishing a Military GAL Capability***

The Coast Guard does not support creation of a GAL program within FAP, because it would not offer any additional benefit.<sup>141</sup> The number of minor victims requiring independent representation is low and the Coast Guard has sufficient support for child victims of sexual assault. For some overseas locations, the Coast Guard has onsite FAP services. In OCONUS (outside the continental United States) locations without Coast Guard FAP, it works with the local DoD FAP or Department of State FAP until the child can receive help from Coast Guard FAP. The Coast Guard also observed that a potential conflict could arise if the SVC/VLC advocated against the appointment of a GAL.<sup>142</sup> If a child client who is capable of directing the representation expresses their wish not to have a GAL, the SVC/VLC would have to advocate the competent child's expressed interest against the appointment of a GAL.

### **F. Military Judges' Experience with Guardian ad Litem Representation**

The military does not have a process for allowing a civilian GAL appointed for a child victim in a civil case to enter an appearance in a court-martial.<sup>143</sup> The Chief Judge for the Navy observed that the VLC Program is effective, and he was unaware of situations involving a conflict between a child's "expressed" interest and "best" interest that the VLC could not address or resolve.<sup>144</sup> The Chief Judge also remarked that he himself had never heard an allegation by any party or participant that some action of an Article 6b representative or VLC was not in the child's best

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<sup>140</sup> *Id.*

<sup>141</sup> See Appendix I for Coast Guard Response to RFI 16.

<sup>142</sup> *Id.*

<sup>143</sup> See Appendix I for Navy-Marine Corps Trial Judiciary Response to RFI 17.

<sup>144</sup> *Id.* at Q2.

interest.<sup>145</sup> The Army Trial Judiciary deferred any comment on current policy or recommendations for change to the Criminal Law Division of the Office of the Judge Advocate General.<sup>146</sup> The Air Force and Coast Guard Trial Judiciaries likewise did not comment on policy considerations regarding the representation of child victims.<sup>147</sup>

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<sup>145</sup> *Id.* at Q3.

<sup>146</sup> *See* Appendix I for Army Trial Judiciary Response to RFI 17.

<sup>147</sup> *See* Appendix I for Air Force and Coast Guard Trial Judiciary Response to RFI 17.

## V. CIVILIAN GUARDIANS AD LITEM AND OTHER ADVOCATE SUPPORT FOR CHILD VICTIMS IN CRIMINAL CASES

Federal and state jurisdictions have a range of approaches to providing support to child victims in criminal cases. However, the research reveals no jurisdiction requires that both an attorney and a GAL or best interest advocate be provided for the child in criminal cases.

### A. Federal Guardian ad Litem Authorities

The Child Abuse Prevention and Treatment Act of 1974 (CAPTA) requires that in order to receive certain funding from the U.S. Department of Health and Human Services, states must establish procedures to appoint a guardian ad litem “in every case involving a victim of child abuse or neglect which results in a judicial proceeding.”<sup>148</sup> The guardian ad litem may be an attorney, a court-appointed special advocate, or both, and their duties are to “obtain first-hand[] a clear understanding of the situation and needs of the child” and “to make recommendations to the court concerning the best interests of the child.”<sup>149</sup>

In compliance with CAPTA, “all states, the District of Columbia, American Samoa, Guam, the Northern Mariana Islands, Puerto Rico, and the U.S. Virgin Islands provide in their statutes for the appointment of representation for a child involved in a child abuse or neglect proceeding.”<sup>150</sup> Although CAPTA contains a broad requirement to appoint guardians ad litem whenever a case of child abuse and neglect results in “a judicial proceeding,” “few [states] do in criminal or juvenile delinquency proceedings.”<sup>151</sup>

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<sup>148</sup> 42 U.S.C. § 5106a(b)(2)(B)(xiii).

<sup>149</sup> *Id.*

<sup>150</sup> Child Welfare Information Gateway, *Representation of Children in Child Abuse and Neglect Proceedings*, 2 (Washington, DC: U.S. Department of Health and Human Services, Children’s Bureau, 2018), available at <https://www.childwelfare.gov/pubPDFs/represent.pdf>. This publication includes a compilation—accurate and complete as of December 2017—of state statutes enacted in order to comply with CAPTA’s funding requirements.

In order to fulfill CAPTA’s requirement, as of December 2017, “approximately” 41 states, the District of Columbia, American Samoa, Guam, the Northern Mariana Islands, Puerto Rico, and the Virgin Islands provide for the appointment of a GAL to represent the best interests of the child. In 15 of these states, the District of Columbia, and the Virgin Islands, the GAL must be an attorney. In Montana, a court-appointed special advocate (CASA), who may or may not be an attorney, can be appointed as the child’s GAL. In other states, volunteers who may or may not be attorneys may serve as GALs.

As of December 2017, “[s]ixteen states require the appointment of an attorney for the child; seven states require both an attorney and GAL. Oregon requires the appointment of a CASA. In Wisconsin, a child has the right to counsel, and he or she may not be removed from the home unless counsel has been appointed. If the child is under age 12, the court may appoint a GAL instead of counsel. In four states, if the GAL is not an attorney, counsel may be appointed to represent the GAL.” *Id.* (footnotes omitted).

<sup>151</sup> National Crime Victim Law Institute, *ABA Endorses Attorneys for Child Victims in Criminal Cases 3–4* (2009), available at <https://law.lclark.edu/live/files/20666-aba-endorses-attorneys-for-child-victims-in>. See also ABA Resolution, *supra* note 60.

Section 3609 of Title 18, United States Code—part of the federal criminal law—authorizes a court to appoint a guardian ad litem for a child victim or witness to a crime involving abuse or exploitation to protect the best interests of the child.<sup>152</sup> Under this federal law, the GAL does not have to be an attorney. The GAL may attend all the depositions, hearings, and trial proceedings in which a child participates, and may make recommendations to the court concerning the welfare of the child. The GAL may have access to all reports, evaluations, and records (except attorney’s work product) necessary to effectively advocate for the child. A GAL cannot be compelled to testify in any court action or proceeding concerning any information or opinion received from the child in the course of serving as a GAL.

The Attorney General Guidelines for Victim and Witness Assistance expand upon 18 U.S.C. § 3509(h) to allow prosecutors to move for appointment of a GAL in any case in which a child is a victim or witness to a crime; the guidelines do not limit GAL eligibility to crimes involving abuse or exploitation.<sup>153</sup>

### **B. State Guardian ad Litem and Other Authorities**

As just noted, every state has enacted a statutory provision to comply with CAPTA’s requirement to appoint representatives for children in judicial proceedings involving child abuse and neglect, but those provisions are largely interpreted as limited to civil proceedings. Numerous states also have enacted specific statutory provisions that mandate or authorize the court to appoint attorneys, guardians ad litem (who may or may not be attorneys), or other advocates to protect the interests of child victims in criminal proceedings.

In addition, states may provide criminal courts with broad authorization to appoint counsel—including counsel for child victims—in the interest of justice.<sup>154</sup> Nonprofit organizations in states and localities also may provide attorneys or other advocates for children in criminal proceedings to protect their legal and/or best interests that are not captured by the states’ statutory schemes. Finally, though their involvement is not specifically addressed in state statutes, guardians ad litem or other advocates appointed for civil proceedings may, in practice, continue to assist the child in any related criminal proceedings.

The following is a partial list of current state statutory provisions regarding the provision of guardians ad litem or other advocates for child victims in criminal proceedings.<sup>155</sup>

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<sup>152</sup> 18 U.S.C. § 3509(h) (*Child Victims’ and Witnesses’ Rights*).

<sup>153</sup> *Attorney General Guidelines for Victim and Witness Assistance 2011 Edition*, 19 (rev. May 2012).

<sup>154</sup> See, e.g., Pa. R. Crim. P. 122(A)(3) (*Appointment of Counsel*), which authorizes the appointment of counsel “in all cases, by the court, on its own motion, when the interests of justice require it.”

<sup>155</sup> See Appendix G for the complete statutory language of the referenced provisions.

***1. Appointment of attorney for child victims in criminal cases to represent the expressed interests of the child:***

- *Oklahoma* – authorizes appointment of an attorney to represent the expressed interests of a child victim in a criminal case of child abuse or neglect.<sup>156</sup> The same statutory provision also authorizes appointment of a guardian ad litem to represent the interests of a child who is a victim of child abuse or neglect.<sup>157</sup>

***2. Mandatory appointment of guardian ad litem or other advocate for child victims in criminal cases:***

- *Connecticut* – requires that a guardian ad litem be appointed for minors in any criminal case involving an abused or neglected child, and authorizes appointment of a guardian ad litem for minors involved in any other criminal proceeding.<sup>158</sup>
- *Florida* – requires that a guardian ad litem “or other advocate” be appointed for minors who are victims or witnesses in any criminal proceeding involving abuse or neglect, for a victim of a sexual offense, or for a witness to a sexual offense committed against another minor, and authorizes appointment of a guardian ad litem or other advocate in any other criminal proceeding in which a minor is involved as a victim or a witness. The guardian ad litem or other advocate has broad access to witnesses and evidence, and may appear on behalf of the minor at all proceedings.<sup>159</sup>
- *Iowa* – requires appointment of an attorney guardian ad litem for a “prosecuting witness who is a child” under the age of 14, and authorizes appointment of a guardian ad litem for prosecuting witnesses ages 14–17.<sup>160</sup>
- *Kentucky* – requires appointment of guardians ad litem or special advocates, if available, for all child victims.<sup>161</sup>

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<sup>156</sup> Okl. Stat. Ann. tit. 21, § 843.7(A)(1) (*Appointment of representatives for child*).

<sup>157</sup> *Id.* at (B).

<sup>158</sup> Conn. Sup. Ct. R. § 44-20 (*Appointment of a Guardian ad litem*).

<sup>159</sup> Fla. Stat. Ann. § 914.17 (*Appointment of advocate for victims or witnesses who are minors or intellectually disabled*). See also *id.* at § 39.822 (*Appointment of guardian ad litem for abused, abandoned, or neglected child*), which also mandates a guardian ad litem be appointed for any child “in any child abuse, abandonment, or neglect judicial proceeding, whether civil or criminal.” According to a Florida practitioner, this statutory requirement is not enforced unless requested. Telephone conversation with Mr. Jay Howell, Apr. 30, 2020 (notes on file at DAC-IPAD).

<sup>160</sup> Iowa Code Ann. § 915.37 (*Guardian ad litem for prosecuting child witnesses*).

<sup>161</sup> Ky. Rev. Stat. Ann. § 26A.140 (*Accommodation of special needs of children*).



**3. Discretionary appointment of guardian ad litem or other advocate for child victims in criminal cases:**

- *Arizona* – recognizes that criminal courts “possess inherent equitable power to appoint a guardian ad litem for a child witness”<sup>162</sup> and have a duty to appoint a representative for a minor victim if the legal guardian of the child is unwilling or unable to adequately represent the victim’s interests (this authority derives from case law rather than from a specific rule or statute).<sup>163</sup>
- *Illinois* – authorizes appointment of a guardian ad litem upon filing of an indictment or information charging a defendant with a sex offense when a minor is the alleged victim.<sup>164</sup>
- *Maine* – authorizes appointment of a guardian ad litem for a minor in certain contested domestic relations proceedings; the guardian ad litem, who must be given notice of all criminal proceedings in which the child is a party or a witness, shall protect the best interests of the child in those proceedings unless otherwise directed by the court.<sup>165</sup>
- *New Hampshire* – requires the court, at a pretrial conference held within 45 days of the filing of an indictment for a sex-related offense, to consider appointment of a guardian ad litem to represent the interests of alleged child victims.<sup>166</sup>
- *North Carolina* – authorizes the court to appoint a pro bono attorney as guardian ad litem whenever a charged crime involves a minor who is a victim or potential witness.<sup>167</sup>
- *North Dakota* – authorizes the court to appoint a guardian ad litem for any minor who is a “material or prosecuting witness” in a criminal proceeding involving designated crimes, which include sexual offenses and human trafficking.<sup>168</sup>
- *Pennsylvania* – authorizes the court to designate “one or more persons as child advocate” on behalf of children who are victims or material witnesses in criminal proceedings.<sup>169</sup>

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<sup>162</sup> *Stewart v. Superior Court In and For County of Maricopa*, 163 Ariz. 227, 787 P.2d 126 (Ct. App. Div. I 1989).

<sup>163</sup> *State ex rel. Romley v. Dairman*, 208 Ariz. 484, 95 P.3d 548 (Ct. App. Div. I 2004). *See also* Ariz. Rev. Stat. Ann. §13-4403, a state provision similar to Article 6b, UCMJ, which authorizes appointment of a representative to assume the rights of a victim.

<sup>164</sup> 725 Ill. Comp. Stat. Ann. § 5/111-2(c) (*Commencement of prosecutions*). A minor is a person under the age of 21. 705 Ill. Comp. Stat. Ann. § 405/1-3(10).

<sup>165</sup> Me. Rev. Stat. Ann. tit. 19-A, § 1507 (*Appointment of guardian ad litem in contested proceedings*).

<sup>166</sup> N.H. R. Crim. P. 44 (*Special Procedures in Superior Court Regarding Sex-Related Offenses Against Children*).

<sup>167</sup> N.C. Sup. and Dist. Ct. R. 7.1 (*Appointment of a Guardian Ad Litem*). *See also* N.C. Gen. Stat. Ann. § 7B-601, which authorizes appointment of guardians ad litem in abuse and neglect proceedings, presumably in compliance with CAPTA, and additionally authorizes the guardian ad litem “to accompany the juvenile to court in any criminal action wherein the juvenile maybe called on to testify in a matter relating to abuse.”

<sup>168</sup> N.D. Cent. Code Ann. § 12.1-20-16 (*Appointment of a guardian ad litem in prosecution for sex offense*).

<sup>169</sup> 42 Pa. Stat. and Cons. Stat. Ann. § 5983 (*Rights and services*).

- *Tennessee* – authorizes the court to appoint a guardian ad litem to represent a child in criminal court.<sup>170</sup>
- *Vermont* – authorizes the court to appoint a guardian ad litem for minors who are victims of specified sexual offenses.<sup>171</sup>

**4. *Other permissible authorizations to aid child victims in criminal cases (this partial list does not include authorizations for a parent, guardian, or other person to support a child during testimony or other similar functions).***<sup>172</sup>

- *Colorado* – “encourage[s]” judges to designate one or more persons to provide specified services to a child victim or witness in a criminal proceeding, including acting as a friend of the court to advise the judge of the child’s ability to understand and cooperate in any court proceeding, and to advise the district attorney regarding the ability of the child to cooperate with the prosecution and regarding the potential impacts of the proceeding on the child.<sup>173</sup>
- *Delaware* – authorizes a child victim or witness to be accompanied by a “friend” who is permitted to advise the judge regarding the child’s ability to understand the proceedings.<sup>174</sup>
- *District of Columbia* – authorizes a “sexual assault youth victim advocate” for sexual assault victims ages 13–17 to be present during any medical or evidentiary examination or interview.<sup>175</sup>
- *Nevada* – establishes a child’s “right to consult with a sexual assault victims’ advocate” during any forensic medical examination or interview by law enforcement or the prosecutor.<sup>176</sup>
- *North Dakota* – encourages state’s attorneys to provide specified services to child victims or witnesses in criminal proceedings, including advice to the court concerning the child’s

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<sup>170</sup> Tenn. Code Ann. § 37-1-610 (*Guardian ad litem; reimbursement of expenses*).

<sup>171</sup> Vt. R. Crim. P. 44.1 (*Appointment of guardian ad litem for victim who is a child*). A minor is a person under the age of 18. Vt. Stat. Ann. tit. 1, § 173.

<sup>172</sup> For a survey of such laws, see National Crime Victim Law Center, *Survey of Select State and Federal Laws Providing Victims’ Rights and Protections That Are Specific to Children* (Oct. 2016).

<sup>173</sup> Colo. Rev. Stat. Ann. § 24-4.1-304 (*Child victim or witness—rights and services*).

<sup>174</sup> Del. Code Ann. tit. 11, § 5134(b) (*Additional rights and services*).

<sup>175</sup> D.C. Code Ann. § 23:1908 (*Sexual assault victims’ rights*).

<sup>176</sup> Nev. Rev. Stat. Ann. § 178A.170(1).

ability to cooperate with the prosecution and the potential effects of the proceedings on the child.<sup>177</sup>

- *Rhode Island* – requires the Department of Children, Youth, and Families to advise the court, police, and prosecutor of the capacity of a child victim to understand and participate in a criminal investigation and in the court proceedings and of the potential effect of the proceedings on the child.<sup>178</sup>
- *Washington* – provides child victims of sex or violent crimes or child abuse the right to have a crime victim advocate present at prosecutorial or defense interviews if exercising that right does not cause any unnecessary delay in investigating or prosecuting the case. The advocate can make recommendations to the prosecuting attorney about the ability of the child to cooperate with the prosecution and about the potential effect of the proceeding on the child and can provide information to the court concerning the child's ability to understand the proceedings.<sup>179</sup>
- *Wisconsin* – encourages counties to provide the following services for children involved in criminal proceedings as victims and witnesses: advice to the judge, as friend of the court when appropriate, regarding the child's ability to understand the proceedings and questions; and advice to the district attorney concerning the child's ability to cooperate with the prosecution and the potential effects of the proceedings on the child.<sup>180</sup>

### C. The Philadelphia Model

Committee staff contacted Support Center for Child Advocates (SCCA) based in Philadelphia, Pennsylvania. SCCA came to the staff's attention through research conducted in the 1980s by the National Institute of Justice that addressed the issue of whether guardians ad litem should be appointed in criminal cases.<sup>181</sup>

Philadelphia's criminal courts utilize SCCA as part of a unique approach to representing child crime victims: in certain cases, particularly when there is no supportive parent for the child victim, the trial court appoints SCCA attorneys who team with an SCCA-employed social worker to represent the child's interests. In some cases involving a child under age 16, the court directs the attorney to wear two hats—counsel and guardian ad litem. In other cases with older teenagers, the attorney serves only as counsel. In all cases, an SCCA social worker supports the attorney as part of a team approach to representation.

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<sup>177</sup> N.D. Cent. Code Ann. § 12.1-35.02(2) (*Additional services*).

<sup>178</sup> 42 R.I. Gen. Laws Ann. § 72-15(n) (*Children's bill of rights*). A child is a person under the age of 15 years. *Id.* at 12 § 28-8(b).

<sup>179</sup> Wash. Rev. Code Ann. § 7.69A.030(2), (5), and (6) (*Rights of child victims and witnesses*).

<sup>180</sup> Wis. Stat. Ann. § 950.055(2)(b) and (c) (*Child victims and witnesses; rights and services*).

<sup>181</sup> Whitcomb, *supra* note 16, at 48–49; *see also supra* Section IIIA.

SCCA's model, teaming the attorney with a social worker, is considered a best practice for the representation of children in criminal cases. Combining the roles of counsel and guardian ad litem in one attorney is potentially problematic, however. Counsel face the possibility of confronting an actual conflict of interest between a child's expressed and best interests. In such a case, the attorney would likely be required to inform the court and request that a separate individual be appointed to serve in the GAL role, which could cause delays in the criminal case and confusion to the child victim.

### ***1. Background***

Founded in 1977, SCCA is the country's oldest and largest pro bono legal and social services agency for children. Its mission is "to advocate for victims of child abuse and neglect with the goal of securing safety, justice, well-being and a permanent, nurturing environment for every child." To accomplish its mission, SCCA relies on volunteer attorneys who are specially trained as child advocates; they work with staff social workers and lawyers, some of whom have been with SCCA for decades.<sup>182</sup>

Although most of SCCA's work involves representing children in various civil dependency/child welfare proceedings that address abuse and neglect (and occasionally domestic relations custody matters), the SCCA lawyer-social worker teams have also been representing child victims of crime throughout its history.<sup>183</sup> SCCA typically becomes involved in a criminal case following a referral by the assistant district attorney prosecuting the case. The trial court judge then appoints SCCA to represent the child. SCCA's appointment is normally requested only when the child victim does not have a supportive parent: for example, when the parent does not believe the child's allegations and is supporting the offender, or when other safety/well-being concerns come to the attention of the prosecutor or court.

### ***2. Statutory Authority for SCCA Appointment***

There are two statutory bases for SCCA attorneys' and social workers' involvement in a criminal case. First, Pennsylvania law authorizes the trial judge to designate "one or more persons as child advocate" on behalf of children (individuals under the age of 16) who are victims or material witnesses in criminal proceedings.<sup>184</sup> The statute provides that the child advocate may be but is not required to be an attorney, so long as the court determines that the person possesses

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<sup>182</sup> "Support Center for Child Advocates," Probono.net (2020), [https://www.probono.net/oppsguide/organization.133257-Support\\_Center\\_for\\_Child\\_Advocates](https://www.probono.net/oppsguide/organization.133257-Support_Center_for_Child_Advocates). The information about SCCA's practices in Philadelphia comes from discussions with SCCA Executive Director Mr. Frank Cervone, Director of Intake and Pro Bono Services Ms. Jodi Schatz, Managing Attorney Ms. Marguerite Gualtieri, and Director of Research and Evaluation Dr. M. Christine Kenty. *See also* the SCCA homepage, [www.SCCALaw.org](http://www.SCCALaw.org). The Committee expresses its appreciation to individuals in SCCA and all civilian organizations consulted for speaking to the Committee staff as they gathered information for this report.

<sup>183</sup> SCCA represents a total of about 1,100 children each year, and including 50 to 100 children each year who are victims and/or witnesses in criminal prosecutions of their alleged abusers.

<sup>184</sup> 42 Pa. Stat. and Cons. Stat. Ann. § 5983(a).

“education, experience or training in child or sexual abuse and a basic understanding of the criminal justice system.”<sup>185</sup> This child advocate has a threefold purpose:

- To explain, in language understood by the child, all legal proceedings in which the child will be involved;
- As a friend of the court, to advise the judge, whenever appropriate, of the child’s ability to understand and cooperate with any court proceedings; and
- To assist or secure assistance for the child and the child’s family in coping with the emotional impact of the crime and subsequent criminal proceedings in which the child is involved.<sup>186</sup>

Second, the Pennsylvania Rules of Criminal Procedure provide that a judge may appoint counsel “in all cases . . . on its own motion, when the interests of justice require it.”<sup>187</sup>

### ***3. Practical Application of Statutory Authority***

The trial courts’ practical application of Pennsylvania’s statutory authorities is not evident from the language of the statutory provisions. In practice, in cases involving a child victim under 16, the trial judge most often appoints SCCA as Child Advocate Attorney who, pursuant to the first statutory provision, essentially serves as friend of the court and friend of the child. SCCA then designates an individual Child Advocate Attorney (typically a volunteer attorney but occasionally a staff attorney employed by SCCA), paired with a Child Advocate Social Worker (also an employee of SCCA) in a multidisciplinary model of representation, to serve as counsel and guardian ad litem for the child, representing the minor’s interests in the criminal case.

It is in these cases that counsel appointed as Child Advocate Attorney acts in a hybrid role, both as counsel and as guardian ad litem. SCCA described its preferred approach as supporting the child by advocating for the child’s expressed interest, both because the role of the attorney in criminal cases, as defined by the authorizing statute, is limited to serving mostly in a supportive role for the child victim/witness, and because the child is not a “party” in the prosecution. Consistent with SCCA’s approach, the child directs their representation as much as possible, and may be able to direct it in some instances but not in others. In those instances in which the child is unable to direct their representation, the attorney uses substituted judgment as described in the ABA Model Act and consistent with Rule of Professional Conduct 1.14.<sup>188</sup>

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<sup>185</sup> *Id.* at § 5983(b). SCCA uses attorneys licensed in Pennsylvania in its cases only as part of the lawyer–social worker child advocacy team, and does not use non-lawyers in the role of child advocate.

<sup>186</sup> *Id.* at § 5983(a)(1)-(3).

<sup>187</sup> Pa. R. Crim. P. 122(A)(3).

<sup>188</sup> *See supra* Sections III.B.2 and III.B.4.

If a conflict between the child's best interest and expressed interest arises, SCCA explained it will inform the court and could seek to bifurcate the two roles with appointment of a separate guardian ad litem to represent the best interests of the child. In such a case, the attorney would continue as counsel representing the child's expressed interests.

In cases involving a victim 16–17 years old, the trial judge appoints SCCA as counsel only, pursuant to the Rules of Criminal Procedure. When appointed as counsel for the older child victim, the attorney serves in a client-directed manner and advocates for the expressed interest of the child.

In all circumstances, SCCA's practice is for an attorney, acting either as counsel and guardian ad litem or as counsel only, to team with a social worker in order to provide the highest-quality services for the child victim. The social worker is not a best interest advocate, and does not operate independently of the attorney. In addition, the social worker is not a case manager (e.g., foster care worker) assigned by the county or state child welfare agency. Rather, as a critical member of the child's legal team and subject to the same restrictions as an attorney on client confidences and privilege, the Child Advocate Social Worker complements the child's attorney regardless of the appointed role, providing specialized expertise on which the attorney draws in determining how best to carry out their duties under the law.

In a criminal case, the Child Advocate Social Worker undertakes such tasks as collaborating with the attorney so that both understand the child's developmental age and ability to direct their own representation, researching and analyzing the child's family context and background, and assessing the potential impact of legal proceedings and options on the child's mental and emotional state. The social worker's contributions to the team's in-depth knowledge are particularly valuable when the attorney is a pro bono volunteer for SCCA who may lack extensive experience in child development and the criminal justice system.

Lawyers are critical to the SCCA's model, regardless of whether they are acting as both counsel and guardian ad litem or as counsel only, because the attorneys advocate to the trial judge in chambers on issues such as accommodations for the child's testimony. In addition, the attorneys advocate their positions to the prosecutor. A nonlawyer is unable to argue before the judge, and may not have the skill or legal expertise to make a case to the prosecutor.

#### ***4. Conclusion***

SCCA attorneys are largely appointed in those cases where there is no parent or guardian supporting the child victim throughout the criminal proceedings. They are not involved in criminal cases to the same extent as SVC/VLC in courts-martial, where the SVC/VLC's role is greater than SCCA's supportive role. For example, SVC/VLC acting on behalf of their clients, have standing to enforce the child victim's rights under Article 6b, UCMJ.

SCCA's use of an attorney/social worker team, in the types of cases to which they are appointed by the court to represent the child's interests, ensures that the child victim receives the best legal representation. This is particularly true when the child's attorney does not possess extensive

experience and expertise in the thorny issues that can arise in child representation—as is generally the case with an SVC.

But the hybrid counsel/GAL role has the potential to place the attorney in an untenable position if an actual conflict of interest arises between the child’s expressed and best interests, such as when the child’s expressed interest puts them at substantial risk of physical harm. As a practical matter, SCCA attorneys serving in the hybrid counsel/GAL role generally advocate the child victim’s expressed interests, likely because their skilled team approach usually results in alignment between the child’s expressed and best interests. Accordingly, the military’s use of attorneys who serve solely as counsel representing the child’s expressed interest is considered the better practice.

## **VI. CONCLUSION**

The Committee concludes that it is neither advisable nor necessary to implement a guardian ad litem program in the Military Services, whether in the form of instituting a new program to protect the best interests of child victims of sexual offenses or of allowing SVCs/VLCs to act as GALs for child victims. Although the addition of a child victim advocate is not necessary in all cases, for those child victims who cannot direct their own legal representation or who lack a supportive family member, a trained child victim advocate working in collaboration with the SVC/VLC is the best option for ensuring that a child's interests are protected in the courtroom. In reaching this conclusion, the Committee assumes that the Department of Defense will implement this report's recommendations designed to address the gaps in current services for child victims.



## **APPENDIX A. COMMITTEE AUTHORIZING STATUTE, AMENDMENTS, AND DUTIES**

### **NATIONAL DEFENSE AUTHORIZATION ACT FOR FISCAL YEAR 2015**

#### **SECTION 546. DEFENSE ADVISORY COMMITTEE ON INVESTIGATION, PROSECUTION, AND DEFENSE OF SEXUAL ASSAULT IN THE ARMED FORCES. (Public Law 113–291; 128 Stat. 3374; 10 U.S.C. 1561 note)**

**(a) ESTABLISHMENT REQUIRED.—**

- (1) **IN GENERAL.**—The Secretary of Defense shall establish and maintain within the Department of Defense an advisory committee to be known as the “Defense Advisory Committee on Investigation, Prosecution, and Defense of Sexual Assault in the Armed Forces” (in this section referred to as the “Advisory Committee”).
- (2) **DEADLINE FOR ESTABLISHMENT.**—The Secretary shall establish the Advisory Committee not later than 30 days before the termination date of the independent panel established by the Secretary under section 576(a)(2) of the National Defense Authorization Act for Fiscal Year 2013 (Public Law 112-239; 126 Stat. 1758), known as the “judicial proceedings panel”.

**(b) MEMBERSHIP.**—The Advisory Committee shall consist of not more than 20 members, to be appointed by the Secretary of Defense, who have experience with the investigation, prosecution, and defense of allegations of sexual assault offenses. Members of the Advisory Committee may include Federal and State prosecutors, judges, law professors, and private attorneys. Members of the Armed Forces serving on active duty may not serve as a member of the Advisory Committee.

**(c) DUTIES.—**

- (1) **IN GENERAL.**—The Advisory Committee shall advise the Secretary of Defense on the investigation, prosecution, and defense of allegations of rape, forcible sodomy, sexual assault, and other sexual misconduct involving members of the Armed Forces.
- (2) **BASIS FOR PROVISION OF ADVICE.**—For purposes of providing advice to the Secretary pursuant to this subsection, the Advisory Committee shall review, on an ongoing basis, cases involving allegations of sexual misconduct described in paragraph (1).

**(d) ANNUAL REPORTS.**—Not later than March 30 each year, the Advisory Committee shall submit to the Secretary of Defense and the Committees on Armed Services of the Senate and the House of Representatives a report describing the results of the activities of the Advisory Committee pursuant to this section during the preceding year.

**(e) TERMINATION.—**

- (1) IN GENERAL.—Except as provided in paragraph (2), the Advisory Committee shall terminate on the date that is five years after the date of the establishment of the Advisory Committee pursuant to subsection (a).
- (2) CONTINUATION.—The Secretary of Defense may continue the Advisory Committee after the termination date applicable under paragraph (1) if the Secretary determines that continuation of the Advisory Committee after that date is advisable and appropriate. If the Secretary determines to continue the Advisory Committee after that date, the Secretary shall submit to the President and the congressional committees specified in subsection (d) a report describing the reasons for that determination and specifying the new termination date for the Advisory Committee.

(f) DUE DATE FOR ANNUAL REPORT OF JUDICIAL PROCEEDINGS PANEL.—Section 576(c)(2)(B) of the National Defense Authorization Act for Fiscal Year 2013 (Public Law 112-239; 126 Stat. 1760) is amended by inserting “annually thereafter” after “reports”.

## **NATIONAL DEFENSE AUTHORIZATION ACT FOR FISCAL YEAR 2016**

### **SECTION 537. MODIFICATION OF DEADLINE FOR ESTABLISHMENT OF DEFENSE ADVISORY COMMITTEE ON INVESTIGATION, PROSECUTION, AND DEFENSE OF SEXUAL ASSAULT IN THE ARMED FORCES.**

Section 546(a)(2) of the Carl Levin and Howard P. “Buck” McKeon National Defense Authorization Act for Fiscal Year 2015 (Public Law 113–291; 128 Stat. 3374; 10 U.S.C. 1561 note) is amended by striking “not later than” and all that follows and inserting “not later than 90 days after the date of the enactment of the National Defense Authorization Act for Fiscal Year 2016.”.

## **NATIONAL DEFENSE AUTHORIZATION ACT FOR FISCAL YEAR 2019**

### **SEC. 533. AUTHORITIES OF DEFENSE ADVISORY COMMITTEE ON INVESTIGATION, PROSECUTION, AND DEFENSE OF SEXUAL ASSAULT IN THE ARMED FORCES.**

Section 546 of the Carl Levin and Howard P. “Buck” McKeon National Defense Authorization Act for Fiscal Year 2015 (10 U.S.C. 1561 note) is amended—

- (1) by redesignating subsections (d) and (e) as subsections (e) and (f), respectively; and
- (2) by inserting after subsection (c) the following new subsection (d):

“(d) AUTHORITIES.—

“(1) HEARINGS.—The Advisory Committee may hold such hearings, sit and act at such

times and places, take such testimony, and receive such evidence as the committee considers appropriate to carry out its duties under this section.

“(2) INFORMATION FROM FEDERAL AGENCIES.—Upon request by the chair of the Advisory Committee, a department or agency of the Federal Government shall provide information that the Advisory Committee considers necessary to carry out its duties under this section. In carrying out this paragraph, the department or agency shall take steps to prevent the unauthorized disclosure of personally identifiable information.”.

#### **SEC. 547. REPORT ON VICTIMS OF SEXUAL ASSAULT IN REPORTS OF MILITARY CRIMINAL INVESTIGATIVE ORGANIZATIONS.**

(a) REPORT.—Not later than September 30, 2019, and not less frequently than once every two years thereafter, the Secretary of Defense, acting through the Defense Advisory Committee on Investigation, Prosecution, and Defense of Sexual Assault in the Armed Forces shall submit to the congressional defense committees a report that includes, with respect to the period of two years preceding the date of the submittal of the report, the following:

- (1) The number of instances in which a covered individual was accused of misconduct or crimes considered collateral to the investigation of a sexual assault committed against the individual.
- (2) The number of instances in which adverse action was taken against a covered individual who was accused of collateral misconduct or crimes as described in paragraph (1).
- (3) The percentage of investigations of sexual assaults that involved an accusation or adverse action against a covered individual as described in paragraphs (1) and (2).

(b) COVERED INDIVIDUAL DEFINED.—In this section, the term “covered individual” means an individual who is identified as a victim of a sexual assault in the case files of a military criminal investigative organization.

#### **NATIONAL DEFENSE AUTHORIZATION ACT FOR FISCAL YEAR 2020**

##### **SEC. 535. EXTENSION OF DEFENSE ADVISORY COMMITTEE ON INVESTIGATION, PROSECUTION, AND DEFENSE OF SEXUAL ASSAULT IN THE ARMED FORCES.**

Section 546(f)(1) of the Carl Levin and Howard P. “Buck” McKeon National Defense Authorization Act for Fiscal Year 2015 (10 U.S.C. 1561 note) is amended by striking “five” and inserting “ten”.

*Joint Explanatory Statement:*

*The conferees request the DAC-IPAD review, as appropriate, whether other justice programs (e.g., restorative justice programs, mediation) could be employed or modified to assist the victim of an alleged sexual assault or the alleged offender, particularly in cases in which the evidence in the victim's case has been determined not to be sufficient to take judicial, non-judicial, or administrative action against the perpetrator of the alleged offense.*

*Further, the conferees recognize the importance of providing survivors of sexual assault an opportunity to provide a full and complete description of the impact of the assault on the survivor during court-martial sentencing hearings related to the offense. The conferees are concerned by reports that some military judges have interpreted Rule for Courts-Martial (RCM) 1001(c) too narrowly, limiting what survivors are permitted to say during sentencing hearings in ways that do not fully inform the court of the impact of the crime on the survivor.*

*Therefore, the conferees request that, on a one-time basis, or more frequently, as appropriate, and adjunct to its review of court-martial cases completed in any particular year, the DAC-IPAD assess whether military judges are according appropriate deference to victims of crimes who exercise their right to be heard under RCM 1001(c) at sentencing hearings, and appropriately permitting other witnesses to testify about the impact of the crime under RCM 1001.*

#### **SEC. 540I. ASSESSMENT OF RACIAL, ETHNIC, AND GENDER DISPARITIES IN THE MILITARY JUSTICE SYSTEM.**

(a) IN GENERAL.—The Secretary of Defense shall provide for the carrying out of the activities described in subsections (b) and (c) in order to improve the ability of the Department of Defense to detect and address racial, ethnic, and gender disparities in the military justice system.

(b) SECRETARY OF DEFENSE AND RELATED ACTIVITIES.—The activities described in this subsection are the following, to be commenced or carried out (as applicable) by not later than 180 days after the date of the enactment of this Act:

(1) For each court-martial carried out by an Armed Force after the date of the enactment of this Act, the Secretary of Defense shall require the head of the Armed Force concerned—

(A) to record the race, ethnicity, and gender of the victim and the accused, and such other demographic information about the victim and the accused as the Secretary considers appropriate;

(B) to include data based on the information described in subparagraph (A) in the annual military justice reports of the Armed Force.

(2) The Secretary of Defense, in consultation with the Secretaries of the military departments and the Secretary of Homeland Security, shall issue guidance that—

(A) establishes criteria to determine when data indicating possible racial, ethnic,

or gender disparities in the military justice process should be further reviewed; and

(B) describes how such a review should be conducted.

(3) The Secretary of Defense, in consultation with the Secretaries of the military departments and the Secretary of Homeland Security, shall—

(A) conduct an evaluation to identify the causes of any racial, ethnic, or gender disparities in the military justice system;

(B) take steps to address the causes of such disparities, as appropriate.

(c) DAC-IPAD ACTIVITIES.—

(1) IN GENERAL.—The activities described in this subsection are the following, to be conducted by the independent committee DAC-IPAD:

(A) A review and assessment, by fiscal year, of the race and ethnicity of members of the Armed Forces accused of a penetrative sexual assault offense or contact sexual assault offense in an unrestricted report made pursuant to Department of Defense Instruction 6495.02, including an unrestricted report involving a spouse or intimate partner, in all cases completed in each fiscal year addressed.

(B) A review and assessment, by fiscal year, of the race and ethnicity of members of the Armed Forces against whom charges were preferred pursuant to Rule for Courts-Martial 307 for a penetrative sexual assault offense or contact sexual assault offense in all cases completed in each fiscal year assessed.

(C) A review and assessment, by fiscal year, of the race and ethnicity of members of the Armed Forces who were convicted of a penetrative sexual assault offense or contact sexual assault offense in all cases completed in each fiscal year assessed.

(2) INFORMATION FROM FEDERAL AGENCIES.—

(A) IN GENERAL.—Upon request by the chair of the committee, a department or agency of the Federal Government shall provide information that the committee considers necessary to conduct reviews and assessments required by paragraph (1), including military criminal investigative files, charge sheets, records of trial, and personnel records.

(B) HANDLING, STORAGE, AND RETURN.—The committee shall handle and store all records received and reviewed under this subsection in

accordance with applicable privacy laws and Department of Defense policy, and shall return all records so received in a timely manner.

(3) **REPORT.**—Not later than one year after the date of the enactment of this Act, the committee shall submit to the Secretary of Defense, and to the Committees on Armed Services of the Senate and the House of representatives, a report setting forth the results of the reviews and assessments required by paragraph (1). The report shall include such recommendations for legislative or administrative action as the committee considers appropriate in light of such results.

(4) **DEFINITIONS.**—In this subsection:

(A) The term “independent committee DAC-IPAD” means the independent committee established by the Secretary of Defense under section 546 of the Carl Levin and Howard P. “Buck” McKeon National Defense Authorization Act for Fiscal Year 2015 (Public Law 113–291; 128 Stat. 3374), commonly known as the “DAC-IPAD”.

(B) The term “case” means an unrestricted report of any penetrative sexual assault offense or contact sexual assault offense made against a member of the Armed Forces pursuant to Department of Defense Instruction 6495.02, including any unrestricted report involving a spouse or intimate partner for which an investigation has been opened by a criminal investigative organization.

(C) The term “completed”, with respect to a case, means that the case was tried to verdict, dismissed without further action, or dismissed and then resolved by non-judicial or administrative proceedings.

(D) The term “contact sexual assault offense” means aggravated sexual contact, abusive sexual contact, wrongful sexual contact, and attempts to commit such offenses under the Uniform Code of Military Justice.

(E) The term “penetrative sexual assault offense” means rape, aggravated sexual assault, sexual assault, forcible sodomy, and attempts to commit such offenses under the Uniform Code of Military Justice.

***H. Rept. 116-120 on H.R. 2500***  
***TITLE V—MILITARY PERSONNEL POLICY***  
***ITEMS OF SPECIAL INTEREST***

***Appointment of Guardian ad Litem for Minor Victims***

*The committee is concerned for the welfare of minor, military dependents who are victims of an alleged sex-*

*related offense. The committee acknowledges the Department of Defense's continued efforts to implement services in support of service members who are victims of sexual assault and further, to expand some of these services to dependents who are victims. However, the committee remains concerned that there is not an adequate mechanism within the military court-martial process to represent the best interests of minor victims following an alleged sex-related offense.*

*Therefore, not later than 180 days after the date of the enactment of this Act, the Defense Advisory Committee on Investigation, Prosecution, and Defense of Sexual Assault in the Armed Forces shall submit to the Committees on the Armed Services of the Senate and the House of Representatives a report that evaluates the need for, and the feasibility of, establishing a process under which a guardian ad litem may be appointed to represent the interests of a victim of an alleged sex-related offense (as that term is defined in section 1044e(g) of title 10, United States Code) who has not attained the age of 18 years.*

## APPENDIX B. COMMITTEE CHARTER AND BALANCE PLAN

### Charter

#### Defense Advisory Committee on Investigation, Prosecution, and Defense of Sexual Assault in the Armed Forces

1. Committee's Official Designation: The committee shall be known as the Defense Advisory Committee on Investigation, Prosecution, and Defense of Sexual Assault in the Armed Forces ("the Committee").
2. Authority: The Secretary of Defense, pursuant to section 546 of the Carl Levin and Howard P. "Buck" McKeon National Defense Authorization Act for Fiscal Year 2015 ("the FY 2015 NDAA") (Public Law 113-291), as modified by section 537 of the National Defense Authorization Act for Fiscal Year 2016 (Public Law 114-92), and in accordance with the provisions of the Federal Advisory Committee Act (FACA) of 1972 (5 U.S.C., Appendix) and 41 C.F.R. § 102-3.50(a), established this non-discretionary advisory committee.
3. Objectives and Scope of Activities: Pursuant to section 546(c)(1) of the FY 2015 NDAA, will advise the Secretary of Defense and the Deputy Secretary of Defense on the investigation, prosecution, and defense of allegations of rape, forcible sodomy, sexual assault, and other sexual misconduct involving members of the Armed Forces.
4. Description of Duties: Pursuant to section 546(c)(2) and (d) of the FY 2015 NDAA, the Committee, not later than March 30 of each year, will submit to the Secretary of Defense through the General Counsel for the Department of Defense (GC DoD), and the Committees on Armed Services of the Senate and House of Representatives, a report describing the results of the activities of the Committee pursuant to section 546 of the FY 2015 NDAA, as amended, during the preceding year. The Committee will review, on an ongoing basis, cases involving allegations of rape, forcible sodomy, sexual assault, and other sexual misconduct involving members of the Armed Forces.

Pursuant to Section 547 of the National Defense Authorization Act for Fiscal Year 2019 (Public Law 115-232), not later than September 30, 2019, and not less frequently than once every two years thereafter, the Secretary of Defense, acting through the Committee, shall submit to the congressional defense committees a report that includes, with respect to the period of two years preceding the date of the submittal of the report, the following:

- (1) The number of instances in which a covered individual was accused of misconduct or crimes considered collateral to the investigation of a sexual assault committed against the individual.
- (2) The number of instances in which adverse action was taken against a covered individual who was accused of collateral misconduct or crimes as described in paragraph (1).
- (3) The percentage of investigations of sexual assaults that involved an accusation or adverse action against a covered individual as described in paragraphs (1) and (2).

The term "covered individual" means an individual who is identified as a victim of a sexual assault in the case files of a military criminal investigative organization.



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Pursuant to section 540I(c) of the of the National Defense Authorization Act for Fiscal Year 2020 (“the FY 2020 NDAA”) (Public Law 116-92), not later than December 20, 2020, the Committee shall submit to the Secretary of Defense and the Committees on Armed Services of the Senate and House of Representatives a report setting forth:

- (1) A review and assessment, by fiscal year, of the race and ethnicity of members of the Armed Forces accused of a penetrative sexual assault offense or contact sexual assault offense in an unrestricted report made pursuant to Department of Defense Instruction 6495.02, including an unrestricted report involving a spouse or intimate partner, in all cases completed in each fiscal year assessed.
- (2) A review and assessment, by fiscal year, of the race and ethnicity of members of the Armed Forces against whom charges were preferred pursuant to Rule for Courts-Martial 307 for a penetrative sexual assault offense or contact sexual assault offense in all cases completed in each fiscal year assessed.
- (3) A review and assessment, by fiscal year, of the race and ethnicity of members of the Armed Forces who were convicted of a penetrative sexual assault offense or contact sexual assault offense in all cases completed in each fiscal year assessed.

The report shall include such recommendations for legislative or administrative action as the committee considers appropriate in light of such results.

Pursuant to section 540K(d) of the FY 2020 NDAA, the Secretary of Defense shall consult with the Committee on a report to be submitted by the Secretary to the Committees on Armed Services of the Senate and House of Representatives not later than June 17, 2020, making findings and recommendations on the feasibility and advisability of a policy for the Department of Defense that would permit a victim of a sexual assault, that is or may be investigated as a result of a communication described in 540k(b), which victim is a member of the Armed Forces or an adult dependent of a member of the Armed Forces, to have the reporting on the sexual assault be treated as a restricted report without regard to the party initiating or receiving such communication.

5. Agency or Official to Whom the Committee Reports: The Committee will report to the Secretary and Deputy Secretary of Defense, through the GC DoD.
6. Support: The DoD, through the GC DoD, the Washington Headquarters Services, and the DoD Components, provides support for the Committee and ensures compliance with requirements of the FACA, the Government in the Sunshine Act of 1976 (“the Sunshine Act”) (5 U.S.C. § 552b), governing Federal statutes and regulations, and DoD policy and procedures.
7. Estimated Annual Operating Costs and Staff Years: The estimated annual operating costs, to include travel, meetings, and contract support, are approximately \$2,810,500. The estimated annual personnel cost to the DoD is 15.0 full-time equivalents.

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8. Designated Federal Officer: The Committee's Designated Federal Officer (DFO) shall be a full-time or permanent part-time DoD civilian officer or employee or member of the Armed Forces, designated in accordance with established DoD policy and procedures.

The Committee's DFO is required to attend all Committee and subcommittee meetings for the entire duration of each and every meeting. However, in the absence of the Committee's DFO, a properly approved Alternate DFO, duly designated to the Committee in accordance with DoD policy and procedures, shall attend the entire duration of all of the Committee or subcommittee meetings.

The DFO, or the Alternate DFO, approves and calls all Committee and subcommittee meetings; prepares and approves all meeting agendas; and adjourns any meeting when the DFO, or the Alternate DFO, determines adjournment to be in the public's interest or required by governing regulations or DoD policy and procedures.

9. Estimated Number and Frequency of Meetings: The Committee shall meet at the call of the Committee's DFO, in consultation with the Committee's Chair and the GC DoD. The Committee will meet at a minimum of once per year.
10. Duration The need for this advisory function is on a continuing basis; however, this charter is subject to renewal every two years.
11. Termination: In accordance with sections 546(e)(1) and (2) of the FY 2015 NDAA, as modified by section 535 of the FY 2020 NDAA, the Committee will terminate on February 28, 2026, ten years after the Committee was established, unless the Secretary of Defense determines that continuation of the Committee after that date is advisable and appropriate. If the Secretary of Defense determines to continue the Committee after that date, the Secretary of Defense will submit to the President and the Committees on Armed Services of the Senate and House of Representatives a report describing the reasons for that determination and specifying the new termination date for the Committee.
12. Membership and Designation: Pursuant to section 546(b) of the FY 2015 NDAA, the Committee will be composed of no more than 20 members. Committee members selected will have experience with the investigation, prosecution, and defense of allegations of sexual assault offenses. Members of the Committee may include Federal and State prosecutors, judges, law professors, and private attorneys. Members of the Armed Forces serving on active duty may not serve as members of the Committee.

The appointment of Committee members will be approved by the Secretary of Defense, the Deputy Secretary of Defense, or the Chief Management Office of the Department of Defense (CMO) ("the DoD Appointing Authorities"), for a term of service of one-to-four years, with annual renewals, in accordance with DoD policy and procedures. No member, unless approved by the DoD Appointing Authorities, may serve more than two consecutive terms of service on the Committee, to include its subcommittees, or serve on more than two DoD Federal advisory committees at one time.

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Committee members who are not full-time or permanent part-time Federal civilian officers or employees, or members of the Armed Forces, shall be appointed as experts or consultants pursuant to 5 U.S.C. § 3109 to serve as special government employee (SGE) members. Committee members who are full-time or permanent part-time Federal civilian officers or employees, or members of the Armed Forces, shall be appointed pursuant to 41 C.F.R. § 102-3.130(a) to serve as regular government employee (RGE) members.

Committee members are appointed to provide advice on the basis of his or her best judgment without representing any particular points of view and in a manner that is free from conflict of interest.

The DoD Appointing Authorities shall appoint the Committee's Chair from among the membership previously approved, in accordance with DoD policy and procedures, for a one-to-two year term of service, with annual renewal, which shall not exceed the member's approved Committee appointment.

Except for reimbursement of official Committee-related travel and per diem, Committee members serve without compensation.

13. Subcommittees: The DoD, when necessary and consistent with the Committee's mission and DoD policy and procedures, may establish subcommittees, task forces, or working groups to support the Committee. Establishment of subcommittees shall be based upon a written determination, to include terms of reference, by the DoD Appointing Authorities or the GC DoD, as the DoD Sponsor. All subcommittees operate under the provisions of the FACA, the Sunshine Act, governing Federal statutes and regulations, and DoD policy and procedures.

Subcommittees shall not work independently of the Committee and shall report all their advice and recommendations solely to the Committee for its thorough discussion and deliberation at a properly noticed and open meeting, subject to the Sunshine Act. Subcommittees have no authority to make decisions or recommendations, verbally or in writing, on behalf of the Committee. No subcommittee nor any of its members may provide updates or report, verbally or in writing, directly to the DoD or to any Federal officers or employees. If a majority of Committee members are appointed to a particular subcommittee, then that subcommittee may be required to operate pursuant to the same FACA notice and openness requirements governing the Committee's operations.

Individual appointments to serve on these subcommittees shall be approved by the DoD Appointing Authorities for a term of service of one-to-four years, subject to annual renewals, in accordance with DoD policy and procedures. No member shall serve more than two consecutive terms of service on the subcommittee without prior approval from the DoD Appointing Authorities. Subcommittee members, who are not full-time or permanent part-time Federal civilian officers or employees, or members of the Armed Forces, shall be appointed as experts or consultants pursuant to 5 U.S.C. § 3109 to serve as SGE members. Subcommittee members who are full-time or permanent part-time Federal civilian officers or employees, or

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members of the Armed Forces, shall be appointed pursuant to 41 C.F.R. § 102-3.130(a) to serve as RGE members.

The DoD Appointing Authorities shall appoint the subcommittee leadership from among the membership previously appointed to serve on the subcommittee in accordance with DoD policy and procedures, for a one-to-two year term of service, with annual renewal, which shall not exceed the member's approved term of service.

Each subcommittee member is appointed to provide advice on behalf of his or her best judgment without representing any particular point of view and in a manner that is free from conflicts of interest.

With the exception of reimbursement for travel and per diem as it pertains to official travel related to the Committee or its subcommittees, subcommittee members shall serve without compensation.

Currently, the GC DoD has approved three subcommittees to the Committee. All work performed by these subcommittee will be sent to the Committee for its thorough deliberation and discussion at a properly noticed and open meeting, subject to the Sunshine act.

- 1) Case Review Subcommittee of the Defense Advisory Committee on Investigation, Prosecution, and Defense of Sexual Assault in the Armed Forces—composed of not more than 15 members to assess and make recommendations related to the investigation, prosecution, and defense of allegations of rape, forcible sodomy, sexual assault, and other sexual misconduct involving members of the Armed Forces based on its review of cases involving such allegations.
  - 2) Data Subcommittee of the Defense Advisory Committee on Investigation, Prosecution, and Defense of Sexual Assault in the Armed Forces—composed of not more than 15 members to assess and make recommendations related to the investigation, prosecution, and defense of allegations of rape, forcible sodomy, sexual assault, and other sexual misconduct involving members of the Armed Forces based on its collection and analysis of data from cases involving such allegations.
  - 3) Policy Subcommittee of the Defense Advisory Committee on Investigation, Prosecution, and Defense of Sexual Assault in the Armed Forces—composed of not more than 15 members to assess and make recommendations related to the investigation, prosecution, and defense of allegations of rape, forcible sodomy, sexual assault, and other sexual misconduct involving members of the Armed Forces based on its review of Department of Defense policies, Military Department policies, and Uniform Code of Military Justice provisions applicable to such allegations.
14. Recordkeeping: The records of the Committee and its subcommittees will be handled in accordance with Section 2, General Record Schedule 6.2, and governing DoD policies and

Charter  
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procedures. These records will be available for public inspection and copying, subject to the Freedom of Information Act of 1966 (5 U.S.C. § 552, as amended).

15. Filing Date: February 16, 2020

Membership Balance Plan  
 Defense Advisory Committee on Investigation, Prosecution, and Defense of  
 Sexual Assault in the Armed Forces

Agency: Department of Defense (DoD)

1. Authority: The Secretary of Defense, pursuant to section 546 of the Carl Levin and Howard P. “Buck” McKeon National Defense Authorization Act for Fiscal Year 2015 (“the FY 2015 NDAA”) (Public Law 113-291), as modified by section 537 of the National Defense Authorization Act for Fiscal Year 2016 (Public Law 114-92), and in accordance with the provisions of the Federal Advisory Committee Act (FACA) of 1972 (5 U.S.C., Appendix) and 41 C.F.R. § 102-3.50(a), established the Defense Advisory Committee on Investigation, Prosecution, and Defense of Sexual Assault in the Armed Forces (“the Committee”), a non-discretionary advisory committee.
2. Mission/Function: The Committee, pursuant to section 546(c)(1) of the FY 2015 NDAA, will advise the Secretary of Defense and the Deputy Secretary of Defense on the investigation, prosecution, and defense of allegations of rape, forcible sodomy, sexual assault, and other sexual misconduct involving members of the Armed Forces.

Pursuant to section 546(c)(2) and (d) of the FY 2015 NDAA, the Committee, not later than March 30 of each year, will submit to the Secretary of Defense through the General Counsel for the Department of Defense (GC DoD), and the Committees on Armed Services of the Senate and House of Representatives, a report describing the results of the activities of the Committee pursuant to section 546 of the FY 2015 NDAA, as amended, during the preceding year. The Committee will review, on an ongoing basis, cases involving allegations of rape, forcible sodomy, sexual assault, and other sexual misconduct involving members of the Armed Forces.

Pursuant to Section 547 of the National Defense Authorization Act for Fiscal Year 2019 (Public Law 115-232), not later than September 30, 2019, and not less frequently than once every two years thereafter, the Secretary of Defense, acting through the Committee, shall submit to the congressional defense committees a report that includes, with respect to the period of two years preceding the date of the submittal of the report, the following:

- (1) The number of instances in which a covered individual was accused of misconduct or crimes considered collateral to the investigation of a sexual assault committed against the individual.
- (2) The number of instances in which adverse action was taken against a covered individual who was accused of collateral misconduct or crimes as described in paragraph (1).
- (3) The percentage of investigations of sexual assaults that involved an accusation or adverse action against a covered individual as described in paragraphs (1) and (2).

The term “covered individual” means an individual who is identified as a victim of a sexual assault in the case files of a military criminal investigative organization.

Pursuant to section 540I(c) of the of the National Defense Authorization Act for Fiscal Year 2020 (“the FY 2020 NDAA”) (Public Law 116-92), not later than December 20, 2020, the Committee shall submit to the Secretary of Defense and the Committees on Armed Services of the Senate and House of Representatives a report setting forth:

Membership Balance Plan  
Defense Advisory Committee on Investigation, Prosecution, and Defense of  
Sexual Assault in the Armed Forces

- (1) A review and assessment, by fiscal year, of the race and ethnicity of members of the Armed Forces accused of a penetrative sexual assault offense or contact sexual assault offense in an unrestricted report made pursuant to Department of Defense Instruction 6495.02, including an unrestricted report involving a spouse or intimate partner, in all cases completed in each fiscal year assessed.
- (2) A review and assessment, by fiscal year, of the race and ethnicity of members of the Armed Forces against whom charges were preferred pursuant to Rule for Courts-Martial 307 for a penetrative sexual assault offense or contact sexual assault offense in all cases completed in each fiscal year assessed.
- (3) A review and assessment, by fiscal year, of the race and ethnicity of members of the Armed Forces who were convicted of a penetrative sexual assault offense or contact sexual assault offense in all cases completed in each fiscal year assessed.

The report shall include such recommendations for legislative or administrative action as the committee considers appropriate in light of such results.

Pursuant to section 540K(d) of the FY 2020 NDAA, the Committee shall be consulted by the Secretary of Defense on a report to be submitted by the Secretary to the Committees on Armed Services of the Senate and House of Representatives not later than June 17, 2020, making findings and recommendations on the feasibility and advisability of a policy for the Department of Defense that would permit a victim of a sexual assault, that is or may be investigated as a result of a communication described in 540k(b), which victim is a member of the Armed Forces or an adult dependent of a member of the Armed Forces, to have the reporting on the sexual assault be treated as a restricted report without regard to the party initiating or receiving such communication.

3. Points of View: Pursuant to section 546(b) of the FY 2015 NDAA, the Committee will be composed of no more than 20 members. Committee members selected will have experience with the investigation, prosecution, and defense of allegations of sexual assault offenses. Members of the Committee may include Federal and State prosecutors, judges, law professors, and private attorneys. Members of the Armed Forces serving on active duty may not serve as members of the Committee.

Committee members, who are not full-time or permanent part-time Federal civilian officers or employees, or members of the Armed Forces, shall be appointed as experts or consultants pursuant to 5 U.S.C. § 3109, to serve as special government employee (SGE) members. Committee members who are full-time or permanent part-time Federal civilian officers or employees, or members of the Armed Forces, shall be appointed pursuant to 41 C.F.R. § 102-3.130(a) to serve as regular government employee (RGE) members.

All Committee members are appointed to provide advice on the basis of their best judgment without representing any particular points of view and in a manner that is free from conflict of interest.



Membership Balance Plan  
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4. Other Balance Factors: N/A
5. Candidate Identification Process: The DoD, in selecting potential candidates for the Committee, reviews the educational and professional credentials of individuals with extensive professional experience in the points of view described above. Potential candidates may be gathered and identified by the General Council of the Department of Defense (GC DoD) and the Committee's staff.

Once potential candidates are identified, the Committee's Designated Federal Officer (DFO), working with the various stakeholders to include senior DoD officers and employees, reviews the credentials of each individual and narrows the list of potential candidates before forwarding the list to the GC DoD for review. During his or her review, the GC DoD strives to achieve a balance between the professional credentials of the individuals and the near-term subject matters that shall be reviewed by the Committee to achieve expertise in points of view regarding anticipated topics.

Once the GC DoD has narrowed the list of candidates and before formal nomination to the DoD Appointing Authorities, the list of potential candidates undergoes a review by the DoD Office of General Counsel and the Office of the Advisory Committee Management Officer (ACMO) to ensure compliance with federal and DoD governance requirements, including compliance with the Committee's statute, charter, and membership balance plan. Following this review, the GC DoD forwards to the list of nominees to the ACMO for approval by the DoD Appointing Authorities.

Following approval by the DoD Appointing Authorities, the candidates are required to complete the necessary appointment paperwork, to include meeting ethics requirements stipulated by the Office of Government Ethics for advisory committee members.

All Committee appointments are for a one-to-four year term of service, with annual renewals. No member, unless approved in a policy deviation by the DoD Appointing Authorities, may serve more than two consecutive terms of service on the Committee, including its subcommittees, or serve on more than two DoD Federal Advisory committees at one time.

Committee membership vacancies will be filled in the same manner as described above. Individuals being considered for appointment to the Committee, or any subcommittee, may not participate in any Committee or subcommittee work until his or her appointment has been approved by the DoD Appointment Authorities and the individual concerned is on-boarded in accordance with DoD policy and procedures.

6. Subcommittee Balance: The DoD, when necessary and consistent with the Committee's mission and DoD policies and procedures, may establish subcommittees, task forces, or working groups to support the Committee.

Currently, the DoD has approved three subcommittees to the Committee. Subcommittee members must will have experience with the investigation, prosecution, and defense of allegations of sexual assault offenses.



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- 1) Case Review Subcommittee of the Defense Advisory Committee on Investigation, Prosecution, and Defense of Sexual Assault in the Armed Forces—composed of not more than 15 members to assess and make recommendations related to the investigation, prosecution, and defense of allegations of rape, forcible sodomy, sexual assault, and other sexual misconduct involving members of the Armed Forces based on its review of cases involving such allegations.
- 2) Data Subcommittee of the Defense Advisory Committee on Investigation, Prosecution, and Defense of Sexual Assault in the Armed Forces—composed of not more than 15 members to assess and make recommendations related to the investigation, prosecution, and defense of allegations of rape, forcible sodomy, sexual assault, and other sexual misconduct involving members of the Armed Forces based on its collection and analysis of data from cases involving such allegations.
- 3) Policy Subcommittee of the Defense Advisory Committee on Investigation, Prosecution, and Defense of Sexual Assault in the Armed Forces—composed of not more than 15 members to assess and make recommendations related to the investigation, prosecution, and defense of allegations of rape, forcible sodomy, sexual assault, and other sexual misconduct involving members of the Armed Forces based on its review of Department of Defense policies, Military Department policies, and Uniform Code of Military Justice provisions applicable to such allegations.

Individuals considered for appointment to any subcommittee of the Committee may come from members of the Committee or from new nominees, as recommended by the GC DoD and based upon the subject matters under consideration. Pursuant to DoD policy and procedures, the GC DoD shall follow the same procedures used for selecting and nominating individuals for appointment consideration by the DoD Appointing Authorities. Individuals being considered for appointment to any subcommittee of the Committee cannot participate in any Committee or subcommittee work until his or her appointment has been approved by the DoD Appointment Authorities, and the individual concerned is on-boarded according to DoD policy and procedures.

Subcommittee members shall be appointed for a term of service of one-to-four years, subject to annual renewals; however, no member shall serve more than two consecutive terms of service on the subcommittee, without prior approval by the Appointing Authorities. Subcommittee members, if not full-time or permanent part-time Federal civilian officers or employees, or members of the Armed Forces, shall be appointed as experts or consultants pursuant to 5 U.S.C. § 3109 to serve as SGE members. Subcommittee members who are full-time or permanent part-time Federal civilian officers or employees, or members of the Armed Forces, shall be appointed pursuant to 41 C.F.R. § 101-11.6(a) to serve as RGE members.

7. Other: As nominees are considered for appointment to the Committee, the DoD adheres to the Office of Management and Budget's Revised Guidance on Appointment of Lobbyists to Federal Advisory Committees, Boards, and Commissions (79 FR 47482; August 13, 2014) and the rules and regulations issued by the Office of Government Ethics.
8. Date Prepared: February 16, 2020

## APPENDIX C. COMMITTEE MEMBERS

### MS. MARTHA S. BASHFORD, CHAIR



Martha Bashford was for 40 years the chief of the New York County District Attorney's Office Sex Crimes Unit, which was the first of its kind in the country. Previously she was co-chief of the Forensic Sciences/Cold Case Unit, where she examined unsolved homicide cases that might now be solvable through DNA analysis. Ms. Bashford was also co-chief of the DNA Cold Case Project, which used DNA technology to investigate and prosecute unsolved sexual assault cases. She indicted assailants identified through the FBI's Combined DNA Index System (CODIS) and obtained John Doe DNA profile indictments to stop the statute of limitations where no suspect had yet been identified. She is a Fellow in the American Academy of Forensic Sciences. Ms. Bashford graduated from Barnard College in 1976 (*summa cum laude*) and received her J.D. degree from Yale Law School in 1979. She is a Fellow in both the American College of Trial Lawyers and the American Academy of Forensic Sciences.

### MAJOR GENERAL MARCIA M. ANDERSON, U.S. ARMY, RETIRED



Marcia Anderson was the Clerk of Court for the Bankruptcy Court–Western District of Wisconsin from 1998 to 2019, where she was responsible for the management of the budget and administration of bankruptcy cases for 44 counties in western Wisconsin. Major General Anderson retired in 2016 from a distinguished career in the U.S. Army Reserve after 36 years of service, which included serving as the Deputy Commanding General of the Army's Human Resources Command at Fort Knox, Kentucky. In 2011, she became the first African American woman in the history of the U.S. Army to achieve the rank of major general. Her service culminated with an assignment at the Pentagon as the Deputy Chief, Army Reserve (DCAR). As the DCAR, she represented the Chief, Army Reserve, and had oversight for the planning, programming, and resource management for the execution of an Army Reserve budget of \$8 billion that supported more than 225,000 Army Reserve soldiers, civilians, and their families. She is a graduate of the Rutgers University School of Law, the U.S. Army War College, and Creighton University.

### THE HONORABLE LEO I. BRISBOIS



Leo I. Brisbois has been a U.S. Magistrate Judge for the District of Minnesota chambered in Duluth, Minnesota, since 2010. Prior to his appointment to the bench, Judge Brisbois served as an Assistant Staff Judge Advocate, U.S. Army, from 1987 through 1998, both on active duty and then in the reserves; his active duty service included work as a trial counsel and as an administrative law officer, both while serving in Germany. From 1991 to 2010, Judge Brisbois was in private practice with the Minneapolis, Minnesota, firm of Stich, Angell, Kreidler, Dodge & Unke, where his practice included all aspects of litigation and appeals involving the defense of civil claims in state and federal courts. Judge Brisbois has also previously served on the Civil Rules and Racial Fairness in the Courts advisory committees established by the Minnesota State Supreme Court, and he has served on the Minnesota Commission on Judicial Selection. From 2009 to 2010, Judge Brisbois was the first person of known Native American heritage to serve as President of the more than 16,000–member Minnesota State Bar Association.

### **MS. KATHLEEN B. CANNON**



Kathleen Cannon is a criminal defense attorney in Vista, California, specializing in serious felony and high-profile cases. Prior to entering private practice in 2011, Ms. Cannon was a public defender for over 30 years, in Los Angeles and San Diego Counties. Over the course of her career, Ms. Cannon supervised branch operations and training programs within the offices and handled thousands of criminal cases. She has completed hundreds of jury trials, including those involving violent sexual assault and capital murder with special circumstances. Since 1994, Ms. Cannon has taught trial advocacy as an adjunct professor of law at California Western School of Law in San Diego, and has been on the faculty of the National Institute of Trial Advocacy as a team leader and teacher. She is past-President and current Training Coordinator for the California Public Defenders' Association, providing educational seminars for criminal defense attorneys throughout the state of California. Ms. Cannon has lectured on battered women syndrome evidence at the Marine Corps World Wide Training Conference at Marine Corps Recruit Depot (MCRD), San Diego, and was a small-group facilitator for the Naval Justice School course "Defending Sexual Assault Cases" in San Diego. Ms. Cannon has received numerous awards, including Top Ten Criminal Defense Attorney in San Diego, Lawyer of the Year from the North County Bar Association, and Attorney of the Year from the San Diego County Public Defender's Office.

### **MS. MARGARET A. GARVIN**



Margaret "Meg" Garvin, M.A., J.D., is the executive director of the National Crime Victim Law Institute (NCVLI), where she has worked since 2003. She is also a clinical professor of law at Lewis & Clark Law School, where NCVLI is located. In 2014, Ms. Garvin was appointed to the Victims Advisory Group of the United States Sentencing Commission, and during 2013–14, she served on the Victim Services Subcommittee of the Response Systems to Adult Sexual Assault Crimes Panel of the U.S. Department of Defense. She has served as co-chair of the American Bar Association's Criminal Justice Section Victims Committee, as co-chair of the Oregon Attorney General's Crime Victims' Rights Task Force, and as a member of the Legislative & Public Policy Committee of the Oregon Attorney General's Sexual Assault Task Force. Ms. Garvin received the John W. Gillis Leadership Award from National Parents of Murdered Children in August 2015. Prior to joining NCVLI, Ms. Garvin practiced law in Minneapolis, Minnesota, and clerked for the Eighth Circuit Court of Appeals. She received her bachelor of arts degree from the University of Puget Sound, her master of arts degree in communication studies from the University of Iowa, and her J.D. from the University of Minnesota.

### **THE HONORABLE PAUL W. GRIMM**



Paul W. Grimm serves as a U.S. District Judge for the District of Maryland. Previously, he served as a U.S. Magistrate Judge and as Chief Magistrate Judge for the District of Maryland. In 2009, the Chief Justice of the United States appointed Judge Grimm to serve as a member of the Civil Rules Advisory Committee, where he served for six years and chaired the Discovery Subcommittee. Before his appointment to the court, Judge Grimm was in private practice for 13 years, handling commercial litigation. Prior to that, he served as an Assistant Attorney General for Maryland, an Assistant States Attorney for Baltimore County, Maryland, and an active duty and Reserve Army Judge Advocate General's Corps officer, retiring as a lieutenant colonel in 2001. Judge Grimm has served as an adjunct professor of law at the University of Maryland School of Law and at the University of Baltimore School of Law, and has published many articles on evidence and civil procedure.

**MR. A. J. KRAMER**

A. J. Kramer has been the Federal Public Defender for the District of Columbia since 1990. He was the Chief Assistant Federal Public Defender in Sacramento, California, from 1987 to 1990, and an Assistant Federal Public Defender in San Francisco, California, from 1980 to 1987. He was a law clerk for the Honorable Proctor Hug, Jr., U.S. Court of Appeals for the Ninth Circuit, Reno, Nevada, from 1979 to 1980. He received a B.A. from Stanford University in 1975, and a J.D. from Boalt Hall School of Law at the University of California at Berkeley in 1979. Mr.

Kramer taught legal research and writing at Hastings Law School from 1983 to 1988. He is a permanent faculty member of the National Criminal Defense College in Macon, Georgia. He is a Fellow of the American College of Trial Lawyers and a member of the ABA Criminal Justice System Council. He was a member of the National Academy of Sciences Committee on Scientific Approaches to Understanding and Maximizing the Validity and Reliability of Eyewitness Identification in Law Enforcement. He was a member of the Courts of the Judicial Conference of the United States' Advisory Committee on Evidence Rules from 2013 to 2019. In July 2019, he received the American Inns of Court Award for Professionalism for the D.C. Circuit. In December 2013, he received the Annice M. Wagner Pioneer Award from the Bar Association of the District of Columbia.

**MS. JENNIFER GENTILE LONG**

Jennifer Gentile Long (M.G.A., J.D.) is CEO and co-founder of AEquitas and an adjunct professor at Georgetown University Law School. She served as an Assistant District Attorney in Philadelphia specializing in sexual violence, child abuse, and intimate partner violence. She was a senior attorney and then Director of the National Center for the Prosecution of Violence Against Women at the American Prosecutors Research Institute. She publishes articles, delivers trainings, and provides expert case consultation on issues relevant to gender-based violence and human trafficking nationally and internationally. Ms. Long serves as an Advisory Committee member of

the American Law Institute's Model Penal Code Revision to Sexual Assault and Related Laws and as an Editorial Board member of the Civic Research Institute for the Sexual Assault and Domestic Violence Reports. She graduated from Lehigh University and the University of Pennsylvania Law School and Fels School of Government.

**MR. JAMES P. MARKEY**

Jim Markey has over 30 years of law enforcement experience with the Phoenix Police Department. Serving in a variety of positions, Mr. Markey was recognized with more than 30 commendations and awards. For over 14 years he directly supervised the sexual assault unit, which is part of a multidisciplinary sexual assault response team co-located in the City of Phoenix Family Advocacy Center. Mr. Markey oversaw the investigation of more than 7,000 sexual assaults, including more than 150 serial rape cases. In 2000, he was able to secure Violence Against Women grant funding to design, develop, and supervise a first-of-its-kind sexual assault

cold case team with the City of Phoenix. This team has been successful in reviewing nearly 4,000 unsolved sexual assault cases dating back over 25 years. For the past 15 years Mr. Markey has been a certified and nationally recognized trainer, delivering in-person and online webinar training for numerous criminal justice organizations on sexual assault investigations and response. Currently, he is employed with the Research Triangle Institute (RTI) located in Durham North as a Senior Law Enforcement Specialist. His work in the Applied Justice Research Unit includes assistance for the DOJ Bureau of Justice Assistance Sexual Assault Kit Initiative (SAKI), providing technical assistance and training to 54 SAKI grantees across the United States. He also developed and directs the SAKI



– Sexual Assault Unit Assessment (SAUA) Team; this team has conducted independent and comprehensive reviews for four major police agencies, assessing a range of areas in their response to sexual assault. In addition to the DACI-PAD, Mr. Markey currently serves as a member of the National Institute of Justice (NIJ) Sexual Assault Forensic Evidence Reporting (SAFER) Working Group and Editorial Team, NIJ Cold Case Working Group, Arizona Commission on Victims in the Courts (COVIC), Arizona Forensic Science Advisory Committee, and Massage Envy Franchising's Safety Advisory Council. Jim continues to work as a trainer and facilitator in the area of sexual violence for the International Association of Chiefs of Police (IACP) and the International Association of College Law Enforcement Administrators (IACLEA).

### **DR. JENIFER MARKOWITZ**



Jenifer Markowitz is a forensic nursing consultant who specializes in issues related to sexual assault, domestic violence, and strangulation, including medical-forensic examinations and professional education and curriculum development. In addition to teaching at workshops and conferences around the world, she provides expert testimony, case consultation, and technical assistance and develops training materials, resources, and publications. A forensic nurse examiner since 1995, Dr. Markowitz regularly serves as faculty and as an expert consultant for the Judge Advocate General's (JAG) Corps for the U.S. Army, Navy, Air Force, Marine Corps, and Coast

Guard. Past national activities include working with the Army Surgeon General's office to develop a curriculum for sexual assault medical-forensic examiners working in military treatment facilities (subsequently adopted by the Navy and Air Force); with the U.S. Department of Justice Office on Violence Against Women (OVW) to develop a national protocol and training standards for sexual assault medical-forensic examinations; with the Peace Corps to assess the agency's multidisciplinary response to sexual assault; with the U.S. Department of Defense to revise the military's sexual assault evidence collection kit and corresponding documentation forms; and as an Advisory Board member for the National Sexual Violence Resource Center. In 2004, Dr. Markowitz was named a Distinguished Fellow of the International Association of Forensic Nurses (IAFN); in 2012, she served as IAFN's President.

### **CHIEF MASTER SERGEANT OF THE AIR FORCE RODNEY J. MCKINLEY, U.S. AIR FORCE, RETIRED**



Chief Master Sergeant of the Air Force Rodney J. McKinley represented the highest enlisted level of leadership and, as such, provided direction for the enlisted corps and represented their interests, as appropriate, to the American public and to those in all levels of government. He served as the personal advisor to the Chief of Staff and the Secretary of the Air Force on all issues regarding the welfare, readiness, morale, and proper utilization and progress of the enlisted force. Chief McKinley is the 15th chief master sergeant appointed to the highest noncommissioned officer position. His background includes various duties in medical and aircraft maintenance, and

he served 10 years as a first sergeant. He also served as a command chief master sergeant at wing, numbered Air Force, and major command levels. He is currently the co-chair of the Air Force Retiree Council and frequently is a guest speaker at bases across the Air Force. He is an honors graduate of St. Leo College, Florida, and received his master's degree in human relations from the University of Oklahoma.

**BRIGADIER GENERAL JAMES A. SCHWENK, U.S. MARINE CORPS, RETIRED**

BGen Schwenk was commissioned as an infantry officer in the Marine Corps in 1970. After serving as a platoon commander and company commander, he attended law school at the Washington College of Law, American University, and became a judge advocate. As a judge advocate he served in the Office of the Secretary of Defense, the Office of the Secretary of the Navy, and Headquarters, Marine Corps; he served as Staff Judge Advocate for Marine Forces Atlantic, II Marine Expeditionary Force, Marine Corps Air Bases West, and several other commands; and he participated in several hundred courts-martial and administrative discharge boards. He represented the Department of Defense on the television show *American Justice*, and represented the Marine Corps in a Mike Wallace segment on *60 Minutes*. He retired from the Marine Corps in 2000.

Upon retirement from the Marine Corps, BGen Schwenk joined the Office of the General Counsel of the Department of Defense as an associate deputy general counsel. He was a legal advisor in the Pentagon on 9/11, and he was the primary drafter from the Department of Defense of many of the emergency legal authorities used in Afghanistan, Iraq, the United States, and elsewhere since that date. He was the principal legal advisor for the repeal of “don’t ask, don’t tell,” for the provision of benefits to same-sex spouses of military personnel, in the review of the murders at Fort Hood in 2009, and on numerous DoD working groups in the area of military personnel policy. He worked extensively with the White House and Congress, and he retired in 2014 after 49 years of federal service.

**DR. CASSIA C. SPOHN**

Cassia Spohn is a Regents Professor and Director of the School of Criminology and Criminal Justice at Arizona State University. She received a Ph.D. in political science from the University of Nebraska–Lincoln. Prior to joining the ASU faculty in 2006, she was a faculty member in the School of Criminology and Criminal Justice at the University of Nebraska at Omaha for 28 years. She is the author or co-author of eight books, including *Policing and Prosecuting Sexual Assault: Inside the Criminal Justice System* and *How Do Judges Decide? The Search for Fairness and Equity in Sentencing*. Her research interests include prosecutorial and judicial decision making; the intersections of race, ethnicity, crime, and justice; and sexual assault case processing decisions. In 2013, she received ASU’s Award for Leading Edge Research in the Social Sciences and was selected as a Fellow of the American Society of Criminology.

### **MS. MEGHAN A. TOKASH**



Meghan Tokash is an Assistant United States Attorney (AUSA) at the U.S. Department of Justice serving the Western District of New York in the violent crimes unit. For eight years she served as a judge advocate in the U.S. Army Judge Advocate General's Corps, where she prosecuted a wide range of cases relating to homicide, rape, sexual assault, domestic violence, and child abuse. AUSA Tokash was selected by the Judge Advocate General of the U.S. Army to serve as one of 15 Special Victim Prosecutors; she worked in the Army's first Special Victim Unit at the Fort Hood Criminal Investigation Division Office and U.S. Army Europe/Central Command. Previously,

AUSA Tokash served as an Army trial defense counsel and as a civilian victim-witness liaison officer for the Department of the Army. AUSA Tokash clerked for the United States Court of Appeals for the Armed Forces. She is a graduate of the Catholic University Columbus School of Law. She earned her master of laws degree in trial advocacy from the Beasley School of Law at Temple University, where at graduation she received the program's Faculty Award.

### **THE HONORABLE REGGIE B. WALTON**



Judge Walton was born in Donora, Pennsylvania. In 1971 he graduated from West Virginia State University, where he was a three-year letterman on the football team and played on the 1968 nationally ranked conference championship team. Judge Walton received his law degree from the American University, Washington College of Law, in 1974.

Judge Walton assumed his current position as a U.S. District Judge for the District of Columbia in 2001. He was also appointed by President George W. Bush in 2004 as the Chair of the National Prison Rape Elimination Commission, a commission created by Congress to identify methods to reduce prison rape. The U.S. Attorney General substantially adopted the Commission's recommendations for implementation in federal prisons; other federal, state, and local officials throughout the country are considering adopting the recommendations. U.S. Supreme Court Chief Justice William Rehnquist appointed Judge Walton in 2005 to the federal judiciary's Criminal Law Committee, on which he served until 2011. In 2007 Chief Justice John Roberts appointed Judge Walton to a seven-year term as a Judge of the U.S. Foreign Intelligence Surveillance Court, and he was subsequently appointed Presiding Judge in 2013. He completed his term on that court on May 18, 2014. Upon completion of his appointment to the Foreign Intelligence Surveillance Court, Judge Walton was appointed by Chief Justice Roberts to serve as a member of the Judicial Conference Committee on Court Administration and Case Management.

Judge Walton traveled to Russia in 1996 to instruct Russian judges on criminal law in a program funded by the U.S. Department of Justice and the American Bar Association's Central and East European Law Initiative Reform Project. He is also an instructor in Harvard Law School's Advocacy Workshop and a faculty member at the National Judicial College in Reno, Nevada.

## APPENDIX D. COMMITTEE PROFESSIONAL STAFF

### COMMITTEE STAFF

Colonel Steven B. Weir, USA, JAG Corps, Staff Director

Ms. Julie K. Carson, Deputy Staff Director

Mr. Dale Trexler, Chief of Staff

Ms. Theresa Gallagher, Attorney-Advisor

Ms. Nalini Gupta, Attorney-Advisor

Ms. Amanda Hagy, Senior Paralegal

Ms. Patricia Ham, Attorney-Advisor

Mr. Glen Hines, Attorney-Advisor

Mr. R. Chuck Mason, Attorney-Advisor

Ms. Marguerite McKinney, Analyst

Ms. Meghan Peters, Attorney-Advisor

Ms. Stacy Powell, Senior Paralegal

Ms. Stayce Rozell, Senior Paralegal

Ms. Terri Saunders, Attorney-Advisor

Ms. Kate Tagert, Attorney-Advisor

Ms. Eleanor Magers Vuono, Attorney-Advisor

### DESIGNATED FEDERAL OFFICERS

Mr. Dwight H. Sullivan  
Senior Associate Deputy General Counsel  
for Military Justice  
U.S. Department of Defense  
Designated Federal Officer

Mr. David J. Gruber  
Associate Deputy General Counsel for  
Military Personnel, Readiness, and Voting  
U.S. Department of Defense  
Alternate Designated Federal Officer

### COMMITTEE CONSULTANTS

Dr. Alice Falk, Editor

Ms. Laurel Prucha Moran, Graphic Designer

Dr. William "Bill" Wells, Criminologist



## APPENDIX E. COMMITTEE RECOMMENDATIONS TO DATE

**DAC-IPAD Recommendation 1** – (Mar 2018) The Secretary of Defense, the Secretary of Homeland Security, and the Services take action to dispel the misperception of widespread abuse of the expedited transfer policy, including addressing the issue in the training of all military personnel.

**DAC-IPAD Recommendation 2** – (Mar 2018) The Secretary of Defense and the Secretary of Homeland Security identify and track appropriate metrics to monitor the expedited transfer policy and any abuses of it.

**DAC-IPAD Recommendation 3** – (Mar 2018) The DoD-level and Coast Guard equivalent Family Advocacy Program (FAP) policy include provisions for expedited transfer of active duty Service members who are victims of sexual assault similar to the expedited transfer provisions in the DoD Sexual Assault Prevention and Response (SAPR) policy and consistent with 10 U.S.C. § 673.

**DAC-IPAD Recommendation 4** – (Mar 2018) The DoD-level military personnel assignments policy (DoD Instruction 1315.18) and Coast Guard equivalent include a requirement that assignments personnel or commanders coordinate with and keep SAPR and FAP personnel informed throughout the expedited transfer, safety transfer, and humanitarian/compassionate transfer assignment process when the transfer involves an allegation of sexual assault.

**DAC-IPAD Recommendation 5** – (Mar 2019) In developing a uniform command action form in accordance with section 535 of the FY19 NDAA, the Secretary of Defense (and the Secretary of Homeland Security with respect to the Coast Guard when not operating as a service in the Navy) should establish a standard set of options for documenting command disposition decisions and require the rationale for those decisions, including declinations to take action.

The Secretary of Defense (and the Secretary of Homeland Security with respect to the Coast Guard when not operating as a service in the Navy) should ensure that the standard set of options for documenting command disposition decisions is based on recognized legal and investigatory terminology and standards that are uniformly defined across the Services and accurately reflect command action source documents.

**DAC-IPAD Recommendation 6** – (Mar 2019) The Secretary of Defense (and the Secretary of Homeland Security with respect to the Coast Guard when not operating as a service in the Navy) should require that judge advocates or civilian attorneys employed by the Services in a similar capacity provide advice to commanders in completing command disposition/action reports in order to make certain that the documentation of that decision is accurate and complete.

**DAC-IPAD Recommendation 7** – (Mar 2019) The Secretary of Defense (and the Secretary of Homeland Security with respect to the Coast Guard when not operating as a service in the Navy) should provide uniform guidance to the Services regarding the submission of final disposition information to federal databases for sexual assault cases in which, after fingerprints have been submitted, the command took no action, or took action only for an offense other than sexual assault.

**DAC-IPAD Recommendation 8** – (Mar 2019) The uniform standards and criteria developed to implement Article 140a, UCMJ, should reflect the following best practices for case data collection:

- a. Collect all case data only from standardized source documents (legal and investigative documents) that are produced in the normal course of the military justice process, such as the initial report of investigation, the commander's report of disciplinary or administrative action, the charge sheet, the Article 32 report, and the Report of Result of Trial.
- b. Centralize document collection by mandating that all jurisdictions provide the same procedural documents to one military justice data office/organization within DoD.
- c. Develop one electronic database for the storage and analysis of standardized source documents, and locate that database in the centralized military justice data office/organization within DoD.
- d. Collect and analyze data quarterly to ensure that both historical data and analyses are as up-to-date as possible.
- e. Have data entered from source documents into the electronic database by one independent team of trained professionals whose full-time occupation is document analysis and data entry. This team should have expertise in the military justice process and in social science research methods, and should ensure that the data are audited at regular intervals.

**DAC-IPAD Recommendation 9** – (Mar 2019) The source documents referenced in DAC-IPAD Recommendation 8 should contain uniformly defined content covering all data elements that DoD decides to collect to meet the requirements of Articles 140a and 146, UCMJ.

**DAC-IPAD Recommendation 10** – (Mar 2019) The data produced pursuant to Article 140a, UCMJ, should serve as the primary source for the Military Justice Review Panel’s periodic assessments of the military justice system, which are required by Article 146, UCMJ, and as the sole source of military justice data for all other organizations in DoD and for external entities.

**DAC-IPAD Recommendation 11** – (Mar 2019) Article 140a, UCMJ, should be implemented so as to require collection of the following information with respect to allegations of both adult-victim and child-victim sexual offenses, within the meaning of Articles 120, 120b, and 125, UCMJ (10 U.S.C. §§ 920, 920b, and 925 (2016)):

- a. A summary of the initial complaint giving rise to a criminal investigation by a military criminal investigative organization concerning a military member who is subject to the UCMJ, and how the complaint became known to law enforcement;
- b. Whether an unrestricted report of sexual assault originated as a restricted report;
- c. Demographic data pertaining to each victim and accused, including race and sex;
- d. The nature of any relationship between the accused and the victim(s);
- e. The initial disposition decision under Rule for Court-Martial 306, including the decision to take no action, and the outcome of any administrative action, any disciplinary action, or any case in which one or more charges of sexual assault were preferred, through the completion of court-martial and appellate review;
- f. Whether a victim requested an expedited transfer or a transfer of the accused, and the result of that request;
- g. Whether a victim declined to participate at any point in the military justice process;
- h. Whether a defense counsel requested expert assistance on behalf of a military accused, whether those requests were approved by a convening authority or military judge, and whether the government availed itself of expert assistance; and
- i. The duration of each completed military criminal investigation, and any additional time taken to complete administrative or disciplinary action against the accused.

**DAC-IPAD Recommendation 12** – (Mar 2019) The Services may retain their respective electronic case management systems for purposes of managing their military justice organizations, provided that

- a. The Services use the same uniform standards and definitions to refer to common procedures and substantive offenses in the Manual for Courts-Martial, as required by

Article 140a; and

- b. The Services develop a plan to transition toward operating one uniform case management system across all of the Services, similar to the federal judiciary's Case Management/Electronic Court Filing (CM/ECF) system.

**DAC-IPAD Recommendation 13** – (Mar 2019) The Secretary of Defense (and the Secretary of Homeland Security with respect to the Coast Guard when not operating as a service in the Navy) expand the expedited transfer policy to include victims who file restricted reports of sexual assault. The victim's report would remain restricted and there would be no resulting investigation. The DAC-IPAD further recommends the following requirements:

- a. The decision authority in such cases should be an O-6 or flag officer at the Service headquarters organization in charge of military assignments, rather than the victim's commander.
- b. The victim's commander and senior enlisted leader, at both the gaining and losing installations, should be informed of the sexual assault and the fact that the victim has requested an expedited transfer—without being given the subject's identity or other facts of the case—thereby enabling them to appropriately advise the victim on career impacts of an expedited transfer request and ensure that the victim is receiving appropriate medical or mental health care.
- c. A sexual assault response coordinator, victim advocate, or special victims' counsel (SVC) / victims' legal counsel (VLC) must advise the victim of the potential consequences of filing a restricted report and requesting an expedited transfer, such as the subject not being held accountable for his or her actions and the absence of evidence should the victim later decide to unrestrict his or her report.

**DAC-IPAD Recommendation 14** – (Mar 2019) The Secretary of Defense (in consultation with the Secretary of Homeland Security with respect to the Coast Guard when not operating as a service in the Navy) establish a working group to review whether victims should have the option to request that further disclosure or investigation of a sexual assault report be restricted in situations in which the member has lost the ability to file a restricted report, whether because a third party has reported the sexual assault or because the member has disclosed the assault to a member of the chain of command or to military law enforcement. The working group's goal should be to find a feasible solution that would, in appropriate circumstances, allow the victim to request that the investigation be terminated. The working group should consider under what circumstances, such as in the interests of justice and safety, a case may merit further investigation regardless of the victim's wishes; it should also consider whether existing safeguards are sufficient to ensure that victims are not improperly pressured by the subject, or by others, to request that the investigation be terminated. This working group should consider developing such a policy with the following requirements:

- a. The victim be required to meet with an SVC or VLC before signing a statement requesting that the investigation be discontinued, so that the SVC or VLC can advise the victim of the potential consequences of closing the investigation.
- b. The investigative agent be required to obtain supervisory or MCIO headquarters-level approval to close a case in these circumstances.
- c. The MCIOs be aware of and take steps to mitigate a potential perception by third-party reporters that allegations are being ignored when they see that no investigation is taking place; such steps could include notifying the third-party reporter of the MCIO's decision to honor the victim's request.
- d. Cases in which the subject is in a position of authority over the victim be excluded from such a policy.
- e. If the MCIO terminates the investigation at the request of the victim, no adverse administrative or disciplinary action may be taken against the subject based solely on the reporting witness's allegation of sexual assault.

**DAC-IPAD Recommendation 15** – (Mar 2019) The Secretary of Defense (and the Secretary of Homeland Security with respect to the Coast Guard when not operating as a service in the Navy) revise the DoD expedited transfer policy (and the policy governing the Coast Guard with respect to expedited transfers) to include the following points:

- a. The primary goal of the DoD expedited transfer policy is to act in the best interests of the victim. Commanders should focus on that goal when they make decisions regarding such requests.
- b. The single, overriding purpose of the expedited transfer policy is to assist in the victim's mental, physical, and emotional recovery from the trauma of sexual assault. This purpose statement should be followed by examples of reasons why a victim might request an expedited transfer and how such a transfer would assist in a victim's recovery (e.g., proximity to the subject or to the site of the assault at the current location, ostracism or retaliation at the current location, proximity to a support network of family or friends at the requested location, and the victim's desire for a fresh start following the assault).
- c. The requirement that a commander determine that a report be credible is not aligned with the core purpose of the expedited transfer policy. It should be eliminated, and instead an addition should be made to the criteria that commanders must consider in making a decision on an expedited transfer request: "any evidence that the victim's report is not credible."

**DAC-IPAD Recommendation 16** – (Mar 2019) Congress increase the amount of time allotted to a commander to process an expedited transfer request from 72 hours to no more than five workdays.

**DAC-IPAD Recommendation 17** – (Mar 2019) The Services track and report the following data in order to best evaluate the expedited transfer program:

- a. Data on the number of expedited transfer requests by victims; the grade and job title of the requester; the sex and race of the requester; the origin installation; whether the requester was represented by an SVC/VLC; the requested transfer locations; the actual transfer locations; whether the transfer was permanent or temporary; the grade and title of the decision maker and appeal authority, if applicable; the dates of the sexual assault report, transfer request, approval or disapproval decision and appeal decision, and transfer; and the disposition of the sexual assault case, if final.
- b. Data on the number of accused transferred; the grade and job title of the accused; the sex and race of the accused; the origin installation; the transfer installation; the grade and title of the decision maker; the dates of the sexual assault report and transfer; whether the transfer was permanent or temporary; and the disposition of the sexual assault case, if final.
- c. Data on victim participation in investigation/prosecution before and after an expedited transfer.
- d. Data on the marital status (and/or number of dependents) of victims of sexual assault who request expedited transfers and accused Service members who are transferred under this program.
- e. Data on the type of sexual assault offense (penetrative or contact) reported by victims requesting expedited transfers.
- f. Data on Service retention rates for sexual assault victims who receive expedited transfers compared with sexual assault victims who do not receive expedited transfers and with other Service members of similar rank and years of service.
- g. Data on the career progression for sexual assault victims who receive expedited transfers compared with sexual assault victims who do not receive expedited transfers and with other Service members of similar rank and years of service.
- h. Data on victim satisfaction with the expedited transfer program.
- i. Data on the expedited transfer request rate of Service members who make unrestricted reports of sexual assault.

**DAC-IPAD Recommendation 18** – (Mar 2019) The Secretaries of the Military Departments (and the Secretary of Homeland Security with respect to the Coast Guard when not operating as a service in the Navy) incorporate into policy, for those sexual assault victims who request it, an option to attend a transitional care program at a military medical facility, Wounded Warrior center, or other facility in order to allow those victims sufficient time and resources to heal from the trauma of sexual assault.

**DAC-IPAD Recommendation 19** – (Mar 2020) The Department of Defense should publish a memorandum outlining sufficiently specific data collection requirements to ensure that the Military Services use uniform methods, definitions, and timelines when reporting data on collateral misconduct (or, where appropriate, the Department should submit a legislative proposal to Congress to amend section 547 by clarifying certain methods, definitions, and timelines). The methodology and definitions should incorporate the following principles:

a. Definition of “sexual offense”:

- The definition of “sexual offense” for purposes of reporting collateral misconduct should include
  - Both penetrative and non-penetrative violations of Article 120, UCMJ (either the current or a prior version, whichever is applicable at the time of the offense);
  - Violations of Article 125, UCMJ, for allegations of sodomy occurring prior to the 2019 version of the UCMJ; and
  - Attempts, conspiracies, and solicitations of all of the above.
- The definition of sexual offense should not include violations of Article 120b, UCMJ (Rape and sexual assault of a child); Article 120c, UCMJ (Other sexual misconduct); Article 130, UCMJ (Stalking); or previous versions of those statutory provisions.

b. Definition of “collateral misconduct”:

- Current DoD policy defines “collateral misconduct” as “[v]ictim misconduct that might be in time, place, or circumstance associated with the victim’s sexual offense incident.”<sup>1</sup>
- However, a more specific definition of collateral misconduct is necessary for purposes of the section 547 reporting requirement. That recommended definition should read as follows: “Any misconduct by the victim that is potentially punishable under the UCMJ, committed close in time to or during the sexual offense, and directly related to the incident that formed the basis of the sexual offense allegation. The collateral misconduct must have been discovered as a direct result of the report of the sexual offense and/or the ensuing investigation into the sexual offense.”
- Collateral misconduct includes (but is not limited to) the following situations:
  - The victim was in an unprofessional or adulterous relationship with the accused at the time of the assault.<sup>2</sup>
  - The victim was drinking underage or using illicit substances at the time of the assault.
  - The victim was out past curfew, was at an off-limits establishment, or was violating barracks/dormitory/berthing policy at the time of the assault.
- To ensure consistency across the Military Services, collateral misconduct, for purposes of this report, should *not* include the following situations (the list is not exhaustive):
  - The victim is under investigation or receiving disciplinary action for misconduct and subsequently makes a report of a sexual offense.
  - The victim used illicit substances at some time after the assault, even if the use may be attributed to coping with trauma.
  - The victim engaged in misconduct after reporting the sexual offense.

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<sup>1</sup> Dep’t of Def. Instr. 6495.02, SEXUAL ASSAULT PREVENTION AND RESPONSE (SAPR) PROGRAM PROCEDURES, Glossary (March 28, 2013, Incorporating Change 3, May 24, 2017), 117.

<sup>2</sup> For purposes of this report, an “unprofessional relationship” is a relationship between the victim and accused that violated law, regulation, or policy in place at the time of the assault.



- The victim had previously engaged in an unprofessional or adulterous relationship with the subject, but had terminated the relationship prior to the assault.
- The victim engaged in misconduct that is not close in time to the sexual offense, even if it was reasonably foreseeable that such misconduct would be discovered during the course of the investigation (such as the victim engaging in an adulterous relationship with an individual other than the subject).
- The victim is suspected of making a false allegation of a sexual offense.
- The victim engaged in misconduct during the reporting or investigation of the sexual offense (such as making false official statements during the course of the investigation).

**c. Methodology for identifying sexual offense cases and victims:**

- To identify sexual offense cases and victims, all closed cases from the relevant time frame that list at least one of the above included sexual offenses as a crime that was investigated should be collected from the MCIOs.
- A case is labeled “closed” after a completed MCIO investigation has been submitted to a commander to make an initial disposition decision, any action taken by the commander has been completed, and documentation of the outcome has been provided to the MCIO.<sup>3</sup>
- Each Military Service should identify all of its Service member victims from all closed cases from the relevant time frame, even if the case was investigated by another Military Service’s MCIO.

**d. Time frame for collection of data:**

- The Military Services should report collateral misconduct data for the two most recent fiscal years preceding the report due date for which data are available. The data should be provided separately for each fiscal year and should include only closed cases as defined above. For example, the Department’s report due September 30, 2021, should include data for closed cases from fiscal years 2019 and 2020.

**e. Definition of “covered individual”:**

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<sup>3</sup> This definition of “closed case” mirrors the definition used by the DAC-IPAD’s Case Review Working Group.

- Section 547 of the FY19 NDAA defines “covered individual” as “an individual who is identified as a victim of a sexual offense in the case files of a military criminal investigative organization.” This definition should be clarified as follows: “an individual identified in the case files of an MCIO as a victim of a sexual offense while in title 10 status.”
- For the purposes of this study, victims are those identified in cases closed during the applicable time frame.

**f. Replacement of the term “accused”:**

- Section 547 of the FY19 NDAA uses the phrase “accused of collateral misconduct.” To more accurately capture the frequency with which collateral misconduct is occurring, the term “accused of” should be replaced with the term “suspected of,” defined as follows: instances in which the MCIO’s investigation reveals facts and circumstances that would lead a reasonable person to believe that the victim committed an offense under the UCMJ.<sup>4</sup>
- Examples of a victim suspected of collateral misconduct include (but are not limited to) the following situations:
  - The victim disclosed engaging in conduct that could be a violation of the UCMJ (and was collateral to the offense).
  - Another witness in the investigation stated that the victim engaged in conduct that could be a violation of the UCMJ (and was collateral to the offense).
  - The subject of the investigation stated that the victim engaged in conduct that could be a violation of the UCMJ (and was collateral to the offense).
  - In the course of the sexual offense investigation, an analysis of the victim’s phone, urine, or blood reveals evidence that the victim engaged in conduct that could be a violation of the UCMJ (and was collateral to the offense).

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<sup>4</sup> Cf. *United States v. Cohen*, 63 M.J. 45, 50 (C.A.A.F. 2006) (stating that determining whether a person is a “suspect” entitled to warnings under Article 31(b) prior to interrogation “is an objective question that is answered by considering all the facts and circumstances at the time of the interview to determine whether the military questioner believed or reasonably should have believed that the servicemember committed an offense”) (internal citations omitted).

- This definition of “suspected of” does not require preferral of charges, a formal investigation, or disciplinary action against the victim for the collateral misconduct. However, if any of those actions has occurred regarding collateral misconduct, or if there is evidence of collateral misconduct from other sources available, such victims should also be categorized as suspected of collateral misconduct even if the MCIO case file does not contain the evidence of such misconduct.
  - For example, if in pretrial interviews the victim disclosed collateral misconduct, such a victim would be counted as suspected of collateral misconduct.

**g. Definition of “adverse action”:**

- The term “adverse action” applies to an officially documented command action that has been initiated against the victim in response to the collateral misconduct.
- Adverse actions required to be documented in collateral misconduct reports are limited to the following:
  - Letter of reprimand (or Military Service equivalent) or written record of individual counseling in official personnel file;
  - Imposition of nonjudicial punishment;
  - Preferral of charges; or
  - Initiation of an involuntary administrative separation proceeding.
- The Committee recommends limiting the definition of adverse action to the above list for purposes of this reporting requirement to ensure consistency and accuracy across the Military Services in reporting and to avoid excessive infringement on victim privacy. The Committee recognizes the existence of other adverse administrative proceedings or actions that could lead to loss of special or incentive pay, administrative reduction of grade, loss of security clearance, bar to reenlistment, adverse performance evaluation (or Military Service equivalent), or reclassification.

**h. Methodology for counting “number of instances”:**

- Cases in which a victim is suspected of more than one type of collateral misconduct should be counted only once; where collateral misconduct is reported by type, it should be counted under the most serious type of potential misconduct (determined by UCMJ maximum punishment) or, if the victim received adverse

action, under the most serious collateral misconduct identified in the adverse action.

- For cases in which a victim received more than one type of adverse action identified above, such as nonjudicial punishment and administrative separation, reporting should include both types of adverse action.

**DAC-IPAD Recommendation 20** – (Mar 2020) Victims suspected of making false allegations of a sexual offense should not be counted as suspected of collateral misconduct.

**DAC-IPAD Recommendation 21** – (Mar 2020) For purposes of the third statistical data element required by section 547, the Department of Defense should report not only the percentage of all Service member victims who are suspected of collateral misconduct but also the percentage of the Service member victims who are suspected of collateral misconduct and then receive an adverse action for the misconduct. These two sets of statistics would better inform policymakers about the frequency with which collateral misconduct is occurring and the likelihood of a victim's receiving an adverse action for collateral misconduct once they are suspected of such misconduct.

**DAC-IPAD Recommendation 22** – (Mar 2020) The Department of Defense should include in its report data on the number of collateral offenses that victims were suspected of by type of offense (using the methodology specified in section h of Recommendation 19) and the number and type of adverse actions taken for each of the offenses, if any. This additional information would aid policymakers in fully understanding and analyzing the issue of collateral misconduct and in preparing training and prevention programs.

**DAC-IPAD Recommendation 23** – (Mar 2020) To facilitate production of the future collateral misconduct reports required by section 547, the Military Services should employ standardized internal documentation of sexual offense cases involving Service member victims suspected of engaging in collateral misconduct as defined for purposes of this reporting requirement.

## APPENDIX F. RULE FOR PROFESSIONAL CONDUCT 1.14 COMMENT COMPARISON CHART

<b>Rule for Professional Conduct 1.14 Comment Comparison<sup>1</sup></b>	
<b>Army Rule for Professional Conduct 1.14 Comment<sup>2</sup></b>	<b>Navy-Marine Corps Rule for Professional Conduct 1.14 Comment<sup>3</sup></b>
(1) The normal client-lawyer relationship is based on the assumption that the client, when properly advised and assisted, is capable of making decisions about important matters. When the client is a minor or suffers from a diminished mental capacity, however, maintaining the ordinary client-lawyer relationship may not be possible in all respects. In particular, a severely incapacitated person may have no power to make legally binding decisions. Nevertheless, a client with diminished capacity often has the ability to understand, deliberate upon, and reach conclusions about matters affecting the client's own well-being. For example, children as young as 5 or 6 years of age, and certainly those of 10 or 12, are regarded as having opinions that are entitled to weight in legal proceedings concerning their custody. So also, it is recognized that some persons of advanced age can be quite capable of handling routine financial matters while needing special legal protection concerning major transactions.	(1) The normal attorney-client relationship is based on the assumption that the client, when properly advised and assisted, is capable of making decisions about important matters. When the client is a minor or suffers from a diminished mental capacity, however, maintaining the ordinary attorney-client relationship may not be possible in all respects. In particular, a severely incapacitated person may have no power to make legally binding decisions. Nevertheless, a client with diminished capacity often has the ability to understand, deliberate upon, and reach conclusions about matters affecting the client's own well-being. For example, children as young as five or six years of age, and certainly those of 10 or 12, are regarded as having opinions that are entitled to weight in legal proceedings concerning their custody. So also, it is recognized that some persons of advanced age can be quite capable of handling routine financial matters while needing special legal protection concerning major transactions.

<sup>1</sup> The Air Force and Coast Guard did not adopt the Comment to Rule 1.14; however, “counsel are encouraged to consult them for guidance and assistance in placing the Rules in context. In doing so, counsel must be aware that the AFRPC were specifically adapted to the unique needs and demands of Air Force practice, and not all of the ABA comments will be helpful.” AFI51-110, *Professional Responsibility Program* (Dec. 11, 2018), 29; *see also* COMDTINST M5800.1, *Coast Guard Legal Rules of Professional Conduct* (June 1, 2005), Introduction (although ABA Comments to the Rules are not incorporated, Coast Guard judge advocates should consult them for guidance).

<sup>2</sup> Army Reg. 27-26, *Rules of Professional Conduct for Lawyers* (June 28, 2018), 48–50.

<sup>3</sup> JAGINST 5803.1E OJAG (Code 13), *Professional Conduct of Attorneys Practicing Under the Cognizance and Supervision of The Judge Advocate General* (Jan. 20, 2015), 64–67.

<p>(2) The fact that a client suffers a disability does not diminish the lawyer's obligation to treat the client with attention and respect. Even if the person has a legal representative, the lawyer should as far as possible accord the represented person the status of client, particularly in maintaining communication.</p>	<p>(2) The fact that a client suffers a disability does not diminish the covered attorney's obligation to treat the client with attention and respect. Even if the person has a legal representative, the covered attorney should as far as possible accord the represented person the status of client, particularly in maintaining communication.</p>
<p>(3) The client may wish to have family members or other persons participate in discussions with the lawyer. When necessary to assist in the representation, the presence of such persons generally does not affect the applicability of the attorney-client evidentiary privilege. Nevertheless, the lawyer must keep the client's interests foremost and, except for protective action authorized under paragraph (b), must look to the client, and not family members, to make decisions on the client's behalf.</p>	<p>(3) The client may wish to have family members or other persons participate in discussions with the covered attorney. When necessary to assist in the representation, the presence of such persons generally does not affect the applicability of the attorney-client evidentiary privilege. Nevertheless, the covered attorney must keep the client's interests foremost and, except for protective action authorized under paragraph b, must look to the client, and not family members, to make decisions on the client's behalf.</p>
<p>(4) If a legal representative has already been appointed for the client, the lawyer should ordinarily look to the representative for decisions on behalf of the client. In matters involving a minor, whether the lawyer should look to the parents as natural guardians may depend on the type of proceeding or matter in which the lawyer is representing the minor, for example, as a Special Victim Counsel. If the lawyer represents the guardian as distinct from the minor, and is aware that the guardian is acting adversely to the minor's interest, the lawyer may have an obligation to prevent or rectify the guardian's misconduct. See Rule 1.2(d).</p>	<p>(4) If a legal representative has already been appointed for the client, the covered attorney should ordinarily look to the representative for decisions on behalf of the client.</p>
<p>(5) If a lawyer reasonably believes that a client is at risk of substantial physical, financial, or other harm unless action is taken, and that a normal client-lawyer relationship cannot be maintained as provided in paragraph (a) because the client lacks sufficient capacity to communicate or to make adequately considered decisions in connection with the representation, then paragraph (b) permits the lawyer to take protective measures deemed necessary. For example, a client expression of intent to take his or her own life may be indicative that the client lacks sufficient capacity to make adequately considered decisions in connection with the representation. Protective measures could include: consulting with family members, using a reconsideration period to permit clarification or improvement of</p>	<p>(5) (a) If a covered attorney reasonably believes that a client is at risk of substantial physical, financial or other harm unless action is taken, and that a normal attorney-client relationship cannot be maintained as provided in paragraph a because the client lacks sufficient capacity to communicate or to make adequately considered decisions in connection with the representation, then paragraph b permits the covered attorney to take protective measures deemed necessary.<sup>4</sup> Such measures could include: consulting with family members, using a reconsideration period to permit clarification or improvement of circumstances, using voluntary surrogate decision-making tools such as durable powers of attorney or consulting</p>

<p>circumstances, using voluntary surrogate decision-making tools such as durable powers of attorney, or consulting with support groups, professional services, adult-protective agencies, or other individuals or entities that have the ability to protect the client. In taking any protective action, the lawyer should be guided by such factors as the wishes and values of the client to the extent known, the client's best interests and the goals of intruding into the client's decision-making autonomy to the least extent feasible, maximizing client capacities, and respecting the family and social connections.</p>	<p>with support groups, professional services, adult-protective agencies or other individuals or entities that have the ability to protect the client. In taking any protective action, the covered attorney should be guided by such factors as the wishes and values of the client to the extent known, the client's best interests and the goals of intruding into the client's decision-making autonomy to the least extent feasible, maximizing client capacities, and respecting the client's family and social connections.</p> <p><sup>1</sup> That a client expresses intent to take his/her own life may indicate that he/she lacks sufficient capacity to make adequately considered decisions in connection with the representation.</p> <p>(b) In determining the extent of the client's diminished capacity, the covered attorney should consider and balance such factors as: the client's ability to articulate reasoning leading to a decision, variability of state of mind, and ability to appreciate consequences of a decision; the substantive fairness of a decision; and the consistency of a decision with the known long-term commitments and values of the client. In appropriate circumstances, the covered attorney may seek guidance from an appropriate diagnostician, recognizing that military law does not recognize a doctor-patient privilege.</p> <p>(c) If a legal representative has not been appointed, the covered attorney should consider whether appointment of a guardian ad litem, conservator or guardian is necessary to protect the client's interests. Thus, if a client with diminished capacity has substantial property that should be sold for the client's benefit, effective completion of the transaction may require appointment of a legal representative. In addition, rules of procedure in litigation sometimes provide that minors or persons with diminished capacity must be represented by a guardian or next friend if they do not have a general guardian. In many circumstances, however, appointment of a legal representative may be more expensive or traumatic for the client than circumstances in fact require. Evaluation of such circumstances is a matter entrusted to the professional judgment of the covered attorney. In considering alternatives, however, the covered attorney should be aware of any law that requires the covered attorney to</p>
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	advocate the least restrictive action on behalf of the client. For procedures governing designations of trustees for military members for purposes of pay matters, see 37 U.S.C. §§ 601–604, and chapter XIV of the Manual of the Judge Advocate General.
(6) In determining the extent of the client’s diminished capacity, the lawyer should consider and balance such factors as: the client’s ability to articulate reasoning leading to a decision, variability of state of mind and ability to appreciate consequences of a decision; the substantive fairness of a decision; and the consistency of a decision with the known long-term commitments and values of the client. In appropriate circumstances, the lawyer may seek guidance from an appropriate diagnostician, recognizing that military law does not recognize a doctor-patient privilege.	Renumbered 5(b)
(7) If a legal representative has not been appointed, the lawyer should consider whether appointment of a guardian ad litem, conservator, or guardian is necessary to protect the client’s interests. Thus, if a client with diminished capacity has substantial property that should be sold for the client’s benefit, effective completion of the transaction may require appointment of a legal representative. In addition, rules of procedure in litigation sometimes provide that minors or persons with diminished capacity must be represented by a guardian or next friend if they do not have a general guardian. In many circumstances, however, appointment of a legal representative may be more expensive or traumatic for the client than circumstances in fact require. Evaluation of such circumstances is a matter entrusted to the professional judgment of the lawyer. In considering alternatives, however, the lawyer should be aware of any law that requires the lawyer to advocate the least restrictive action on behalf of the client.	Renumbered 5(c)
(8) Disclosure of the client’s diminished capacity could adversely affect the client’s interests. For example, raising the question of diminished capacity could, in some circumstances, lead to proceedings for involuntary commitment. Information relating to the representation is protected by Rule 1.6. Therefore, unless authorized to do so, the lawyer may not disclose such information. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized to make the necessary disclosures, even when the client directs the lawyer to the contrary. Nevertheless, given the	Renumbered (6) Disclosure of the client’s diminished capacity could adversely affect the client’s interests. For example, raising the question of diminished capacity could, in some circumstances, lead to proceedings for involuntary commitment. Information relating to the representation is protected by Rule 1.6. Therefore, unless authorized to do so, the lawyer may not disclose such information. When taking protective action pursuant to paragraph b, the lawyer is impliedly authorized to make the necessary disclosures, even when the client directs the covered attorney to the



<p>risks of disclosure, paragraph (c) limits what the lawyer may disclose in consulting with other individuals or entities or seeking the appointment of a legal representative. At the very least, the lawyer should determine whether it is likely that the person or entity consulted with will act adversely to the client's interests before discussing matters related to the client. See also Rule 1.6(b)(1)(i) (lawyer shall reveal information relating to representation of a client to the extent lawyer reasonably believes necessary to prevent reasonably certain death or substantial bodily harm to anyone, including the client).</p>	<p>contrary. Nevertheless, given the risks of disclosure, paragraph c limits what the covered attorney may disclose in consulting with other individuals or entities. At the very least, the covered attorney should determine whether it is likely that the person or entity consulted with will act adversely to the client's interest before discussing matters related to the client. Given the overriding military and social concern for the preservation of human life, a defense counsel, victim legal counsel, or legal assistance attorney may reveal information received during or relating to the representation of a client to the extent the covered attorney reasonably believes the client is suffering from a diminished capacity and action is necessary to prevent the client from attempting suicide or causing serious bodily harm to herself or himself. This includes reports to, and requests for assistance from, command authorities as well as appropriate military medical professionals, chaplains, and social workers, consistent with paragraph c of this Rule. The covered attorney's position in such cases is an unavoidably difficult one.</p>
<p>(9) In an emergency where the health, safety, or a financial interest of a person with seriously diminished capacity is threatened with imminent and irreparable harm, an Army lawyer may take legal action on behalf of such a person, if duly authorized by competent authority to represent individual clients or that individual client in particular, even though the person is unable to establish a client-lawyer relationship or to make or express considered judgments about the matter, when the person or another acting in good faith on that person's behalf has consulted with the lawyer. Even in such an emergency, however, the lawyer should not act unless the lawyer reasonably believes that the person has no other lawyer, agent, or other representative available. The lawyer should take legal action on behalf of the person only to the extent reasonably necessary to maintain the status quo or otherwise avoid imminent and irreparable harm. A lawyer who undertakes to represent a person in such an exigent situation has the same duties under these Rules as the lawyer would with respect to a client.</p>	<p>Deleted.</p>
<p>(10) A lawyer who acts on behalf of a person with seriously diminished capacity in an emergency should keep the confidences of the person as if dealing with a client, disclosing them only to the extent necessary to accomplish the intended protective action. The lawyer should disclose to</p>	<p>Deleted.</p>

any tribunal involved and to any other counsel involved the nature of his or her relationship with the person. The lawyer should take steps to regularize the relationship or implement other protective solutions as soon as possible.	
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## APPENDIX G. SELECTED STATUTES REGARDING APPOINTMENT OF GUARDIANS AD LITEM FOR CHILDREN (most relevant language highlighted)

### 1. 18 U.S.C. § 3509

*Child victims' and child witnesses' rights*

#### (h) Guardian ad litem

(1) **In general.**—The court may appoint, and provide reasonable compensation and payment of expenses for, a guardian ad litem for a child who was a victim of, or a witness to, a crime involving abuse or exploitation to protect the best interests of the child. In making the appointment, the court shall consider a prospective guardian's background in, and familiarity with, the judicial process, social service programs, and child abuse issues. The guardian ad litem shall not be a person who is or may be a witness in a proceeding involving the child for whom the guardian is appointed.

(2) **Duties of guardian ad litem.**—A guardian ad litem may attend all the depositions, hearings, and trial proceedings in which a child participates, and make recommendations to the court concerning the welfare of the child. The guardian ad litem may have access to all reports, evaluations and records, except attorney's work product, necessary to effectively advocate for the child. (The extent of access to grand jury materials is limited to the access routinely provided to victims and their representatives.) A guardian ad litem shall marshal and coordinate the delivery of resources and special services to the child.

A guardian ad litem shall not be compelled to testify in any court action or proceeding concerning any information or opinion received from the child in the course of serving as a guardian ad litem.

(3) **Immunities.**—A guardian ad litem shall be presumed to be acting in good faith and shall be immune from civil and criminal liability for complying with the guardian's lawful duties described in paragraph (2).

### 2. Child Abuse Prevention and Treatment Act, 42 U.S.C. § 5101 et seq.

42 U.S.C. § 5106a

#### (b) Eligibility requirements

##### (1) State plan

##### (A) In general

To be eligible to receive a grant under this section, a State shall submit to the Secretary a State plan that specifies the areas of the child protective services system described in subsection (a) that the State will address with amounts received under the grant. . . .

(2) Contents

A State plan submitted under paragraph (1) shall contain a description of the activities that the State will carry out using amounts received under the grant to achieve the objectives of this subchapter, including—

(A) an assurance that the State plan, to the maximum extent practicable, is coordinated with the State plan under part B of title IV of the Social Security Act relating to child welfare services and family preservation and family support services;

(B) an assurance in the form of a certification by the Governor of the State that the State has in effect and is enforcing a State law, or has in effect and is operating a statewide program, relating to child abuse and neglect that includes— . . .

(xiii) provisions and procedures requiring that in every case involving a victim of child abuse or neglect which results in a judicial proceeding, a guardian ad litem, who has received training appropriate to the role, including training in early childhood, child, and adolescent development, and who may be an attorney or a court appointed special advocate who has received training appropriate to that role (or both), shall be appointed to represent the child in such proceedings—

(I) to obtain first-hand, a clear understanding of the situation and needs of the child; and

(II) to make recommendations to the court concerning the best interests of the child; . . .

*42 U.S.C. § 5106c*

(e) Adoption of State task force recommendations

(1) General rule

Subject to the provisions of paragraph (2), before a State receives assistance under this section, a State shall adopt recommendations of the State task force in each of the following categories—

(A) investigative, administrative, and judicial handling of cases of child abuse and neglect, including child sexual abuse and exploitation, as well as cases involving suspected child maltreatment related fatalities and cases involving a potential combination of jurisdictions, such as intrastate, interstate, Federal-State, and State-Tribal,

in a manner which reduces the additional trauma to the child victim and the victim's family and which also ensures procedural fairness to the accused;

(B) experimental, model, and demonstration programs for testing innovative approaches and techniques which may improve the prompt and successful resolution of civil and criminal court proceedings or enhance the effectiveness of judicial and administrative action in child abuse and neglect cases, particularly child sexual abuse and exploitation cases, including the enhancement of performance of court-appointed attorneys and guardians ad litem for children, and which also ensure procedural fairness to the accused; and

(C) reform of State laws, ordinances, regulations, protocols, and procedures to provide comprehensive protection for children, which may include those children involved in reports of child abuse or neglect with a potential combination of jurisdictions, such as intrastate, interstate, Federal-State, and State-Tribal, from child abuse and neglect, including child sexual abuse and exploitation, while ensuring fairness to all affected persons.

### **3. Arizona**

*Stewart v. Superior Court In and For County of Maricopa*, 163 Ariz. 227, 787 P.2d 126 (Ct. App. Div. 1 1989) (criminal division of superior court, “despite the absence of a specific rule or statute,” possesses inherent equitable power to appoint a guardian ad litem for a child witness). See also Ariz. Rev. Stat. Ann. § 13-4403 [state provision similar to Article 6b appointment of representative to assume the right of the victim]; and *State ex rel. Romley v. Dairman*, 208 Ariz. 484, 95 P.3d 548 (Ct. App. Div. 1 2004) (the court’s duty to appoint a “representative” for a minor victim if the legal guardian of the child is unwilling or unable to adequately represent the victim’s interests). Note that Arizona has a Crime Victims Bill of Rights contained in the state constitution.

### **4. Colorado – Colo. Rev. Stat. Ann. § 24-4.1-304**

§ 24-4.1-304. *Child victim or witness—rights and services*

(1) In addition to all rights afforded to a victim or witness under section 24-4.1-302.5, law enforcement agencies, prosecutors, and judges are encouraged to designate one or more persons to provide the following services on behalf of a child who is involved in criminal proceedings as a victim or a witness:

(a) To explain, in language understood by the child, all legal proceedings in which the child will be involved;

(b) To act, as a friend of the court, to advise the judge, whenever appropriate, of the child’s ability to understand and cooperate in any court proceeding;

(c) To assist the child and the child's family in coping with the emotional impact of the crime and any subsequent criminal proceeding in which the child is involved;

(d) To advise the district attorney concerning the ability of a child witness to cooperate with the prosecution and concerning the potential effects of the proceeding on the child.

## **5. Connecticut – Conn. Sup. Ct. R. § 44-20**

### *§ 44-20 Appointment of Guardian ad litem*

(a) In any criminal proceeding involving an abused or neglected minor child, a guardian ad litem shall be appointed. The judicial authority may also appoint a guardian ad litem for a minor involved in any other criminal proceedings, including those in which the minor resides with and is the victim of a person arrested or charged with a criminal offense, those in which the minor resides in the same household as the victim and the defendant, or those in which the minor is the defendant. Unless the judicial authority orders that another person be appointed guardian ad litem, the family relations counselor or family relations caseworker shall be designated as guardian ad litem.

## **6. Delaware – Del. Code Ann. tit. 11, § 5134(b)**

### *§ 5134. Additional rights and services*

(a) A child victim or witness is entitled to an explanation, in language understood by the child, of all legal proceedings in which the child is to be involved.

(b) A child victim or witness is entitled to be accompanied, in all proceedings, by a "friend" or other person in whom the child trusts, which person shall be permitted to advise the judge, when appropriate and as a friend of the Court, regarding the child's ability to understand proceedings and questions.

(c) A child victim or witness is entitled to information about, and referrals to, appropriate social services and programs to assist such child, and the child's family, in coping with the emotional impact of the crime, and the subsequent Court proceedings in which the child is to become involved.

## **7. District of Columbia**

### **D.C. Code Ann. § 23:1908**

#### *Sexual assault victims' rights.*

(Effective: March 3, 2020)

(a) In addition to the rights set forth in subchapter I of this chapter, a sexual assault victim shall have the right to have . . .

(3) For sexual assault victims 18 years of age or older, a sexual assault victim advocate, and for sexual assault victims ages 13 to 17, a sexual assault youth victim advocate, present during any:

(A) Forensic medical, evidentiary, or physical examination;

(B) Point during the hospital visit; provided, that the presence of a sexual assault victim advocate or a sexual assault youth victim advocate does not pose health or safety risks to the sexual assault victim, the sexual assault victim advocate, or the sexual assault youth victim advocate; and

(C) Interview.

(b) A sexual assault victim shall have the rights provided in subsection (a)(3) of this section even if the sexual assault victim previously declined the presence of a sexual assault victim advocate or a sexual assault youth victim advocate.

**Definition of “sexual assault youth victim advocate”: D.C. Code. Ann. § 23:1907**

*Definitions.*

Effective: March 3, 2020

(14) “Sexual assault youth victim advocate” means an employee or contractor of a community-based organization whose director or the director’s designee is a member of the SART [Sexual Assault Response Team] and who:

(A) Qualifies as a sexual assault victim advocate; and

(B) Has undergone an additional 20 hours of training related to youth sexual assault victim advocacy using a curriculum approved by the OVSJG [Office of Victim Services and Justice Grants] that includes instruction on:

(i) Providing services to sexual assault victims under the age of 18, including the different needs of children and adolescents;

(ii) Navigating family dynamics in the context of providing services to children and adolescents who have experienced sexual assault;

(iii) The co-occurrence of child abuse in children and adolescents who have experienced sexual assault; and

(iv) Children’s susceptibility to suggestive questioning, the impact suggestive questions have on criminal investigations and prosecutions, and techniques for minimizing the potential for suggestibility.

**8. Florida**

**Fla. Stat. Ann. § 914.17**

*§ 914.17. Appointment of advocate for victims or witnesses who are minors or intellectually disabled*

(1) A guardian ad litem or other advocate shall be appointed by the court to represent a minor in any criminal proceeding if the minor is a victim of or witness to child abuse or neglect, a victim of a sexual offense, or a witness to a sexual offense committed against another minor. The court may appoint a guardian ad litem or other advocate in any other criminal proceeding in which a minor is involved as a victim or a witness. The guardian ad litem or other advocate shall have full access to all evidence and reports introduced during the proceedings, may interview witnesses, may make recommendations to the court, shall be noticed and have the right to appear on behalf of the minor at all proceedings, and may request additional examinations by medical doctors, psychiatrists, or psychologists. The guardian ad litem or other advocate shall:

(a) Explain, in language understandable to the minor, all legal proceedings in which the minor is involved;

(b) Act, as a friend of the court, to advise the judge, whenever appropriate, of the minor's ability to understand and cooperate with any court proceeding; and

(c) Assist the minor and the minor's family in coping with the emotional effects of the crime and subsequent criminal proceedings in which the minor is involved. . . .

(3) Any person participating in a judicial proceeding as a guardian ad litem or other advocate is presumed prima facie to be acting in good faith and in so doing is immune from any liability, civil or criminal, which might be incurred or imposed.

**Fla. Stat. Ann. § 39.822**

*§ 39.822. Appointment of guardian ad litem for abused, abandoned, or neglected child*

(1) A guardian ad litem shall be appointed by the court at the earliest possible time to represent the child in any child abuse, abandonment, or neglect judicial proceeding, whether civil or criminal. Any person participating in a civil or criminal judicial proceeding resulting from such appointment shall be presumed prima facie to be acting in good faith and in so doing shall be immune from any liability, civil or criminal, that otherwise might be incurred or imposed.

(2) In those cases in which the parents are financially able, the parent or parents of the child shall reimburse the court, in part or in whole, for the cost of provision of guardian ad litem services. Reimbursement to the individual providing guardian ad litem services shall not be contingent upon successful collection by the court from the parent or parents.

(3) Upon presentation by a guardian ad litem of a court order appointing the guardian ad litem:



(a) An agency, as defined in chapter 119, shall allow the guardian ad litem to inspect and copy records related to the best interests of the child who is the subject of the appointment, including, but not limited to, records made confidential or exempt from s. 119.07(1) or s. 24(a), Art. I of the State Constitution. The guardian ad litem shall maintain the confidential or exempt status of any records shared by an agency under this paragraph.

(b) A person or organization, other than an agency under paragraph (a), shall allow the guardian ad litem to inspect and copy any records related to the best interests of the child who is the subject of the appointment, including, but not limited to, confidential records.

For the purposes of this subsection, the term “records related to the best interests of the child” includes, but is not limited to, medical, mental health, substance abuse, child care, education, law enforcement, court, social services, and financial records.

(4) The guardian ad litem or the program representative shall review all disposition recommendations and changes in placements, and must be present at all critical stages of the dependency proceeding or submit a written report of recommendations to the court. Written reports must be filed with the court and served on all parties whose whereabouts are known at least 72 hours prior to the hearing.

#### **9. Illinois - 725 Ill. Comp. Stat. Ann. § 5/111-2(c) (footnotes omitted)**

*§ 111-2. Commencement of prosecutions . . .*

(c) Upon the filing of an information or indictment in open court charging the defendant with the commission of a sex offense defined in any Section of Article 11 of the Criminal Code of 1961 or the Criminal Code of 2012, and a minor as defined in Section 1-3 of the Juvenile Court Act of 1987 is alleged to be the victim of the commission of the acts of the defendant in the commission of such offense, the court may appoint a guardian ad litem for the minor as provided in Section 2-17, 3-19, 4-16 or 5-610 of the Juvenile Court Act of 1987.

A “minor” means a person under the age of 21. 705 Ill. Comp. Stat. Ann. § 405/1-3(10).

#### **10. Iowa – Iowa Code Ann. § 915.37**

*§ 915.37. Guardian ad litem for prosecuting child witnesses*

1. A prosecuting witness who is a child, as defined in section 702.5, in a case involving a violation of chapter 709 or 710A, or section 726.2, 726.3, 726.6, or 728.12, is entitled to have the witness’s interests represented by a guardian ad litem at all stages of the proceedings arising from such violation. The guardian ad litem shall be a practicing attorney and shall be designated by the court after due consideration is given to the desires and needs of the child and the compatibility of the child and the child’s interests with the prospective guardian ad litem. If a guardian ad litem has previously been appointed for the child in a proceeding under chapter 232 or a proceeding in which the juvenile court has waived jurisdiction under section 232.45, the court shall appoint the same guardian ad litem under this section. The guardian ad litem shall

receive notice of and may attend all depositions, hearings, and trial proceedings to support the child and advocate for the protection of the child but shall not be allowed to separately introduce evidence or to directly examine or cross-examine witnesses. However, the guardian ad litem shall file reports to the court as required by the court. If a prosecuting witness is fourteen, fifteen, sixteen, or seventeen years of age, and would be entitled to the appointment of a guardian ad litem if the prosecuting witness were a child, the court may appoint a guardian ad litem if the requirements for guardians ad litem in this section are met, and the guardian ad litem agrees to participate without compensation.

A “child” is any person under the age of 14. I.C.A. § 702.5.

## **11. Kentucky – Ky. Rev. Stat. Ann. § 26A.140**

### *§ 26A.140 Accommodation of special needs of children*

(1) Courts shall implement measures to accommodate the special needs of children which are not unduly burdensome to the rights of the defendant, including, but not limited to:

(a) Trained guardians ad litem or special advocates, if available, shall be appointed for all child victims and shall serve in Circuit and District Courts to offer consistency and support to the child and to represent the child’s interests where needed. . . .

(c) Children expected to testify shall be prepared for the courtroom experience by the Commonwealth’s or county attorney handling the case with the assistance of the guardian ad litem or special advocate. . . .

(2) The Supreme Court is encouraged to issue rules for the conduct of criminal and civil trials involving child abuse in which a child victim or child witness may testify at the trial.

## **12. Maine – Me. Rev. Stat. Ann. tit. 19-A, § 1507**

### *§ 1507. Appointment of guardian ad litem in contested proceedings*

1. Guardian ad litem; appointment. In contested proceedings under sections 904, 1653 and 1803 in which a minor child is involved, the court may appoint a guardian ad litem for the child. The appointment may be made at any time, but the court shall make every effort to make the appointment as soon as possible after the commencement of the proceeding. The court may appoint a guardian ad litem when the court has reason for special concern as to the welfare of a minor child. In determining whether an appointment must be made, the court shall consider . . .

8. Notice. A guardian ad litem must be given notice of all civil or criminal hearings and proceedings, including, but not limited to, grand juries, in which the child is a party or a witness. The guardian ad litem shall protect the best interests of the child in those hearings and proceedings, unless otherwise ordered by the court.

### 13. Nevada

#### **Nev. Rev. Stat. Ann. § 178A.170(1)**

*§ 178A.170. Right to consult with sexual assault victims' advocate; right to designate attendant to provide support; attendant may be excluded under certain circumstances*

*Effective: January 1, 2020*

1. **A survivor has the right to consult with a sexual assault victims' advocate during:**

- (a) Any forensic medical examination; and
- (b) Any interview by a law enforcement official or prosecutor.

2. Except as otherwise provided in subsection 3, a survivor has the right to designate an attendant to provide support during:

- (a) Any forensic medical examination; and
- (b) Any interview by a law enforcement official or prosecutor.

3. If a law enforcement official or prosecutor conducts an interview of a survivor who is a minor, the law enforcement official or prosecutor may exclude the attendant from the interview if the law enforcement official or prosecutor:

(a) Has successfully completed specialized training in interviewing survivors who are minors that meets the standards of the National Children's Alliance or its successor organization or another national organization that provides specialized training in interviewing survivors who are minors; and

(b) Determines, in his or her good faith, that the presence of the attendant would be detrimental to the purpose of the interview.

#### **Nev. Rev. Stat. Ann. § 178A.140**

*§ 178A.140. "Survivor" defined*

"Survivor" means a person who is a victim of sexual assault, as defined in NRS 217.280 or, if the victim is incompetent, deceased or a minor, the parent, guardian, spouse, legal representative or other person related to the victim within the second degree of consanguinity or affinity, unless such person is the defendant or accused or is convicted of the sexual assault.

#### **Ninth Judicial District Court Rules, Rule 30**

*Rule 30. Special advocates*

(a) Under appropriate circumstances, the judge may appoint a court-appointed special advocate (CASA) as an advocate for any minor child, or appoint a special advocate for the elderly (SAFE)

as an advocate for a fragile adult or adult subject to a court-ordered guardianship. When a CASA is appointed, the CASA office shall supervise the advocate's activities under the policies and procedures adopted by the CASA office. When a SAFE is appointed, the SAFE office shall supervise the advocate's activities under the policies and procedures adopted by the SAFE office.

(b) A CASA may be appointed by the court, upon its own initiative or upon the request of either party, in the following cases: . . .

(4) In addition to any other victim-impact statement permitted by law, cases where the child is a victim of criminal activity and due to age or competency cannot make his or her own victim impact statement; or . . .

(6) Any other case where the court determines that the services of a CASA would serve the best interests of the minor child or expedite the resolution of the matter.

#### **14. New Hampshire – N.H. R. Crim. P. 44**

##### *Rule 44. Special Procedures in Superior Court Regarding Sex-Related Offenses Against Children*

(a) In any superior court case alleging a sex-related offense in which a minor child was a victim, the court shall allow the use of anatomically correct drawings and/or anatomically correct dolls as demonstrative evidence to assist the alleged victim or minor witness in testifying, unless otherwise ordered by the court for good cause shown.

(b) In the event that the alleged victim or minor witness is nervous, afraid, timid, or otherwise reluctant to testify, the court may allow the use of leading questions during the initial testimony but shall not allow the use of such questions relating to any essential element of the criminal offense.

(c) The clerk shall schedule a pretrial conference, to be held within forty-five days of the filing of an indictment, for the purpose of establishing a discovery schedule and trial date. At such conference, the court shall consider the advisability and need for the appointment of a guardian ad litem to represent the interests of the alleged victim.

(d) In the event that a guardian ad litem is appointed to represent the interests of a minor victim or witness, the role and scope of services of the guardian ad litem shall be explicitly outlined by the trial judge prior to trial.

(e) The guardian ad litem appointed under this rule shall be compensated at the same hourly rate and shall be subject to the same case maximums as set forth for defense counsel in misdemeanor cases under the provisions of Supreme Court Rule 47. The guardian ad litem shall also be reimbursed for the guardian's investigative and related expenses, as allowed under Rule 47, upon a finding of necessity and reasonableness by a justice of the appropriate court, made prior to the said expenses being incurred.

## 15. North Carolina

### Sup. and Dist. Ct. R. 7.1

#### *Rule 7.1. Appointment of Guardian Ad Litem*

When any person is charged with a crime wherein the victim is a minor, or a minor is a potential witness to such crime, the court may appoint an attorney, from a list of pro bono attorneys approved by the Chief District Court Judge, as guardian ad litem for such minor victim or witness.

### N.C. Gen. Stat. Ann. § 7B-601 (Juvenile Code)

#### *§ 7B-601. Appointment and duties of guardian ad litem*

(a) When in a petition a juvenile is alleged to be abused or neglected, the court shall appoint a guardian ad litem to represent the juvenile. When a juvenile is alleged to be dependent, the court may appoint a guardian ad litem to represent the juvenile. The juvenile is a party in all actions under this Subchapter. The guardian ad litem and attorney advocate have standing to represent the juvenile in all actions under this Subchapter where they have been appointed. The appointment shall be made pursuant to the program established by Article 12 of this Chapter unless representation is otherwise provided pursuant to G.S. 7B-1202 or G.S. 7B-1203. The appointment shall terminate when the permanent plan has been achieved for the juvenile and approved by the court. The court may reappoint the guardian ad litem pursuant to a showing of good cause upon motion of any party, including the guardian ad litem, or of the court. In every case where a nonattorney is appointed as a guardian ad litem, an attorney shall be appointed in the case in order to assure protection of the juvenile's legal rights throughout the proceeding. The duties of the guardian ad litem program shall be to make an investigation to determine the facts, the needs of the juvenile, and the available resources within the family and community to meet those needs; to facilitate, when appropriate, the settlement of disputed issues; to offer evidence and examine witnesses at adjudication; to explore options with the court at the dispositional hearing; to conduct follow-up investigations to insure that the orders of the court are being properly executed; to report to the court when the needs of the juvenile are not being met; and to protect and promote the best interests of the juvenile until formally relieved of the responsibility by the court.

(b) The court may authorize the guardian ad litem to accompany the juvenile to court in any criminal action wherein the juvenile may be called on to testify in a matter relating to abuse.

(c) The guardian ad litem has the authority to obtain any information or reports, whether or not confidential, that may in the guardian ad litem's opinion be relevant to the case. No privilege other than the attorney-client privilege may be invoked to prevent the guardian ad litem and the court from obtaining such information. The confidentiality of the information or reports shall be respected by the guardian ad litem, and no disclosure of any information or reports shall be made to anyone except by order of the court or unless otherwise provided by law.

## **16. North Dakota**

### **N.D. Cent. Code Ann. § 12.1-20-16**

#### *§ 12.1-20-16. Appointment of a guardian ad litem in prosecution for sex offenses*

A minor or an individual with a developmental disability who is a material or prosecuting witness in a criminal proceeding involving an act in violation of sections 12.1-20-01 through 12.1-20-08, section 12.1-20-11, or chapter 12.1-41, may, at the discretion of the district court, have the witness' interests represented by a guardian ad litem at all stages of the proceedings arising from the violation. The appointment may be made upon the order of the court on its own motion or at the request of a party to the action. The guardian ad litem may, but need not, be a licensed attorney and must be designated by the court after due consideration is given to the desires and needs of the minor or the individual with a developmental disability. An individual who is also a material witness or prosecuting witness in the same proceeding may not be designated guardian ad litem. The guardian ad litem must receive notice of and may attend all depositions, hearings, and trial proceedings to support the minor or the individual with a developmental disability and advocate for the protection of the minor or the individual with a developmental disability but may not separately introduce evidence or directly examine or cross-examine witnesses. The expenses of the guardian ad litem, when approved by the judge, must be paid by the Supreme Court. The state shall also pay the expenses of the guardian ad litem in commitment proceedings held in district court pursuant to chapter 25-03.1.

### **N.D. Cent. Code Ann. § 12.1-35-02**

#### *§ 12.1-35-02. Additional services*

In addition to all rights afforded to victims and witnesses by law, state's attorneys are encouraged to provide the following additional services to children who are involved in criminal proceedings as victims or witnesses:

1. Explanations, in language understood by the child, of all legal proceedings in which the child will be involved.
2. Advice to the court concerning the ability of a child witness to cooperate with the prosecution and the potential effects of the proceedings on the child.
3. Information about, and referrals to, appropriate social services programs to assist the child and the child's family members in coping with the emotional impact of the crime and the subsequent proceedings in which the child is involved.
4. Information about the availability of a child development specialist to ensure questions asked of the witness are chronologically and developmentally appropriate.

## **17. Oklahoma – Okl. Stat. Ann. tit. 21, § 843.7(A)(1) (footnote omitted)**

*§ 843.7. Appointment of representatives for child*

A. 1. In every criminal case filed pursuant to the Oklahoma Child Abuse Reporting and Prevention Act, the judge of the district court may appoint an attorney-at-law to appear for and represent a child who is the alleged victim of child abuse or neglect.

2. The attorney may be allowed a reasonable fee for such services and shall meet with the child as soon as possible after receiving notification of the appointment.

3. Except for good cause shown to the court, the attorney shall meet with the child not less than twenty-four (24) hours prior to any hearing.

4. The attorney shall be given access to all reports relevant to the case and to any reports of examination of the child's parents, legal guardian, custodian or other person responsible for the child's health or safety made pursuant to this section.

5. The attorney shall represent the child and any expressed interests of the child. To that end, the attorney shall make such further investigation as the attorney deems necessary to ascertain the facts, to interview witnesses, examine and cross-examine witnesses at the preliminary hearing and trial, make recommendations to the court, and participate further in the proceedings to the degree appropriate for adequately representing the child.

B. A court-appointed special advocate or guardian ad litem as defined by the Oklahoma Children's Code 2 and the Oklahoma Juvenile Code 3 may be appointed to represent the best interests of the child who is the alleged subject of child abuse or neglect. The court-appointed special advocate or guardian ad litem shall be given access to all reports relevant to the case and to reports of service providers and of examination of the child's parents, legal guardian, custodian or other person responsible for the child's health or safety made pursuant to this section including but not limited to, information authorized by the Oklahoma Children's Code and the Oklahoma Juvenile Code.

C. At such time as the information maintained by the statewide registry for child abuse, sexual abuse, and neglect is indexed by name of perpetrator and the necessary and appropriate due process procedures are established by the Department of Human Services, a court-appointed special advocate organization, in accordance with the policies and rules of the Department, may utilize the registry for the purpose of completing background screenings of volunteers with the organization.

**18. Pennsylvania – 42 Pa. Stat. and Cons. Stat. Ann. § 5983**

*§ 5983. Rights and services*

(a) Designation of persons to act on behalf of children.—Courts of common pleas may designate one or more persons as a child advocate to provide the following services on behalf of children who are involved in criminal proceedings as victims or material witnesses:



(1) To explain, in language understood by the child, all legal proceedings in which the child will be involved.

(2) As a friend of the court, to advise the judge, whenever appropriate, of the child's ability to understand and cooperate with any court proceedings.

(3) To assist or secure assistance for the child and the child's family in coping with the emotional impact of the crime and subsequent criminal proceedings in which the child is involved.

(b) Qualifications.—Persons designated under subsection (a) may be attorneys at law or other persons who, by virtue of service as rape crisis or domestic violence counselors or by virtue of membership in a community service organization or of other experience acceptable to the court, possess education, experience or training in child or sexual abuse and a basic understanding of the criminal justice system.

## **19. Rhode Island**

### **12 R.I. Gen. Laws Ann. § 28-842**

#### *§ 12-28-8. Child victims*

(a) The general assembly finds that it is necessary to provide child victims and witnesses in family, district or superior court with special consideration and treatment beyond that usually afforded to adults. It is the intent of this section to provide these children with additional rights and protection during their involvement with the criminal justice system.

(b) As used in this section, "child" is anyone who is less than fifteen (15) years of age.

(c) Child victims of felony offenses, or offenses which would be considered felony offenses if committed by adults, shall have the following rights in addition to those set forth elsewhere in this chapter:

(1) To have explanations, in language understandable to a child of the victim's age, of all investigative and judicial proceedings in which the child will be involved;

(2) To be accompanied at all investigative and judicial proceedings by a relative, guardian, or other person who will contribute to the child's sense of well-being, unless it is determined by the party conducting the proceeding that the presence of the particular person would substantially impede the investigation or prosecution of the case;

(3) To have all investigative and judicial proceedings in which the child's participation is required arranged so as to minimize the time when the child must be present;

(4) To be permitted to testify at all judicial proceedings in the manner which will be least traumatic to the child, consistent with the rights of the defendant;



(5) To be provided information about and referrals to appropriate social service programs to assist the child and the child's family in coping with the emotional impact of the crime and the subsequent proceedings in which the child is involved.

#### **42 R.I. Gen. Laws Ann. § 72-15(n)**

##### *§ 42-72-15. Children's bill of rights*

... (n) A child victim or witness shall be afforded the protections of § 12-28-9 under the direction of the department of children, youth and families, and the department shall advise the court and the police and the prosecutor on the capacity of the child victim to understand and participate in the investigation and in the court proceedings and of the potential effect of the proceedings on the child.

#### **20. Tennessee – Tenn. Code Ann. § 37-1-610**

##### *§ 37-1-610. Guardian ad litem; reimbursement of expenses*

(a) A guardian ad litem shall be appointed to represent the child in any child sexual abuse civil or juvenile judicial proceeding and in general sessions or criminal court at the discretion of the court. Any person participating in such proceeding resulting from such appointment shall be presumed prima facie to be acting in good faith and in so doing shall be immune from any liability, civil or criminal, that otherwise might be incurred or imposed.

(b) In those cases in which the parents are financially able, the court may order such parent or parents to reimburse the court to the extent of insurance coverage; provided, that the court shall order the perpetrator in all cases, whether such person is a parent or other person, to fully reimburse the court for such expenses, for the cost of provision of guardian ad litem services and any medical and treatment costs resulting from the child sexual abuse. Reimbursement to the individual providing such services shall not be contingent upon successful collection by the court from the parent or parents.

#### **21. Vermont – Vt. R. Crim. P. 44.1**

##### *RULE 44.1. APPOINTMENT OF GUARDIAN AD LITEM FOR VICTIM WHO IS A CHILD*

In any prosecution for sexual assault under 13 V.S.A. § 3252, aggravated sexual assault under 13 V.S.A. § 3253, lewd or lascivious conduct with a child under 13 V.S.A. § 2602 or incest under 13 V.S.A. § 205, alleged to have been committed against a minor, and in any juvenile proceeding under chapter 12 of Title 33 involving a delinquent act alleged to have been committed against a minor if the delinquent act would be an offense listed in this rule if committed by an adult, the court may appoint a guardian ad litem for that minor to represent the interests of the minor. The guardian shall not be a person who is or may be a witness in the proceeding.

Vt. Stat. Ann. tit. 1, § 173. A minor is a person under the age of 18.

#### **22. Washington – Wash. Rev. Code Ann. § 7.69A.030**

*§ 7.69A.030. Rights of child victims and witnesses*

In addition to the rights of victims and witnesses provided for in RCW 7.69.030, there shall be every reasonable effort made by law enforcement agencies, prosecutors, and judges to assure that child victims and witnesses are afforded the rights enumerated in this section. Except as provided in RCW 7.69A.050 regarding child victims or child witnesses of violent crimes, sex crimes, or child abuse, the enumeration of rights shall not be construed to create substantive rights and duties, and the application of an enumerated right in an individual case is subject to the discretion of the law enforcement agency, prosecutor, or judge. Child victims and witnesses have the following rights, which apply to any criminal court and/or juvenile court proceeding:

- (1) To have explained in language easily understood by the child, all legal proceedings and/or police investigations in which the child may be involved.
- (2) With respect to child victims of sex or violent crimes or child abuse, to have a crime victim advocate from a crime victim/witness program, or any other support person of the victim's choosing, present at any prosecutorial or defense interviews with the child victim. This subsection applies if practical and if the presence of the crime victim advocate or support person does not cause any unnecessary delay in the investigation or prosecution of the case. The role of the crime victim advocate is to provide emotional support to the child victim and to promote the child's feelings of security and safety.
- (3) To be provided, whenever possible, a secure waiting area during court proceedings and to have an advocate or support person remain with the child prior to and during any court proceedings.
- (4) To not have the names, addresses, nor photographs of the living child victim or witness disclosed by any law enforcement agency, prosecutor's office, or state agency without the permission of the child victim, child witness, parents, or legal guardians to anyone except another law enforcement agency, prosecutor, defense counsel, or private or governmental agency that provides services to the child victim or witness.
- (5) To allow an advocate to make recommendations to the prosecuting attorney about the ability of the child to cooperate with prosecution and the potential effect of the proceedings on the child.
- (6) To allow an advocate to provide information to the court concerning the child's ability to understand the nature of the proceedings.
- (7) To be provided information or appropriate referrals to social service agencies to assist the child and/or the child's family with the emotional impact of the crime, the subsequent investigation, and judicial proceedings in which the child is involved.
- (8) To allow an advocate to be present in court while the child testifies in order to provide emotional support to the child.

(9) To provide information to the court as to the need for the presence of other supportive persons at the court proceedings while the child testifies in order to promote the child's feelings of security and safety.

(10) To allow law enforcement agencies the opportunity to enlist the assistance of other professional personnel such as child protection services, victim advocates or prosecutorial staff trained in the interviewing of the child victim.

(11) With respect to child victims of violent or sex crimes or child abuse, to receive either directly or through the child's parent or guardian if appropriate, at the time of reporting the crime to law enforcement officials, a written statement of the rights of child victims as provided in this chapter. The written statement shall include the name, address, and telephone number of a county or local crime victim/witness program, if such a crime victim/witness program exists in the county.

## **23. Wisconsin**

### **Wis. Stat. Ann. § 950.055**

#### *§ 950.055. Child victims and witnesses; rights and services*

(1) Legislative intent. The legislature finds that it is necessary to provide child victims and witnesses with additional consideration and different treatment than that usually afforded to adults. The legislature intends, in this section, to provide these children with additional rights and protections during their involvement with the criminal justice or juvenile justice system. The legislature urges the news media to use restraint in revealing the identity of child victims or witnesses, especially in sensitive cases.

(2) Additional services. In addition to all rights afforded to victims and witnesses under s. 950.04 and services provided under s. 950.06 (1m), counties are encouraged to provide the following additional services on behalf of children who are involved in criminal or delinquency proceedings as victims or witnesses:

(a) Explanations, in language understood by the child, of all legal proceedings in which the child will be involved.

(b) Advice to the judge, when appropriate and as a friend of the court, regarding the child's ability to understand proceedings and questions. The services may include providing assistance in determinations concerning the taking of depositions by audiovisual means under s. 908.08 or 967.04(7) and (8) and the duty to expedite proceedings under s. 971.105.

(c) Advice to the district attorney concerning the ability of a child witness to cooperate with the prosecution and the potential effects of the proceedings on the child.

(d) Information about and referrals to appropriate social services programs to assist the child and the child's family in coping with the emotional impact of the crime and the subsequent proceedings in which the child is involved.

(3) Program responsibility. In each county, the county board is responsible for the provision of services under this section. A county may seek reimbursement for services provided under this section as part of its program plan submitted to the department under s. 950.06. To the extent possible, counties shall utilize volunteers and existing public resources for the provision of these services.

## APPENDIX H. AUTHORITIES FOR VICTIM SERVICES IN THE MILITARY

**FY 1995 NDAA – (Dec. 5, 1994) Public Law 103-337**

### **SEC. 534. VICTIMS' ADVOCATES PROGRAMS IN DEPARTMENT OF DEFENSE.**

(a) Establishment.—

(1) The Secretary of Defense, acting through the Under Secretary of Defense for Personnel and Readiness, shall revise policies and regulations of the Department of Defense with respect to the programs of the Department of Defense specified in paragraph (2) in order to establish within each of the military departments a victims' advocates program.

(2) Programs referred to in paragraph (1) are the following:

- (A) Victim and witness assistance programs.
- (B) Family advocacy programs.
- (C) Equal opportunity programs.

(3) In the case of the Department of the Navy, separate victims' advocates programs shall be established for the Navy and the Marine Corps.

(b) Purpose.—A victims' advocates program established pursuant to subsection (a) shall provide assistance described in subsection (d) to members of the Armed Forces and their dependents who are victims of any of the following:

- (1) Crime.
- (2) Intrafamilial sexual, physical, or emotional abuse.
- (3) Discrimination or harassment based on race, gender, ethnic background, national origin, or religion.

(c) Interdisciplinary Councils.—

(1) The Secretary of Defense shall establish a Department of Defense council to coordinate and oversee the implementation of programs under subsection (a). The membership of the council shall be selected from members of the Armed Forces and officers and employees of the Department of Defense having expertise or experience in a variety of

disciplines and professions in order to ensure representation of the full range of services and expertise that will be needed in implementing those programs.

- (2) The Secretary of each military department shall establish similar interdisciplinary councils within that military department as appropriate to ensure the fullest coordination and effectiveness of the victims' advocates program of that military department. To the extent practicable, such a council shall be established at each significant military installation.

(d) Assistance.—

- (1) Under a victims' advocates program established under subsection (a), individuals working in the program shall principally serve the interests of a victim by initiating action to provide

- (A) information on available benefits and services,
- (B) assistance in obtaining those benefits and services, and
- (C) other appropriate assistance.

- (2) Services under such a program in the case of an individual who is a victim of family violence (including intrafamilial sexual, physical, and emotional abuse) shall be provided principally through the family advocacy programs of the military departments.

- (e) Staffing.—The Secretary of Defense shall provide for the assignment of personnel (military or civilian) on a full-time basis to victims' advocates programs established pursuant to subsection (a). The Secretary shall ensure that sufficient numbers of such full-time personnel are assigned to those programs to enable those programs to be carried out effectively.

- (f) Implementation Deadline.—Subsection (a) shall be carried out not later than six months after the date of the enactment of this Act.

- (g) Implementation Report.—Not later than 30 days after the date on which Department of Defense policies and regulations are revised pursuant to subsection (a), the Secretary of Defense shall submit to the Committees on Armed Services of the Senate and House of Representatives a report on the implementation (and plans for implementation) of this section.

**IMPLEMENTATION:**

**Sections 580(a)(4)(C), 637(a)(5), 1059, 1076, 1176(a), 1561(a), 1562, 1588, 4061, 6036, 9061, 12646(e)(1), 12686, and Chapter 47 of title 10, United States Code  
Section 922(d)(9) and 922(g)(9) of title 18, United States Code**

**DoDI 6400.06 “Domestic Abuse Involving DoD Military and Certain Affiliated Personnel” (Aug. 21, 2007, Incorporating Change 4, May 26, 2017)**

**DoD Directive 1030.01, “Victim Witness Assistance,” Apr. 13, 2004, as amended**

**FY 2005 NDAA – (Oct. 28, 2004) Public Law 108-375, 118 STAT. 1927**

**SEC. 577. DEPARTMENT OF DEFENSE POLICY AND PROCEDURES ON PREVENTION AND RESPONSE TO SEXUAL ASSAULTS INVOLVING MEMBERS OF THE ARMED FORCES.**

**[No reference to military dependents]**

(a) Comprehensive Policy on Prevention and Response to Sexual Assaults.—

- (1) Not later than January 1, 2005, the Secretary of Defense shall develop a comprehensive policy for the Department of Defense on the prevention of and response to sexual assaults involving members of the Armed Forces.
- (2) The policy shall be based on the recommendations of the Department of Defense Task Force on Care for Victims of Sexual Assaults and on such other matters as the Secretary considers appropriate.
- (3) Before developing the comprehensive policy required by paragraph (1), the Secretary of Defense shall develop a definition of sexual assault. The definition so developed shall be used in the comprehensive policy under paragraph (1) and otherwise within the Department of Defense and Coast Guard in matters involving members of the Armed Forces. The definition shall be uniform for all the Armed Forces and shall be developed in consultation with the Secretaries of the military departments and the Secretary of Homeland Security with respect to the Coast Guard.

(b) Elements of Comprehensive Policy.—The comprehensive policy developed under subsection (a) shall, at a minimum, address the following matters:

- (1) Prevention measures.
- (2) Education and training on prevention and response.
- (3) Investigation of complaints by command and law enforcement personnel.
- (4) Medical treatment of victims.
- (5) Confidential reporting of incidents.
- (6) Victim advocacy and intervention.

- (7) Oversight by commanders of administrative and disciplinary actions in response to substantiated incidents of sexual assault.
  - (8) Disposition of victims of sexual assault, including review by appropriate authority of administrative separation actions involving victims of sexual assault.
  - (9) Disposition of members of the Armed Forces accused of sexual assault.
  - (10) Liaison and collaboration with civilian agencies on the provision of services to victims of sexual assault.
  - (11) Uniform collection of data on the incidence of sexual assaults and on disciplinary actions taken in substantiated cases of sexual assault.
- (c) Report on Improvement of Capability To Respond to Sexual Assaults.—Not later than March 1, 2005, the Secretary of Defense shall submit to Congress a proposal for such legislation as the Secretary considers necessary to enhance the capability of the Department of Defense to address matters relating to sexual assaults involving members of the Armed Forces.
- (d) Application of Comprehensive Policy to Military Departments.—The Secretary of Defense shall ensure that, to the maximum extent practicable, the policy developed under subsection (a) is implemented uniformly by the military departments.
- (e) Policies and Procedures of Military Departments.—
- (1) Not later than March 1, 2005, the Secretaries of the military departments shall prescribe regulations, or modify current regulations, on the policies and procedures of the military departments on the prevention of and response to sexual assaults involving members of the Armed Forces in order—
    - (A) to conform such policies and procedures to the policy developed under subsection (a); and
    - (B) to ensure that such policies and procedures include the elements specified in paragraph (2).
  - (2) The elements specified in this paragraph are as follows:
    - (A) A program to promote awareness of the incidence of sexual assaults involving members of the Armed Forces.
    - (B) A program to provide victim advocacy and intervention for members of the Armed Force concerned who are victims of sexual assault, which program shall make available, at home stations and in deployed locations, trained advocates who are readily available to intervene on behalf of such victims.
    - (C) Procedures for members of the Armed Force concerned to follow in the case of an incident of sexual assault involving a member of such Armed Force, including—
      - (i) specification of the person or persons to whom the alleged offense should be reported;
      - (ii) specification of any other person whom the victim should contact;



- (iii) procedures for the preservation of evidence; and
    - (iv) procedures for confidential reporting and for contacting victim advocates.
  - (D) Procedures for disciplinary action in cases of sexual assault by members of the Armed Force concerned.
  - (E) Other sanctions authorized to be imposed in substantiated cases of sexual assault, whether forcible or nonforcible, by members of the Armed Force concerned.
  - (F) Training on the policies and procedures for all members of the Armed Force concerned, including specific training for members of the Armed Force concerned who process allegations of sexual assault against members of such Armed Force.
  - (G) Any other matters that the Secretary of Defense considers appropriate.
- (f) Annual Report on Sexual Assaults.—
- (1) Not later than January 15 of each year, the Secretary of each military department shall submit to the Secretary of Defense a report on the sexual assaults involving members of the Armed Forces under the jurisdiction of that Secretary during the preceding year. In the case of the Secretary of the Navy, separate reports shall be prepared for the Navy and for the Marine Corps.
  - (2) Each report on an Armed Force under paragraph (1) shall contain the following:
    - (A) The number of sexual assaults against members of the Armed Force, and the number of sexual assaults by members of the Armed Force, that were reported to military officials during the year covered by such report, and the number of the cases so reported that were substantiated.
    - (B) A synopsis of, and the disciplinary action taken in, each substantiated case.
    - (C) The policies, procedures, and processes implemented by the Secretary concerned during the year covered by such report in response to incidents of sexual assault involving members of the Armed Force concerned.
    - (D) A plan for the actions that are to be taken in the year following the year covered by such report on the prevention of and response to sexual assault involving members of the Armed Forces concerned.
  - (3) Each report under paragraph (1) for any year after 2005 shall include an assessment by the Secretary of the military department submitting the report of the implementation during the preceding fiscal year of the policies and procedures of such department on the prevention of and response to sexual assaults involving members of the Armed Forces in order to determine the effectiveness of such policies and procedures during such fiscal year in providing an appropriate response to such sexual assaults.
  - (4) The Secretary of Defense shall submit to the Committees on Armed Services of the Senate and House of Representatives each report submitted to the Secretary under this subsection, together with the comments of the Secretary on the report. The Secretary shall submit each such report not later than March 15 of the year following the year covered by the report.

- (5) For the report under this subsection covering 2004, the applicable date under paragraph (1) is April 1, 2005, and the applicable date under paragraph (4) is May 1, 2005.

**IMPLEMENTATION: DoDI 6495.02 (Mar. 28, 2013, Incorporating Change 2, Effective July 7, 2015)**

**FY 2007 NDAA – (Oct. 17, 2006) Public Law 109-364, 120 Stat. 2083.**

**SEC. 701. TRICARE COVERAGE FOR FORENSIC EXAMINATION FOLLOWING SEXUAL ASSAULT OR DOMESTIC VIOLENCE.**

Section 1079(a) of title 10, United States Code, is amended by adding at the end the following new paragraph: “(17) Forensic examinations following a sexual assault or domestic violence may be provided.”.

**FY 2011 NDAA – (Jan. 7, 2011) Public Law 111-383, 124 Stat. 4137.**

**SEC. 1622. SEXUAL ASSAULT VICTIMS ACCESS TO VICTIM ADVOCATE SERVICES.**

(a) Availability of Victim Advocate Services.—

- (1) Availability.—A member of the Armed Forces or a dependent, as described in paragraph (2), who is the victim of a sexual assault is entitled to assistance provided by a qualified Sexual Assault Victim Advocate.
- (2) Covered dependents.—The assistance described in paragraph (1) is available to a dependent of a member of the Armed Forces who is the victim of a sexual assault and who resides on or in the vicinity of a military installation. The Secretary concerned shall define the term “vicinity” for purposes of this paragraph.

(b) Notice of Availability of Assistance; Opt Out.—The member or dependent shall be informed of the availability of assistance under subsection (a) as soon as the member or dependent seeks assistance from a Sexual Assault Response Coordinator. The victim shall also be informed that the services of a Sexual Assault Response Coordinator and Sexual Assault

Victim Advocate are optional and that these services may be declined, in whole or in part, at any time.

- (c) **Nature of Reporting Immaterial.**—In the case of a member of the Armed Forces, Victim Advocate services are available regardless of whether the member elects unrestricted or restricted (confidential) reporting of the sexual assault.

**IMPLEMENTATION: DoDI 6495.02 (Mar. 28, 2013, Incorporating Change 2, Effective July 7, 2015)**

**FY 2012 NDAA – (Dec. 31, 2011) Public Law 112-81, 125 Stat. 1298**

**SEC. 581. ACCESS OF SEXUAL ASSAULT VICTIMS TO LEGAL ASSISTANCE AND SERVICES OF SEXUAL ASSAULT RESPONSE COORDINATORS AND SEXUAL ASSAULT VICTIM ADVOCATES.**

- (a) **LEGAL ASSISTANCE FOR VICTIMS OF SEXUAL ASSAULT.**—Not later than 180 days after the date of the enactment of this Act, the Secretaries of the military departments shall prescribe regulations on the provision of legal assistance to victims of sexual assault. Such regulations shall require that legal assistance be provided by military or civilian legal assistance counsel pursuant to section 1044 of title 10, United States Code.

(b) **ASSISTANCE AND REPORTING.**—

- (1) **IN GENERAL.**—Chapter 80 of title 10, United States Code, is amended by inserting after section 1565a the following new section:

“§ 1565b. Victims of sexual assault: access to legal assistance and services of Sexual Assault Response Coordinators and Sexual Assault Victim Advocates

- “(a) **AVAILABILITY OF LEGAL ASSISTANCE AND VICTIM ADVOCATE SERVICES.**—  
(1) A member of the armed forces, or a dependent of a member, who is the victim of a sexual assault may be provided the following:

“(A) Legal assistance provided by military or civilian legal assistance counsel pursuant to section 1044 of this title.

“(B) Assistance provided by a Sexual Assault Response Coordinator.

“(C) Assistance provided by a Sexual Assault Victim Advocate.

“(2) A member of the armed forces or dependent who is the victim of sexual assault shall be informed of the availability of assistance under paragraph (1) as soon as the member or dependent seeks assistance from a Sexual Assault Response Coordinator, a Sexual Assault Victim Advocate, a military criminal investigator, a victim/witness liaison, or a trial counsel. The member or dependent shall also be informed that the legal assistance and the services of a Sexual Assault Response Coordinator or a Sexual Assault Victim Advocate under paragraph (1) are optional and may be declined, in whole or in part, at any time.

“(3) Legal assistance and the services of Sexual Assault Response Coordinators and Sexual Assault Victim Advocates under paragraph (1) shall be available to a member or dependent regardless of whether the member or dependent elects unrestricted or restricted (confidential) reporting of the sexual assault.

“(b) RESTRICTED REPORTING.—(1) Under regulations prescribed by the Secretary of Defense, a member of the armed forces, or a dependent of a member, who is the victim of a sexual assault may elect to confidentially disclose the details of the assault to an individual specified in paragraph (2) and receive medical treatment, legal assistance under section 1044 of this title, or counseling, without initiating an official investigation of the allegations.

“(2) The individuals specified in this paragraph are the following:

“(A) A Sexual Assault Response Coordinator.

“(B) A Sexual Assault Victim Advocate.

“(C) Healthcare personnel specifically identified in the regulations required by paragraph (1).”.

(2) CLERICAL AMENDMENT.—The table of sections at the beginning of chapter 80 of such title is amended by inserting after the item relating to section 1565a the following new item:

“1565b. Victims of sexual assault: access to legal assistance and services of Sexual Assault Response Coordinators and Sexual Assault Victim Advocates.”.

**IMPLEMENTATION: DoDI 6495.02 (Mar. 28, 2013, Incorporating Change 2, Effective July 7, 2015)**

**FY 2013 NDAA – (Jan. 2, 2013) Public Law 112-239, 126 Stat. 1632**

**SEC. 573. ESTABLISHMENT OF SPECIAL VICTIM CAPABILITIES WITHIN THE MILITARY DEPARTMENTS TO RESPOND TO ALLEGATIONS OF CERTAIN SPECIAL VICTIM OFFENSES.**

- (a) **ESTABLISHMENT REQUIRED.**—Under regulations prescribed by the Secretary of Defense, the Secretary of each military department shall establish special victim capabilities for the purposes of—
- (1) investigating and prosecuting allegations of child abuse, serious domestic violence, or sexual offenses; and
  - (2) providing support for the victims of such offenses.
- (b) **PERSONNEL.**—The special victim capabilities developed under subsection (a) shall include specially trained and selected—
- (1) investigators from the Army Criminal Investigative Command, Naval Criminal Investigative Service, or Air Force Office of Special Investigations;
  - (2) judge advocates;
  - (3) victim witness assistance personnel; and
  - (4) administrative paralegal support personnel.
- (c) **TRAINING, SELECTION, AND CERTIFICATION STANDARDS.**—The Secretary of Defense shall prescribe standards for the training, selection, and certification of personnel who will provide special victim capabilities for a military department.
- (d) **DISCRETION REGARDING EXTENT OF CAPABILITIES.**—
- (1) **IN GENERAL.**—Subject to paragraph (2), the Secretary of a military department shall determine the extent to which special victim capabilities will be established within the military department and prescribe regulations for the management and use of the special victim capabilities.
  - (2) **REQUIRED ELEMENTS.**—At a minimum, the special victim capabilities established within a military department must provide effective, timely, and responsive world-wide support for the purposes described in subsection (a).
- (e) **TIME FOR ESTABLISHMENT.**—

- (1) **IMPLEMENTATION PLAN.**—Not later than 270 days after the date of the enactment of this Act, the Secretary of Defense shall submit to the Committees on Armed Services of the Senate and the House of Representatives a report containing—
- (A) the plans and time lines of the Secretaries of the military departments for the establishment of the special victims capabilities; and
  - (B) an assessment by the Secretary of Defense of the plans and time lines.
- (2) **INITIAL CAPABILITIES.**—Not later than one year after the date of the enactment of this Act, the Secretary of each military department shall have available an initial special victim capability consisting of the personnel specified in subsection (b).
- (f) **EVALUATION OF EFFECTIVENESS.**—Not later than 180 days after the date of the enactment of this Act, the Secretary of Defense shall—
- (1) prescribe the common criteria to be used by the Secretaries of the military departments to measure the effectiveness and impact of the special victim capabilities from the investigative, prosecutorial, and victim’s perspectives; and
  - (2) require the Secretaries of the military departments to collect and report the data used to measure such effectiveness and impact.
- (g) **SPECIAL VICTIM CAPABILITIES DEFINED.**—In this section, the term “special victim capabilities” means a distinct, recognizable group of appropriately skilled professionals who work collaboratively to achieve the purposes described in subsection (a). This section does not require that the special victim capabilities be created as separate military unit or have a separate chain of command.

#### **IMPLEMENTATION:**

**Report: Establishment of Special Victim Capabilities within the Military Departments to Respond to Allegations of Certain Special Victim Offenses (Dec. 12, 1013); USD(P&R) DTM 14-003, “DoD Implementation of Special Victim Capability Prosecution and Legal Support”(Feb. 12, 2014, Incorporating Change 2, Feb. 2, 2016); IG DoD DTM 14-002, “The Establishment of Special Victim Capability Within MCIOs” (Feb. 11, 2014); DoDI 5505.19 Establishment of SVIP Capability within MCIOs (Feb. 3, 2015, Incorporating Change 1, Effective Sept. 4, 2015)**

**10 USC 1561 note.**

**FY 2014 NDAA – (Dec. 26, 2013) Public Law 113-66, 127 Stat. 672**

**§1716. Special Victims’ Counsel Availability for Victims of Sex-Related Offenses**

**10 U.S.C. §1044e. Special Victims' Counsel for victims of sex-related offenses****(a) Designation; Purposes.—**

(1) The Secretary concerned shall designate legal counsel (to be known as “Special Victims’ Counsel”) for the purpose of providing legal assistance to an individual described in paragraph (2) who is the victim of an alleged sex-related offense, regardless of whether the report of that offense is restricted or unrestricted.

(2) An individual described in this paragraph is any of the following:

(A) An individual eligible for military legal assistance under section 1044 of this title.

(B) An individual who is—

- (i) not covered under subparagraph (A);
- (ii) a member of a reserve component of the armed forces; and
- (iii) a victim of an alleged sex-related offense as described in paragraph (1)—

(I) during a period in which the individual served on active duty, full-time National Guard duty, or inactive-duty training; or

(II) during any period, regardless of the duty status of the individual, if the circumstances of the alleged sex-related offense have a nexus to the military service of the victim, as determined under regulations prescribed by the Secretary of Defense.

**(b) Types of Legal Assistance Authorized.—**The types of legal assistance authorized by subsection (a) include the following:

(1) Legal consultation regarding potential criminal liability of the victim stemming from or in relation to the circumstances surrounding the alleged sex-related offense and the victim’s right to seek military defense services.

(2) Legal consultation regarding the Victim Witness Assistance Program, including—

(A) the rights and benefits afforded the victim;

(B) the role of the Victim Witness Assistance Program liaison and what privileges do or do not exist between the victim and the liaison; and

(C) the nature of communication made to the liaison in comparison to communication made to a Special Victims’ Counsel or a legal assistance attorney under section 1044 of this title.

- (3) Legal consultation regarding the responsibilities and support provided to the victim by the Sexual Assault Response Coordinator, a unit or installation Sexual Assault Victim Advocate, or domestic abuse advocate, to include any privileges that may exist regarding communications between those persons and the victim.
  - (4) Legal consultation regarding the potential for civil litigation against other parties (other than the United States).
  - (5) Legal consultation regarding the military justice system, including (but not limited to)—
    - (A) the roles and responsibilities of the trial counsel, the defense counsel, and investigators;
    - (B) any proceedings of the military justice process in which the victim may observe;
    - (C) the Government's authority to compel cooperation and testimony; and
    - (D) the victim's responsibility to testify, and other duties to the court.
  - (6) Representing the victim at any proceedings in connection with the reporting, military investigation, and military prosecution of the alleged sex-related offense.
  - (7) Legal consultation regarding eligibility and requirements for services available from appropriate agencies or offices for emotional and mental health counseling and other medical services;
  - (8) Legal consultation and assistance—
    - (A) in personal civil legal matters in accordance with section 1044 of this title;
    - (B) in any proceedings of the military justice process in which a victim can participate as a witness or other party;
    - (C) in understanding the availability of, and obtaining any protections offered by, civilian and military protecting or restraining orders; and
    - (D) in understanding the eligibility and requirements for, and obtaining, any available military and veteran benefits, such as transitional compensation benefits found in section 1059 of this title and other State and Federal victims' compensation programs.
  - (9) Such other legal assistance as the Secretary of Defense (or, in the case of the Coast Guard, the Secretary of the Department in which the Coast Guard is operating) may authorize in the regulations prescribed under subsection (h).
- (c) Nature of Relationship.—The relationship between a Special Victims' Counsel and a victim in the provision of legal advice and assistance shall be the relationship between an attorney and client.
- (d) Qualifications.—An individual may not be designated as a Special Victims' Counsel under this section unless the individual—



- (1) meets the qualifications specified in section 1044(d)(2) of this title; and
- (2) is certified as competent to be designated as a Special Victims' Counsel by the Judge Advocate General of the armed force in which the judge advocate is a member or by which the civilian attorney is employed, and within the Marine Corps, by the Staff Judge Advocate to the Commandant of the Marine Corps.

(e) Administrative Responsibility.—

- (1) Consistent with the regulations prescribed under subsection (h), the Judge Advocate General (as defined in section 801(1) of this title) under the jurisdiction of the Secretary concerned, and within the Marine Corps the Staff Judge Advocate to the Commandant of the Marine Corps, is responsible for the establishment and supervision of individuals designated as Special Victims' Counsel.
- (2) The Secretary of Defense (and, in the case of the Coast Guard, the Secretary of the Department in which the Coast Guard is operating) shall conduct a periodic evaluation of the Special Victims' Counsel programs operated under this section.

(f) Availability of Special Victims' Counsel.—

- (1) An individual described in subsection (a)(2) who is the victim of an alleged sex-related offense shall be offered the option of receiving assistance from a Special Victims' Counsel upon report of an alleged sex-related offense or at the time the victim seeks assistance from a Sexual Assault Response Coordinator, a Sexual Assault Victim Advocate, a military criminal investigator, a victim/witness liaison, a trial counsel, a healthcare provider, or any other personnel designated by the Secretary concerned for purposes of this subsection.
- (2) The assistance of a Special Victims' Counsel under this subsection shall be available to an individual described in subsection (a)(2) regardless of whether the individual elects unrestricted or restricted reporting of the alleged sex-related offense. The individual shall also be informed that the assistance of a Special Victims' Counsel may be declined, in whole or in part, but that declining such assistance does not preclude the individual from subsequently requesting the assistance of a Special Victims' Counsel.

(g) Alleged Sex-related Offense Defined.—In this section, the term “alleged sex-related offense” means any allegation of—

- (1) a violation of section 920, 920a, 920b, 920c, or 925 of this title (article 120, 120a, 120b, 120c, or 125 of the Uniform Code of Military Justice); or

(2) an attempt to commit an offense specified in a paragraph (1) as punishable under section 880 of this title (article 80 of the Uniform Code of Military Justice).

(h) Regulations.—The Secretary of Defense and the Secretary of the Department in which the Coast Guard is operating shall prescribe regulations to carry out this section.

#### **IMPLEMENTATION:**

**Pub. L. 113–66, div. A, title XVII, §1716(a)(4), Dec. 26, 2013, 127 Stat. 969, provided that: “Section 1044e of title 10, United States Code, as added by paragraph (1), shall be implemented within 180 days after the date of the enactment of this Act [Dec. 26, 2013].”**

**FY 2015 NDAA – (Dec. 19, 2014) Public Law 113-291, 128 Stat. 3292**

#### **§531 Technical Revisions and Clarifications for certain FY14 NDAA Provisions**

(f) EXTENSION OF CRIME VICTIMS’ RIGHTS TO VICTIMS OF OFFENSES UNDER THE UNIFORM CODE OF MILITARY JUSTICE.—

(1) CLARIFICATION OF LIMITATION ON DEFINITION OF VICTIM TO NATURAL PERSONS.—Subsection (b) of section 806b of title 10, United States Code (article 6b of the Uniform Code of Military Justice), as added by section 1701 of the National Defense Authorization Act for Fiscal Year 2014 (Public Law 113–66; 127 Stat. 952), is amended by striking “a person” and inserting “an individual”.

(2) CLARIFICATION OF AUTHORITY TO APPOINT INDIVIDUALS TO ASSUME RIGHTS OF CERTAIN VICTIMS.—Subsection (c) of such section is amended—

(A) in the heading, by striking “LEGAL GUARDIAN” and inserting “APPOINTMENT OF INDIVIDUALS TO ASSUME RIGHTS”;

(B) by inserting “(but who is not a member of the armed forces)” after “under 18 years of age”;

(C) by striking “designate a legal guardian from among the representatives” and inserting “designate a representative”;

(D) by striking “other suitable person” and inserting “another suitable individual”; and

(E) by striking “the person” and inserting “the individual”.

# APPENDIX I. DAC-IPAD REQUESTS FOR INFORMATION (Sets 15 – 17)

## Request for Information

### RFI Set 15, Questions 1-5, Documents 1-3

**Topic: Appointment of Guardians ad Litem for Minor Victims of Sex-Related Offenses**  
**Date of Request: January 28, 2020**

#### I. Purpose

- A. The DAC-IPAD is a federal advisory committee established by the Secretary of Defense pursuant to section 546 of the National Defense Authorization Act for Fiscal Year 2015 (Public Law 113-291), as amended.
- B. The mission of the Committee is to advise the Secretary of Defense on the investigation, prosecution, and defense of allegations of rape, forcible sodomy, sexual assault, and other sexual misconduct involving members of the Armed Forces.
- C. The DAC-IPAD requests the below information to facilitate its required review of cases involving allegations of sexual misconduct on an ongoing basis for purposes of providing advice to the Secretary of Defense.

#### II. Summary of Requested Response Dates

Suspense	Question(s)	Proponent
<b>March 1, 2020</b>	Questions 1-5 and Documents 1-3	Services – Provide narrative responses regarding SVC/VLC, Article 6b representatives, and guardians ad litem for minor victims and the requested policies, regulations, and guidance.

#### III. Narrative Questions for Special Victims' Counsel and Victims' Legal Counsel (SVC/VLC) Programs Regarding Guardians ad Litem for Minor Victims

##### Background:

U.S. House of Representatives Report 116-120, part 1, (2019), accompanying H.R. 2500, contains a request for the DAC-IPAD to evaluate need for, and feasibility of, the appointment of guardians ad litem for minor victims of sex-related offenses. Specifically, Section 421 of the House Report states the following:

*Appointment of Guardian ad Litem for Minor Victims*

The committee is concerned for the welfare of minor, military dependents who are victims of an alleged sex-related offense. The committee acknowledges the Department of Defense's continued efforts to implement services in support of service members who are victims of sexual assault and further, to expand some of these services to dependents who are victims. However, the committee remains concerned that there is not an adequate mechanism within the military court-martial process to represent the best interests of minor victims following an alleged sex-related offense.

Therefore, not later than 180 days after the date of the enactment of this Act, the Defense Advisory Committee on Investigation, Prosecution, and Defense of Sexual Assault in the Armed Forces shall submit to the Committees on the Armed Services of the Senate and the House of Representatives a report that evaluates the need for, and the feasibility of, establishing a process under which a guardian ad litem may be appointed to represent the interests of a victim of an alleged sex-related offense (as that term is defined in section 1044e(g) of title 10, United States Code) who has not attained the age of 18 years.

### Questions:

Question 1: For all military investigations involving an alleged sex-related offense (as that term is defined in section 1044e(g) of title 10, United States Code), against a minor victim, and closed in the last two calendar years (2018, 2019): please provide a list, by year, of all alleged victims (represent each victim by a number, starting with 1) who were under the age of 18 at the time of the sex-related offense and for which the alleged offender was a Service member subject to the UCMJ.

For each victim identified, please document:

- a. The age of the victim at the time of the offense;
- b. Whether the victim was represented by a SVC/VLC;
- c. Whether an Article 6b, UCMJ, representative, was appointed, and if so, the basis for requesting the representative;
- d. If there was an Article 6b representative appointed, the nature of the representative's relationship to the victim (e.g. mother, aunt);
- e. Whether there were conflicts in the case between the victim's, or victim's representative's expressed wishes and the best interests of the victim;
- f. Whether a guardian ad litem was appointed, and if so, how and by whom.

Question 2: Does your Service believe it would be beneficial to, or has your Service already established a process under which a guardian ad litem may be appointed to represent the interests of a minor victim of an alleged sex-related offense described above (or any other offenses)?

Question 3: Are SVC/VLC in your Service specifically authorized to represent a victim's best interest in the event the victim lacks the capacity or maturity to make a decision regarding a specific issue involved in the case? If, so, please reference the specific policy or regulation providing for this representation.

Question 4: If SVC/VLC in your Service are authorized to represent the best interests of a minor victim in certain instances of incapacity, please identify any of the victims listed in Question 1 for whom this occurred. If SVC/VLC are not allowed to represent best interests of a minor victim in your Service, please explain what happens when a victim lacks capacity due to his or her young age and there is not a suitable Article 6b representative available. Please identify any of the victims listed in Question 1 for whom this was the case and provide a brief description of the case and how the issue was addressed.

Question 5: Please provide any additional comments or feedback regarding the feasibility of and need for a guardian ad litem appointment process for the military that would be helpful for the DAC-IPAD to consider in its evaluation and report to Congress on this issue.

#### **IV. Request for Service Policies, Regulations, and Other Written Documents Related to SVC/VLC or Guardians ad Litem Appointed for Minor Victims**

##### **Requested documents:**

1. All Service policies, regulations, or guidance that address SVC/VLC representation of victims under the age of 18.
2. All Service policies, regulations, or guidance that address guardians ad litem.
3. MOAs/MOUs between the Services and State/Local Child Protection Service organizations or other organizations that address the appointment of guardians ad litem for victims under the age of 18 in criminal cases involving Service member subjects. If there are more than five such MOAs/MOUs in your Service, please provide five as a representative sample. If there are fewer than five, please provide all relevant MOA/MOUs.

### **RFI Set 15 Military Service Responses**

#### **Topic: Appointment of Guardians ad Litem for Minor Victims of Sex-Related Offenses**

**RFI Set 15, Question 1:** For all military investigations involving an alleged sex-related offense (as that term is defined in section 1044e(g) of title 10, United States Code), against a minor victim, and closed in the last two calendar years (2018, 2019): please provide a list, by year, of all alleged victims (represent each victim by a number, starting with 1) who were under the age of 18 at the time of the sex-related offense and for which the alleged offender was a Service member subject to the UCMJ.

For each victim identified, please document:

- a. The age of the victim at the time of the offense;
- b. Whether the victim was represented by a SVC/VLC;
- c. Whether an Article 6b, UCMJ, representative, was appointed, and if so, the basis for requesting the representative;
- d. If there was an Article 6b representative appointed, the nature of the representative's relationship to the victim (e.g. mother, aunt);
- e. Whether there were conflicts in the case between the victim's, or victim's representative's expressed wishes and the best interests of the victim;
- f. Whether a guardian ad litem was appointed, and if so, how and by whom.

**Military Service responses to Question 1 and all of RFI Set 15 are available online at**  
**<https://www.dacipad.whs.mil>**

**RFI Set 15, Question 2:** Does your Service believe it would be beneficial to, or has your Service already established a process under which a guardian ad litem may be appointed to represent the interests of a minor victim of an alleged sex-related offense described above (or any other offenses)?

#### **Army Response to Q2:**

The Army SVC Program has a process by which an SVC may seek to have a civilian guardian ad litem (GAL) appointed to represent the best interests of a minor client located within CONUS. If an SVC concludes that the minor client's parent or guardian is acting against that child's best interests—i.e. taking actions or making decisions that are objectively unreasonable and/or harmful

to the child—the SVC may contact the local Family Advocacy Program (FAP) or other installation agency responsible for child cases to coordinate a civilian GAL appointment.

**Navy Response to Q2:**

The Navy has not established a guardian ad litem (GAL) program within the Service, nor is there a specific process by which GALs are appointed to represent the interests of minor victims as part of the military justice process. However, Article 6b representatives are routinely appointed by military judges to represent the interests of the minor victim.

The Joint Service Committee is currently gathering information and conducting further study of this issue, as required by section 540L of the FY20 NDAA. That report is due no later than December 9, 2020. Therefore, offering an opinion on the benefits of any proposed changes would be premature.

**Marine Corps Response to Q2:**

The services are currently gathering information and conducting further study of this issue, as required by section 540L of the FY20 NDAA. Therefore, offering an opinion on the benefits of any proposed changes would be premature.

The standard process established by Rule 38 of the trial judiciary's rules for the appointment of a victim's designee has been an improvement from past practice. The rule ensures protection of the rights of minor victims is considered at the first session of court. When no suitable designee is available, military judges have appointed guardians ad litem on a rare case-by-case basis. However, without a standard process or authority, securing a guardian ad litem in individual cases is a time consuming process for the trial counsel. It requires significant effort as well as the willingness and availability of local guardians ad litem to serve in this role. A standard process to secure a guardian ad litem when no suitable designee was available would allow a trial counsel to focus more of their effort on litigating the case.

**Air Force Response to Q2:**

The Air Force has not established a guardian ad litem (GAL) process.

The Air Force is studying this matter and working with our sister services on the Joint Service Committee to prepare a report responsive to this request IAW the FY20 NDAA requirement, but we do not have an answer at this time. We have, however, identified several of the areas we are studying related to this report in response to Question 5.

**Coast Guard Response to Q2:**

No response

**RFI Set 15, Question 3:** Are SVC/VLC in your Service specifically authorized to represent a victim's best interest in the event the victim lacks the capacity or maturity to make a decision regarding a specific issue involved in the case? If, so, please reference the specific policy or regulation providing for this representation.

**Army Response to Q3:**

No, SVC are not authorized to represent a victim's best interest in the event the victim lacks the capacity or maturity to make a decision regarding a specific issue involved in the case. Army SVCs are only authorized to represent the expressed interests of minor clients. Army SVCs are not authorized to serve as de facto GAL or Article 6b, UCMJ, representatives, by representing the minor client's best interests due to a lack of capacity or maturity to make decisions.

**Navy Response to Q3:**

Navy VLC are currently authorized to represent a victim's best interest in specific, limited instances. However, it is not the Navy VLC practice to permanently assume the role of representing the best interests of clients as Article 6b representatives. VLC are attorneys whose primary duty is to represent the expressed wishes of their clients. They are trained legal representatives and not trained for extended representation of the interests of incapacitated clients. Where a client may require, due to incapacity, the involvement of another person to represent his or her best interests, it would be advisable to appoint a GAL or an Article 6b representative even when a VLC is representing the client.

Both the Rules of Professional Conduct governing U.S. Navy attorneys and the U.S. Navy VLC Program Manual contemplate U.S. Navy VLC representing clients who lack capacity or maturity to make decisions regarding specific issues in a particular case. See JAGINST 5810.3A, 10-1; JAGINST 5803.1E, Rule 1.14.

The most explicit authorization to act in a client's best interest is found in Chapter X of the VLC Program manual: "... After consultation with the client, and as necessary with the client's parent(s) or guardian (if there appears to be no conflict with the client), FAP or other mental health counselors or therapists, and VLC Program leadership, the VLC shall advocate on the particular issue that the VLC determines to be the best decision for the client under the circumstances..." JAGINST 5810.3A, 10-4(e) [emphasis added]. The Rules of Professional Conduct, rather than impose a duty under such circumstances, contain a permissive rule to act in a client's best interest: "When the covered attorney reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial, or other harm unless action is taken and cannot adequately act in the client's own interest, the covered attorney may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the



client.” JAGINST 5803.1E, Rule 1.14(b). Similarly, Chapter IV of the VLC Program Manual, in addition to authorizing the filing of motions and other “typical” VLC actions on behalf of a client, authorizes VLC to “perform any other lawful, ethical action to represent their clients’ interests.” JAGINST 5810.3A, 6-1(c). The general statutory authority for the VLCP is broad and does not appear to prohibit any such action. See 10 U.S.C. 1044e, b.

Other rules imply that the role of the VLC is not to determine the best interest of a victim who lacks capacity to direct representation, but merely to advocate as their attorney in accordance with the client’s expressed wishes. See JAGINST 5810.3A, 10-4. Similarly, rather than advocate for the best interest of their client, “VLC should consider whether appointment of a civilian guardian ad litem or Article 6b representative is necessary to protect the client’s interests.” *Id.* at 10-9(h). This represents a subtle nuance between the legal representative’s role and responsibility in representing the legal interests of a client based on expressed wishes and desires and the role of an individual charged with representing the best interests of an incapacitated client. VLC certainly can and do explain all options to a client and even perhaps identify options that may be against a client’s best interests but ultimately the VLC is responsible for following the client’s expressed wishes and desires as part of the attorney-client relationship. Where a client is incapacitated, an independent representative should be charged with the authority to represent the best interests of the client, to include working with the VLC regarding legal options available to the client.

Navy VLC are currently authorized to act, absent direction from a client, in a client’s best interest only under limited circumstances. The circumstances contemplated refer to talking to others outside of the attorney-client relationship to see whether further assistance, such as appointment of a GAL, is required. In doing so however, the VLC still must comply with their duty of confidentiality detailed in JAGINST 5803.1E, Rule 1.6. There is no explicit authorization for VLC to step into the role of an Art. 6b representation or GAL. The policy of the Chief of Staff of the Navy VLC Program has been to prohibit VLC from being appointed as Art. 6(b) representatives, instead maintaining a clear role for VLC as legal advocates who represent the expressed desires and wishes of a client except in very limited instances.

### **Marine Corps Response to Q3:**

Marine Corps VLC are generally not authorized to represent what a VLC might believe to be in a victim’s best interests when such representation would be in conflict with the victim’s expressed interests. Rather, in accordance with paragraph 9003 of the Marine Corps VLC Manual, the VLC has an ethical obligation to advocate for the client’s expressed interests. Even if the VLC determines that the client has diminished capacity, provided the client has sufficient considered judgment and capacity to direct VLCO services, the VLC continues to represent the client in a traditional attorney-client relationship. However, a VLC may act in a client’s best interests in very limited circumstances. First, pursuant to Rule 1.14 of JAGINST 5803.1E, when a client’s capacity is diminished by age or other reason, and the VLC believes that a client is at risk of substantial harm, the VLC may take protective action. In doing so, the VLC should be guided, amongst other considerations, by the client’s best interests. Second, in accordance with paragraph 9005.6 of the Marine Corps VLC Manual, when a victim lacks capacity due to his or her young age and there is not a suitable Article 6b representative available, the VLC should inquire thoroughly into all circumstances that a careful and competent person in the client’s position should consider in

determining the client's best decision regarding the issue in question. After consultation with the client, FAP or other mental health counselors or therapists, and VLCO leadership, the VLC shall advocate on the particular issue that the VLC determines to be the best decision for the client under the circumstances. In such an instance, the client shall continue to direct the VLC in all other areas where the client maintains sufficient capacity and considered judgment.

### **Air Force Response to Q3:**

No, the Air Force SVC Program is based upon the express interest of the client. The purpose of the SVC Program is to (1) provide advice: develop victims' understanding of the investigatory and military justice processes; and (2) provide advocacy: protect the rights afforded to victims in the military justice system; and (3) empower victims by removing barriers to their full participation in the military justice process. This requires an SVC to advocate for victims' expressed interests and not per se the "best" interests of the victims. Advocating for the expressed interests of the victim provides the empowerment envisioned by the SVC Program.

Both "expressed interest" and "best interest" have a legal connotation. "Expressed interests" are those interests or decisions made by a client who has demonstrated the capacity to make determinations regarding representation. "Best interests" is generally used in the civil law context in determinations or modifications of child custody, child support, child neglect, or termination of parental rights and to determine what situation will best foster the child's happiness, security, mental health, and emotional development. However, in a criminal context, where SVCs typically operate, "best interest" is more difficult to define and many times the best interests and express interests are often the same. The goal of SVC representation is to empower clients throughout the military justice process and that requires an expressed interest model where the choice is the client's to make.

The Air Force Rules of Professional Conduct places certain obligations upon legal practitioners requiring SVCs to follow an expressed interest model of representation. In accordance with Air Force Rules of Professional Conduct 1.2 (a) "[A] lawyer shall abide by a client's decisions concerning the objectives of representation, and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued." Rule 1.14(a) states, "When a client's capacity to make adequately considered decisions in connection with the representation is diminished, whether because of minority, mental impairment, or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client." Rule 1.14(b) states, "When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial, or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian." These professional conduct rules are consistent with, and modeled after, the American Bar Association's Model Rules of Professional Conduct.

In general, SVCs are provided training and receive advice from senior supervising attorneys regarding the differences between a GAL and the role of an SVC. SVCs are advised to work to

align the child victim's express interests with their best interest to the extent possible. However, the SVC is responsible for representing the express interests of the child client and not what a third party or the SVC believes is the best interest of the child. SVCs are also provided instruction on determining capacity of their clients to direct representation, and resources to utilize when the client's capacity is in question. If necessary, SVCs are authorized to explore the appointment of a GAL in accordance with the Air Force Rules of Professional Responsibility and consultation with leadership and senior attorneys. Ultimately, through the express interest model used by the Air Force SVC Program, victims are empowered to help ensure their full participation in the military justice process.

### **Coast Guard Response to Q3:**

No response.

**RFI Set 15, Question 4:** If SVC/VLC in your Service are authorized to represent the best interests of a minor victim in certain instances of incapacity, please identify any of the victims listed in Question 1 for whom this occurred. If SVC/VLC are not allowed to represent best interests of a minor victim in your Service, please explain what happens when a victim lacks capacity due to his or her young age and there is not a suitable Article 6b representative available. Please identify any of the victims listed in Question 1 for whom this was the case and provide a brief description of the case and how the issue was addressed.

### **Army Response to Q4:**

If an Army SVC believes that his or her minor client lacks capacity due to her or his young age and there is not a suitable Article 6b, UCMJ, representative available, the Army SVC could petition a military judge under Rule for Courts-Martial (RCM) 801(a)(6) to find a suitable person for this role. The Army SVC Program prohibits Army SVCs from serving as Article 6b, UCMJ, representatives.

### **Navy Response to Q4:**

As noted above, Navy VLC are prohibited from serving as an Art. 6(b) representative on behalf of any client. They are, however, as outlined in the rules and regulations noted in the answer to Question 3 above, permitted to represent the best interests of a client in certain specific instances in their role as VLC.

In polling Navy VLC regarding this question, only one case was discovered where no appropriate Article 6b representative could be identified. Although several VLC noted that they observed cases where it may have been challenging to identify an Article 6b representative who the military judge deemed capable of competently representing the best interests of a minor victim, an appropriate and willing candidate was ultimately identified.

The circumstances of the one known Navy case where the military judge could not identify an appropriate Article 6b representative from the victim's family or other known options:

- Case Facts: Minor child (Client), three years old, first made allegations of sexual assault against Active Duty Stepfather (Accused) in [redacted year]. At the time, Client was living with Biological Mom (Mom) and Accused in [redacted location]. Mom reported the allegations to military authorities and an investigation occurred. Ultimately, Client recanted and named a different individual as her assailant.
- Case Facts continued: In [redacted year], Client, now seven years old, was living with Mom, Accused, and three younger siblings (all biological to Accused), in [redacted location]. In the summer of [redacted year], Accused visited Mom while Mom was in the hospital. Accused confessed to the initial allegations and additional instances of sexual abuse against Client. Mom secretly recorded Accused's confession. Mom contacted Accused's chain of command to report allegations of sexual abuse against Client and reported her own allegations of abuse.
- Case Facts continued: In [redacted year], Child Protective Services (CPS) in [redacted location] received several allegations of neglect and abuse of the minor children from several anonymous sources. In December [redacted year], prior to referral of charges, Client and three younger siblings entered foster care due to allegations of neglect against Mom.
- Charges: Charges were preferred in October [redacted year] and referred to a General Court-Martial in December [redacted year]. Accused was charged with two specifications of violating UCMJ, Article 120b (Rape of a Child and Sexual Abuse of a Child), one specification of violating UCMJ, Article 120 (Sexual Assault) committed against Mom, and one specification of violating, UCMJ, Article 92 (Violation of a General Lawful Order). Arraignment occurred on [redacted date] and Military Judge ordered VLC to find an appropriate Article 6b representative (Representative) for Client. Defense objected to Mom as a potential Representative.
- Court-Martial: In July [redacted year], Accused entered a plea of guilty pursuant to a pretrial agreement. Accused was sentenced to 18 years confinement, to be reduced in rank to E-1, and to be discharged from the Naval service with a dishonorable discharge. Pursuant to the pretrial agreement, all confinement in excess of 8 years was suspended for a period of 12 months from the date of the Convening Authority's action. However, if Accused fails to complete the non-violent sex offender treatment program, the Convening Authority may order executed that portion of the adjudged sentence that is suspended up to, but not to exceed 12 years. The adjudged reduction in rank was disapproved. Automatic forfeitures of any pay and allowances were deferred and waived pursuant to Article 58b, UCMJ.
- Need for Article 6b Representative: Client was very articulate, was able to almost fully understand the court-martial process and express her desires. However, a Representative was required in this case because Client was not able to understand the Military Rule of Evidence 513 motion or a plea agreement. In addition, due to CPS involvement, it was extremely difficult for VLC to access any of Client's records, even with Mom's permission. There were numerous reasons why Mom was not appropriate to act as Representative for Client. Mom was a named victim on the

charge sheet, she was no longer a custodial parent, and the Defense was alleging the Client was fabricating the allegations under the specific influence of Mom. No other extended family members were an appropriate choice. Client's Biological Dad was not involved in Client's life and was never identified. Mom's family lived over 2,000 miles away. Accused's parents (Grandparents) lived over 2,000 miles away. Although Grandparents were petitioning for custody of Client, they were very close with Accused and did not believe the allegations by Client. There were concerns that if Grandparents had custody or were appointed as Representative, they would no longer allow access to Client for purposes of the Court-Martial. VLC did not believe it was appropriate to ask Client's school officials or Foster Mom to act as Representative. Client had been enrolled in multiple schools recently and it was unknown if Client would remain with the same Foster Mom for the duration of the Court-Martial proceedings. Additionally, Client had two GALs appointed during the CPS cases. However, both GALs refused to participate with the Criminal Court-Martial.

- **Local GAL:** VLC ultimately found a willing state-approved GAL by "cold-calling" several attorneys listed on the [redacted] State Bar online database. Upon VLC's motion and with no objection from any party, the Court ordered the appointment of the civilian attorney as Client's Representative. The appointing order stated that Representative, Client and VLC all have privileged communications under MRE 502. VLC then filed a request for funding with the Convening Authority. Convening Authority approved funding for Representative for 20 hours of pre-trial work.
- **Critical Conflict Resolved by Representative:** While both VLC and Representative spoke with Client regarding the details of the plea agreement, Representative was able to articulate Client's best interest and positively endorse the plea agreement. When it came to sentencing, Client insisted to VLC she wanted to testify in person, even if the Accused was present. However, Mom wanted Client to testify remotely or have VLC read a statement on Client's behalf. CPS did not want Client to testify in person, suspecting it would be detrimental to her well-being. Foster Mom had general concerns of Client testifying, but did not provide an opinion. Representative was able to determine Client's best interest based on conversations with and recommendations of Client's trauma therapists. Ultimately, Client testified in person at the sentencing hearing.

#### **Marine Corps Response to Q4:**

Marine Corps VLCO is unable to identify any of the victims listed in Question 1 for whom this was the case because the information is privileged. In accordance with paragraph 9008.9 of the VLC Manual and Rule 1.14 of JAGINST 5803.1E, information relating to the representation of a client with diminished capacity is protected as confidential and is generally covered by attorney-client privilege.

#### **Air Force Response to Q4:**

Air Force SVCs are not permitted, pursuant to the Air Force Rules of Professional Conduct, to represent the best interests of a minor victim. In the case where a client has diminished capacity to direct representation, the SVC works with trial counsel to obtain a suitable Article 6b representative in accordance with Air Force Rules of Professional Conduct Rule 1.14(b).<sup>1</sup> In

accordance with the purpose of empowering victims while abiding by their Rules for Professional Responsibility, SVCs are prohibited from being appointed as their client's Article 6b representative.

The Air Force does not have records documenting a case where there was no Article 6b representative appointed because the court could not identify a suitable Article 6b representative. As noted in the [data provided in Question 1], there were occasions where an Article 6b representative was not appointed on the record. It is uncertain why an Article 6b representative was not appointed in those instances. As noted in the attached spreadsheet, a civilian GAL was hired to perform Article 6b representative services in at least one Air Force case.

<sup>1</sup> Rule 1.14(b) states, “When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial, or other harm unless action is taken and cannot adequately act in the client’s own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian.”

#### **Coast Guard Response to Q4:**

The Coast Guard has not had a case involving a victim lacking capacity due to young age where a suitable Article 6b representative was not available. The Coast Guard does not have a policy in place to address a situation where no suitable Article 6b representative is available.

**RFI Set 15, Question 5:** Please provide any additional comments or feedback regarding the congressional proposal to establish a guardian ad litem appointment process for the military that would be helpful for the DAC-IPAD to consider in its evaluation and report to Congress on this issue.

#### **Army Response to Q5:**

The Army SVC Program believes a military guardian ad litem (GAL) program is unnecessary. A minor child’s best interests are already protected and represented through the appointment of a civilian GAL or an Article 6b, UCMJ, representative. Moreover, GAL are typically involved in civilian family law matters such as divorce or child custody. It is unclear how a GAL would operate in the military justice process or why the existing procedures are insufficient.

#### **Navy Response to Q5:**

As stated in the answer to Question 2, the Services are currently gathering information and conducting further study of this issue.

**Marine Corps Response to Q5:**

It would be helpful to consider that the Services are conducting further study of this issue, as required by section 540L of the FY20 NDAA. The DAC-IPAD's experience and expertise regarding civilian prosecutions would also be helpful for the Services in conducting the required study, particularly as it relates to the timing of when guardians ad litem are normally appointed in civilian practice. Knowing what mechanisms most civilian jurisdictions have to appoint guardians ad litem during investigations would be useful information for the Services to have.

**Air Force Response to Q5:**

This response addresses considerations in implementing a GAL function or other modifications to the court-martial and related military processes similar to what exists in 18 U.S.C. § 3509, the Federal Child Victims' and Child Witnesses' Rights statute. It is important to note that military judges and courts-martial have no jurisdiction over civilian minors in civil law matters. Child safety matters are addressed to the extent possible by command and the Air Force Family Advocacy Program (FAP) working in conjunction with local Child Protective Services (CPS) organizations.<sup>2</sup> Commanders may issue Military Protective Orders, No-Contact Orders, or impose pretrial confinement or other restrictions in appropriate situations. In most instances, a GAL within the military justice process would be unable to further resolve the underlying safety and welfare concerns for military dependent children that require civilian judicial involvement. We urge caution inserting a GAL into the military justice process without clearly articulating civil law limitations to that authority.

In the court-martial process there are currently few points where a decision-making authority is explicitly authorized or directed to consider the best interests of a minor or incapacitated victim. However victims and witnesses have certain enumerated privileges and rights, and various government entities have certain obligations towards victims and witnesses throughout the process.<sup>3</sup>

Adding a GAL into the military justice process would add logistical complications on the court-martial. The GAL's schedule would be added to those of the other counsel and witnesses in the case that must be accommodated in order to schedule proceedings. If the GAL is not local, the travel time required to be present could delay hearings that would otherwise be handled on short notice. Insertion of a new process into the court-martial always creates additional grounds for appeal following a conviction.

Establishing a GAL program would create an additional burden for the Services. Ideally, individuals serving as GALs would be attorneys with experience working with children, possess knowledge of relevant psychosocial issues, and have significant military justice experience. Requiring all three areas of expertise would make it difficult to hire suitable local civilian GALs. Analyzing the data for Question 1, no Air Force installation had enough cases involving child victims during the two calendar years to warrant a full-time GAL. Filling GAL requirements from regional billets adds travel expenses, and would reduce the victim's accessibility to the GAL. Although attorneys trained as SVCs might be suitably trained to provide GAL services as a separate function, the current

caseloads coupled with the projected additional domestic violence victim clients with the SVC Program expansion would make it difficult to comply with statutorily capped caseload limitations. Additionally, as previously noted, SVCs are designated to represent the express interests of the victims and a GAL function is counter to the model of representation used by the SVC Program. Coupling these two functions on one individual could create confusion of issues, conflicts of interests, and other unforeseen legal issues, in addition to the noted caseload limitations. With those general considerations as a background, below is a brief description of the roles and authorities for Article 6b representative, Special Victims' Counsel, and GAL (under 18 U.S.C. § 3509). Following the description and authorities of the roles is an outline of observations on how inserting a GAL function could impact the military justice system.

<sup>2</sup> The Air Force Family Advocacy Program (FAP) operate the Child Sexual Maltreatment Response Team (CSMRT), the High Risk for Violence Response Team (HRVRT), and the Central Registry Board (CRB). While representatives of the local Air Force Office of Special Investigations (AFOSI) detachment and an attorney appointed by the Staff Judge Advocate (SJA) are part of these mechanisms, they operate separately from the criminal investigation and military justice process. See AFI 40-301, Family Advocacy Program.

<sup>3</sup> See Article 6b, UCMJ and DoDI 1030.01, Victim Witness Assistance, 23 April 2007.

#### **Coast Guard Response to Q5:**

The Coast Guard has not had a sufficient number of cases where a minor was without a parent or guardian involved in the minor's representation. Consequently, input from the trial judiciary, and potentially the Family Advocacy Program, is needed on this proposal as the military judge would be the real "customer" of the guardian ad litem. Additionally, the potential exists for an SVC/VLC to advocate against the appointment of a guardian ad litem. Such a circumstance could occur when the SVC/VLC represents the expressed interests of a minor client whom that SVC/VLC has determined not to be of diminished capacity. R.C.M. 801(a)(6) states that a military judge is not required to hold a 39(a) hearing before designating a guardian ad litem, but were such a hearing to occur, then an SVC/VLC who had determined that their client is not of diminished capacity would be required to advocate against the designation of a guardian ad litem if that is what the competent minor client expressed.

#### **Requested documents:**

1. All Service policies, regulations, or guidance that address SVC/VLC representation of victims under the age of 18.

#### **Army Response: SVC/VLC Policies**

No Response.



**Navy Response: SVC/VLC Policies**

- A. JAGINST 5810.3 (Navy Victims' Legal Counsel Program)
- B. JAGINST 5803.1E (Rules of Practice)

**Marine Corps Response: SVC/VLC Policies**

- A. MCO 5800.16 (Legal Support and Administration Manual) – Volume 4, Victims' Legal Counsel Organization
- B. Marine Corps Victims' Legal Counsel Manual
- C. JAGINST 5803.1E (Rules of Practice)

**Air Force Response: SVC/VLC Policies**

- 2a – AFI 51-201, Administration of Military Justice, dated, 30 Oct 19  
Air Force Guidance Memorandum Excerpts  
Chapter 16, Victim and Witness Assistance  
Section 22B, Special Victim Investigation and Prosecution Capability (SVIP)
- 2b – Uniform Rules of Practice Before Air Force Courts-Martial, dated, 1 Oct 19
- 2c – AFI 51-110, Professional Responsibility Program, dated, 11 Dec 18  
Attachment 2, Air Force Rules of Professional Conduct

**Coast Guard Response: SVC/VLC Policies**

- Commandant Instruction 5891.5 (Special Victims' Counsel Program)

2. All Service policies, regulations, or guidance that address guardians ad litem.

**Army Response: Guardian ad Litem Policies**

Army Regulation (AR) Family Advocacy Program (FAP) 608-18 states a Guardian Ad Litem is a guardian appointed by a court to represent the interests of a child in a child protective case. A guardian ad litem is considered an extension of the court and helps the court decide what is in the best interests of the child.

**Background**

The Federal Child Abuse Prevention and Treatment Act (CAPTA) requires each state to have provisions or procedures for requiring certain individual to report known child abuse and neglect, 42 U.S.C § 5106a(b)(2)(B)(i).

Installation FAP and covered professionals are required by law, NDAA FY 17 and AR 608-18 to report any suspected incidents of abuse (physical, sexual and emotional) and/or neglect of a child to the local Child Protective Service (CPS) agency.

NDAA FY 17 mandates that:

1. All allegations of child abuse in military Families and homes be reported immediately to the FAP on the installation to which the concerned service members is assigned;
2. Individual within the chain of command of a service member will report credible information, which may include a reasonable belief that a child in the Family or home of the service member has suffered an incident of child abuse and/or child neglect to the installation FAP; and
3. Covered professionals are required to report any suspected incidents of abuse and/or neglect of a child in the Family or home of a service member to the local CPS.

AR 608-18 also states, every report of child abuse should be reported to military law enforcement.

If a child is a victim of a crime to include a sexual assault the incident should be reported to the appropriate authorities, military law enforcement, civilian law enforcement and CPS.

Furthermore, NDAA FY 19 states report or allegation of juvenile-on-juvenile problematic sexual behavior on a military installation shall be reviewed by FAP, reported to the appropriate authorities and FAP should conduct a multi-faceted multidisciplinary review (MDT).

#### **Navy Response: Guardian ad Litem Policies**

- A. Navy-Marine Corps Trial Judiciary Uniform Rules of Practice
- B. JAGINST 5803.1E (Rules of Practice)

#### **Marine Corps Response: Guardian ad Litem Policies**

- A. Navy-Marine Corps Trial Judiciary Uniform Rules of Practice

#### **Air Force Response: Guardian ad Litem Policies**

2a – AFI 51-201, Administration of Military Justice, dated, 30 Oct 19  
Air Force Guidance Memorandum Excerpts  
Chapter 16, Victim and Witness Assistance  
Section 22B, Special Victim Investigation and Prosecution Capability (SVIP)

2b – Uniform Rules of Practice Before Air Force Courts-Martial, dated, 1 Oct 19

2c – AFI 51-110, Professional Responsibility Program, dated, 11 Dec 18

## Attachment 2, Air Force Rules of Professional Conduct

**Coast Guard Response: Guardian ad Litem Policies**

No Response

3. MOAs/MOUs between the Services and State/Local Child Protection Service organizations or other organizations that address the appointment of guardians ad litem for victims under the age of 18 in criminal cases involving Service member subjects. If there are more than five such MOAs/MOUs in your Service, please provide five as a representative sample. If there are fewer than five, please provide all relevant MOA/MOUs.

**Army Response: MOAs/MOUs**

DCS, G-9 - Army FAP Response: Installation FAPs are expected to develop Memorandum of Agreements (MOAs) with Child Protective Services (CPS) to coordinate, collaborate and respond to allegations or reports that a child is a victim of child abuse and/or child neglect IAW AR FAP 608-18.

The Department of the Army is in the process of establishing an MOU with the National Children's Alliance to ensure that a coordinated community response is provided to children and their Families who are impacted by incidents of child abuse, child neglect and Problematic Sexual Behavior of Children and Youth (PSB-CY). The purpose is to provide trauma informed services, crisis intervention, support and to address the needs of children and Families.

**Army FAP Source Documents Regarding MOUs**

AR FAP 608-18, 1-8, a, (9) Garrison Commanders will direct the development of a Memorandum of Agreement (MOA) whenever possible with Child Protective Services (CPS) and other authorities in the civilian jurisdiction(s) adjoining the Army installation to include law enforcement agencies and courts involved in domestic violence.

DoDM 6400.01 Volume 1, 1 July 2019, a. Family Advocacy Committee, PS 3, Monitoring Coordinated Community Response and Risk Management Plan. The Family Advocacy Committee (FAC) monitors the implementation of the coordinated community response and risk management plan. Such monitoring includes a review of the development, signing and implementation of formal memorandums of understand MOUs among military activities and between military activities, civilian authorities and agencies to address child abuse and domestic abuse.

PS 4, Roles, Functions and Responsibilities. The FAC must monitor collaboration between all installation agencies involved with the coordinated community response to child abuse, domestic abuse in their respective roles functions and responsibilities as expressed in DoDI 6400.06 and Service FAP headquarters implementing policies and guidance.

PS 5, MOUs. The FAC must verify that formal MOUs are established as appropriate with counterparts in the local civilian community to improve coordination on trauma-informed

assessment, care and support, child abuse and domestic abuse investigations, PSB-CY assessment and intervention, emergency removal of children from homes, fatalities, criminal investigations and arrests.

**Navy Response: MOAs/MOUs**

We received responses from two RLSOs concerning MOAs/MOUs. The remaining RLSO located in the continental United States indicated they were unaware of any agreements. Attachment 3 contains a memorandum of understanding dated July 11, 1988, and a draft of a new memorandum of understanding between Naval Station Great Lakes and the Illinois Department of Children and Family Services (DCFS). Also attached is an MOU between Navy Region West and Washington State Department of Social and Health Services' Children's Administration, Child Protective Services Division (DSHS/CPS). These memoranda address joint child abuse investigations, jurisdiction over these cases, sharing of information and other services but do not specifically address the appointment of guardians ad litem.

*Navy Example MOUs not releasable by DAC-IPAD*

**Marine Corps Response: MOAs/MOUs**

A. None.

**Air Force Response: MOAs/MOUs**

Example MOAs/MOUs from Air Force installations

- 3a – Fairchild AFB, WA
- 3b – Langley AFB, VA Ex. 1
- 3c – Langley AFB, VA Ex. 2
- 3d – Laughlin AFB, TX
- 3e – Schriever AFB, CO

*Air Force Example MOUs not releasable by DAC-IPAD*

**Coast Guard Response: MOAs/MOUs**

No response.

**Request for Information from the Family Advocacy Programs  
of the Military Services**  
**RFI Set 16, Questions 1-5, Documents 1-3**  
**Topic: Appointment of Guardians ad Litem for Minor Victims  
of Sex-Related Offenses Date of Request: March 19, 2020**

**I. Purpose**

- A. The DAC-IPAD is a federal advisory committee established by the Secretary of Defense pursuant to section 546 of the National Defense Authorization Act for Fiscal Year 2015 (Public Law 113-291), as amended.
- B. The mission of the Committee is to advise the Secretary of Defense on the investigation, prosecution, and defense of allegations of rape, forcible sodomy, sexual assault, and other sexual misconduct involving members of the Armed Forces.
- C. The DAC-IPAD requests the below information to facilitate its required review of cases involving allegations of sexual misconduct on an ongoing basis for purposes of providing advice to the Secretary of Defense.

**II. Summary of Requested Response Dates**

Suspense	Question(s)	Proponent
<b>April 22, 2020</b>	Questions 1-5 and Documents 1-3	Provide narrative responses regarding the need for, and feasibility of, the appointment of guardians ad litem for minor victims of sex-related offenses; the feasibility of developing and maintaining a guardian ad litem program within FAP and/or expanding FAP services OCONUS; and the requested policies, regulations, and guidance.

**III. Narrative Questions for Family Advocacy Programs Regarding Guardians ad Litem for Minor Victims**

**Background:**

U.S. House of Representatives Report 116-120, part 1, (2019), accompanying H.R. 2500, contains a request for the DAC-IPAD to evaluate need for, and feasibility of, the appointment of guardians ad litem for minor victims of sex-related offenses. Specifically, Section 421 of the House Report states the following:

***Appointment of Guardian ad Litem for Minor Victims***

*The [Armed Services Committee of the U.S. House of Representatives] is concerned for the welfare of minor, military dependents who are victims of an*

*alleged sex-related offense. The committee acknowledges the Department of Defense's continued efforts to implement services in support of service members who are victims of sexual assault and further, to expand some of these services to dependents who are victims. However, the committee remains concerned that there is not an adequate mechanism within the military court- martial process to represent the best interests of minor victims following an alleged sex-related offense.*

*Therefore, not later than 180 days after the date of the enactment of this Act, the Defense Advisory Committee on Investigation, Prosecution, and Defense of Sexual Assault in the Armed Forces shall submit to the Committees on the Armed Services of the Senate and the House of Representatives a report that evaluates the need for, and the feasibility of, establishing a process under which a guardian ad litem may be appointed to represent the interests of a victim of an alleged sex- related offense (as that term is defined in section 1044e(g) of title 10, United States Code) who has not attained the age of 18 years.*

### **Questions:**

Question 1: For all reports or allegations involving an alleged sex-related offense received by FAP (as that term is defined in section 1044e(g) of title 10, United States Code), against a minor victim, and closed in the last two calendar years (2018, 2019): please provide a list, by year, of all alleged victims (represent each victim by a number, starting with 1) who were under the age of 18 at the time of the sex-related offense and for which the alleged offender was a Service member subject to the UCMJ.

For each victim identified, please document:

- a. The age of the victim at the time of the offense;
- b. Whether the victim was CONUS or OCONUS at the time of the offense;
- c. Whether a Memorandum of Agreement (MOA) with civilian Child Protective Services (CPS) existed at the installation where the victim lived;
- d. Whether a guardian ad litem was appointed, and if so, how and by whom;
- e. Whether FAP assigned another liaison or assistant to the victim who was trained in child services;
- f. Whether the child was referred to a civilian agency for services and treatment.

Question 2: Is there a policy or process for the Family Advocacy Program to obtain a guardian ad litem to represent the interests of a minor victim of an alleged sex-related offense

described above (or any other offenses)? If FAP has a policy to appoint a guardian ad litem in a criminal case, please characterize the effectiveness of the appointment process. What, if any, challenges face the program, such as funding, quality, or consistency? Note, this question addresses criminal cases and is different from the appointment of a guardian ad litem in a civil proceeding, such as a child protective hearing or custody dispute.

Question 3: Would it be beneficial and feasible to create a guardian ad litem program within the Family Advocacy Program to represent the interests of a minor victim of an alleged sex-related offense described above (or any other offenses), instead of relying on MOUs to partner with civilian guardian ad litem programs?

Question 4: Would it be beneficial and feasible to expand Family Advocacy Program services OCONUS to serve victims of child abuse and neglect who are dependents overseas? Or does this already exist in your Service?

Question 5: Please provide any additional comments or feedback regarding the need for a guardian ad litem for minor victims or additional services for child victims of sex-related offenses that would be helpful for the DAC-IPAD to consider in its evaluation and report to Congress on this issue.

#### **IV. Request for Policies, Regulations, and Other Written Documents Related to Guardians ad Litem Appointed for Minor Victims**

##### **Requested documents:**

1. All FAP policies, regulations, or guidance that address guardian ad litem representation of victims under the age of 18.
2. MOAs/MOUs between FAP and State/Local Child Protection Service organizations or other organizations that address the appointment of guardians ad litem for victims under the age of 18 in criminal cases involving Service member subjects. If there are more than five such MOAs/MOUs, please provide five as a representative sample. If there are fewer than five, please provide all relevant MOA/MOUs.
3. Training materials and FAP policies, regulations, or guidance relating to FAP services and treatment for child victims of alleged sex-related offenses.

### **RFI Set 16 Military Service Responses**

#### **Topic: Appointment of Guardians ad Litem for Minor Victims of Sex-Related Offenses**

**RFI Set 16 Question 1:** For all reports or allegations involving an alleged sex-related offense received by FAP (as that term is defined in section 1044e(g) of title 10, United States Code), against a minor victim, and closed in the last two calendar years (2018, 2019): please provide a list, by year, of all alleged victims (represent each victim by a number, starting with 1) who were under the age of 18 at the time of the sex-related offense and for which the alleged offender was a Service member subject to the UCMJ.

For each victim identified, please document:

- a. The age of the victim at the time of the offense;
- b. Whether the victim was CONUS or OCONUS at the time of the offense;
- c. Whether a Memorandum of Agreement (MOA) with civilian Child Protective Services (CPS) existed at the installation where the victim lived;
- d. Whether a guardian ad litem was appointed, and if so, how and by whom;
- e. Whether FAP assigned another liaison or assistant to the victim who was trained in child services;
- f. Whether the child was referred to a civilian agency for services and treatment.

**Military Service responses to Question 1 and all of RFI Set 16 are available online at <https://www.dacipad.whs.mil>**

**RFI Set 16 Question 2:** Is there a policy or process for the FAP to obtain a Guardian Ad Litem to represent the interests of a minor victim of an alleged sex-related offense described above?

#### **Army FAP Response to Q2: Guardian ad Litem Policy**

FAP policy [Army Regulation (AR) 608-18, The Army Family Advocacy Program] does not include a provision for Family Advocacy Program staff to obtain a Guardian Ad Litem for minor victims of sex-related offenses that occur in either the Continental United States (CONUS) or Outside the Continental United States (OCONUS). FAP Policy defines a Guardian Ad Litem as



a guardian appointed by a court to represent the interests of a child in a child protective case. FAP policy maintains a provision for FAP staff to provide all available records to a Guardian Ad Litem when appointed by a court.

### **Navy FAP Response to Q2: Guardian ad Litem Policy**

The Family Advocacy Program (FAP) is a treatment and assessment program and not directly linked to the judicial processing of cases of child sexual offense. The FAP does not have a policy or process that provides any guardian *ad litem* (GAL) services to represent the interests of a minor victim of an alleged sex-related offense or any other offense. FAP does not ensure that a GAL is assigned to any FAP cases as the FAP is not a process attached to the civil or criminal court proceedings.

To ensure support of victims, the linkage between installation services and off-post resources is paramount. This includes mandated reporting to the local child protective agency, linking with and coordinating services with the Navy's Victim Legal Counsel and providing victim advocacy to the non-offending parent. Coordination with the Navy's legal resources is intertwined for most FAP processes

### **Marine Corps FAP Response to Q2: Guardian ad Litem Policy**

There is not a policy or process for FAP to obtain a guardian ad litem nor is there the authority to appoint a guardian ad litem. For further details, please contact HQMC Judge Advocate Division (JAD).

### **Air Force FAP Response to Q2: Guardian ad Litem Policy**

The Air Force FAP has not established a policy or process to directly coordinate the services of guardians ad litem (GALs) to represent the interests of a minor victim of an alleged sex-related offense (or any other offense). The FAP makes notification to law enforcement, investigatory agencies, and legal authorities when reports of child sexual abuse are received. In most cases, initial response will be managed through the use of a multidisciplinary team established for this purpose, known as the Child Sexual Maltreatment Response Team (CSMRT). These entities serve in mutually supportive roles, though they operate in parallel and with separate, distinct purposes.

The FAP offers safety planning, clinical intervention, and support to victims and support to non-offending caregivers. As the described GAL would work in the military justice or other criminal system, it would be outside the scope of FAP policy to direct such activities. The most similar service offered through FAP policy would be access to a Domestic Abuse Victim Advocate (DAVA), who offers support, court accompaniment, and advocacy for adult survivors of domestic abuse, to include intimate partner sexual assault. In child sexual abuse cases, a FAP DAVA may be able to offer support and information to non-offending parents or caregivers, but

they would not focus their expertise directly on the child victim. Air Force FAP would defer to the court system regarding the appropriateness and appointment of a GAL.

### **Coast Guard FAP Response to Q2: Guardian ad Litem Policy**

The Family Advocacy Program does not have a policy in place to appoint a guardian ad litem to represent the interests of a minor victim of an alleged sex-related offense described above or any other offenses. Currently, the CG utilizes the SVC to represent the best interest of a minor victim of sexual assault. In addition, the Military Judge has the discretion to designate a person to assume the victim's rights under the UCMJ.

**RFI Set 16 Question 3:** Would it be beneficial and feasible to create a Guardian Ad Litem program within the FAP to represent the interests of a minor victim of an alleged sex-related offense, instead of relying on MOUs to partner with civilian Guardian Ad Litem programs?

### **Army FAP Response to Q3: Need for Guardian ad Litem program**

It would not be feasible for the Army to create a Guardian Ad Litem program within the Army's FAP program in the absence of DoD Policy. The current DoD Policy for victim advocacy services related to FAP [Department of Defense Instruction (DoDI) 6400.06, Domestic Abuse Involving DoD Military and Certain Affiliated Personnel, Incorporating Change 4, May 26, 2017] establishes limited provisions for domestic abuse advocacy services under the DoD definition of domestic abuse.

Recent changes to DoD standards [Department of Defense Manual (DoDM) 6400.01 volume 1, Family Advocacy Program (FAP): FAP Standards, July 22, 2019] for victim advocacy services specific to problematic sexual behavior in children and youth (PSB-CY) establishes minimum qualification standards for FAP victim advocates in support of children impacted by PSB-CY. These standards provide minimum qualifications for child victim advocates however, these standards do not reflect Guardian Ad Litem services.

Due to the limited instances where it was determined that a Guardian Ad Litem was required it would not be beneficial to maintain service-specific Guardian Ad Litem capabilities. This requirement is fully met by local community agencies.

### **Navy FAP Response to Q3: Need for Guardian ad Litem program**

Under the current mission of reporting, assessment and treatment, FAP is not the most feasible program to implement a GAL framework. While FAP does have trained child therapists and FAP Victim Advocates to support victims of abuse, these individuals are not trained to perform legal advocacy/GAL services. The GAL program represents the child's best interests in every case of

abuse or neglect incidents that results in a judicial proceeding. For that reason, if consideration is being given to where to expand a program to support military child victims, it should be considered that the military legal services support this initiative.

Adding a GAL component to the FAP is also not beneficial because it would expand the scope beyond the current congressional mandate and would stretch the role of FAP from advocacy and support to representation in legal proceedings, which is outside of our scope of practice.

To avoid a duplication of services there is value in the military justice system coordinating and establishing MOUs with the civilian legal system and local family court systems to ensure that military children are adequately represented in the judicial process. Each state has statutes that specify when the court must appoint a GAL representative for child abuse and neglect cases. The civilian justice system specifies the required certification and expertise necessary to serve as a GAL.

The FAP is a treatment and assessment program and not related to the judicial process. Within FAP, the non-offending parent can obtain victim advocacy services from a FAP Victim Advocate. These services are advocacy based and do not have the same responsibilities as a GAL. FAP VAs provide advocacy services to non-offending parents, they do not represent the child directly.

#### **Marine Corps FAP Response to Q3: Need for Guardian ad Litem program**

In accordance with DoDI 6400.01, FAP promotes healthy relationship development through prevention, identification, assessment, advocacy, reporting, and response to child abuse, domestic abuse, and problematic sexual behaviors in children and youth. The role of guardian ad litem is outside the scope of FAP and could create a conflict of interest. FAP is not investigative and personnel are not required to have a legal background. FAP is available to provide subject matter expertise on child abuse.

#### **Air Force FAP Response to Q3: Need for Guardian ad Litem program**

No. The Air Force FAP acknowledges that while there may be value in having a military GAL program, creating such a position within the FAP would blur the lines between the FAP role of safety planning, providing support, and offering treatment and the role of investigatory and legal entities. Furthermore, the number of child sexual abuse cases referred to the FAP, per base, would be too small to justify a position dedicated to this function at the installation level.

#### **Coast Guard FAP Response to Q3: Need for Guardian ad Litem program**

Currently, the number of minor victims requiring independent representation is low. Creating an entire GAL program would not offer any additional benefit. If needed, USCG can provide a

representative to serve in a capacity similar to that of a guardian ad litem in those cases were it would be appropriate.

**Set 16 Question 4:** Would it be beneficial and feasible to expand Family Advocacy Program services OCONUS to serve victims of child abuse and neglect who are dependents overseas? Or does this already exist in your Service?

**Army FAP Response to Q4: OCONUS Needs**

No response provided

**Navy FAP Response to Q4: OCONUS Needs**

Family Advocacy Program serves to support victims in OCONUS and CONUS locations. Victims of child abuse and neglect who are OCONUS are eligible for FAP services.

**Marine Corps FAP Response to Q4: OCONUS Needs**

FAP provides counseling services to victims of child abuse and neglect, counseling services to parents, and victim advocacy services to non-abusing parents CONUS and OCONUS. Numerous prevention services are also available to promote protective factors and reduce risk factors associated with child abuse and neglect. These services include home visitation, parenting classes, Baby Boot Camp, and play groups. FAP personnel can provide subject matter expertise on child abuse to requesting individuals, such as an appointed guardians ad litem.

**Air Force FAP Response to Q4: OCONUS Needs**

Serving victims of child abuse and neglect who are dependents is already part of Air Force FAP's mandate, whether stateside or overseas. In OCONUS locations, not having the depth and breadth of community support services as that found within the United States can make FAP operations more challenging. However, the Air Force FAP mitigates this challenge by partnering with the personnel system and employing various family relocation options to move impacted families to more appropriate locations to address their needs. For example, lack of an appropriate CPS structure has historically been sufficient justification to grant a Humanitarian Reassignment from an OCONUS location. It would not be feasible to try to replicate such structures at an overseas installation.

**Coast Guard FAP Response to Q4: OCONUS Needs**

The USCG has onsite Family Advocacy services in certain OCONUS locations. In OCONUS locations where the USCG does not have a FAP, the local OCONUS DoD FAP or DOS FAP will provide initial services to CG family members, then work collaboratively with a USCG FAP to provide ongoing services.

**RFI Set 16 Question 5:** Please provide any additional comments or feedback regarding the need for a guardian ad litem for minor victims or additional services for child victims of sex-related offenses that would be helpful for the DAC-IPAD to consider in its evaluation and report to Congress on this issue.

**Army FAP Response to Q5: Additional Comments**

No response provided.

**Navy FAP Response to Q5: Additional Comments**

Additional services for child victims are identified below:

- NAVPERSCOM (PERS-8) Control Flag

A flag placed in the personnel data system by NAVPERSCOM (PERS-8) for all suspected child sexual abuse cases. This flag may restrict transfers, reenlistments, advancements and/or promotions of active duty offenders until case resolution. A member is notified of these restrictions by NAVPERSCOM via their CO after the case has been reported. The flag is lifted by NAVPERSCOM (PERS-8) at case resolution and if there are no further restrictions.

- FAP – Child Victim Advocacy Services

Similar to domestic violence situations, FAP Victim Advocates (FAP VA) provide a wide variety of advocacy services to non-offending parents/caregivers of children who have experienced abuse. FAP VA works to help create a safe environment where understanding of the trauma is increased and the resiliency of the victim is protected. Services include providing information and referral services, support, and ongoing safety planning. Because violence often disrupts child development and creates chaos in a family, FAP VAs work with the non-offending parent to receive supportive resources, develop positive life skills, and help create the vision of a strong, safe, and non-violent family. By engaging the non-offending parent and involving them in addressing the impacts of violence on their children, FAP VAs facilitate a strong familial bond and increase the parent understanding of the effects of violence on children.

- Child Therapist

Provides assessment and treatment of children and demonstrated experience working with children exposed to family violence or victims of child abuse. Child Therapists provide specialized and focused services to children, provide immediate intervention and risk assessment IAW best practices in the mental health community and educate and ensure adequate referral and follow-up of any case presenting suicidal or homicidal risk.

- Victims' Legal Counsel (VLC)

The Navy Victims' Legal Counsel Program provides survivors of a sexual offense with a dedicated attorney to help victims understand the investigation and military justice process, guard their legal rights and interests and obtain additional support in accessing resources that may assist in their recovery. This attorney is provided to Navy service members and other eligible victims of sexual offenses at Navy expense. VLC services are provided to children who were allegedly assaulted by an active duty Navy member and not by a dependent/child.

Victims' Legal Counsel complement the care and support victims already receive through Sexual Assault Response Coordinators (SARCs), Family Advocacy Program (FAP) Victim Advocates (VAs) personnel by providing legal counsel and advice on sexual offense reporting options as well as legal support during the investigation and disciplinary processing of those reports.

Navy victims of a sexual offense have an opportunity to discuss their concerns with someone who represents only their interests so that they are prepared to participate more comfortably and effectively in the investigation and processing of their cases. In order to be eligible to receive legal services from the VLC Program, you must be a victim of a sexual offense and otherwise eligible for legal services from a military attorney. Sexual offenses include rape and sexual assault; stalking; rape and sexual assault of a child; and other sexual misconduct noted in Article 120c of the Uniform Code of Military Justice. Victims eligible for VLC services include: Active-Duty and Reserve personnel; other service personnel, retirees when assaulted by an active-duty Navy member; and dependents, including spouses and children, of active-duty Navy members when assaulted by an active-duty member. Certain overseas Department of Navy civilian employees may also be eligible to receive services from the VLC Program.

- Victim and Witness Assistance Program (VWAP)

Victims and witnesses often face adverse effects from crime. Victims and witnesses should not face the effects of crime alone. The Victim Witness Assistance Program (VWAP) ensures victims and witnesses are provided with meaningful assistance once a crime is reported. The VWAP is specifically designed to lessen the effects of crime on victims and witnesses and to help them understand and participate in the military justice process. The VWAP uses a multi-disciplinary approach to assist victims and witnesses. This approach combines the services of law enforcement, family advocacy, medical, legal, and corrections personnel.

VWAP is a support that reduce the trauma, frustration and inconvenience experienced by victims and witnesses of crime; inform victims of their statutory rights; and, assist victim and witness understanding of the military justice process.

When a person suffers direct physical, emotional or pecuniary harm as the result of a commission of a crime in violation of the UCMJ (or in violation of the law of another jurisdiction if any portion of the investigation is conducted primarily by the DoD components), including but not limited military members and their family members; when stationed OCONUS, DoD civilian employees and contractors, and their family members.

Services are available to victims under age 18, incompetent, incapacitated, or deceased (in order of preference): a spouse, legal guardian, parent, child, sibling, other family member, or court designated person.

#### **Marine Corps FAP Response to Q5: Additional Comments**

A formalized system for identifying guardians ad litem would be valuable to children in need of such services. Some states require guardians ad litem to be attorneys; therefore, having a military attorney available to act as a guardian ad litem may be advantageous. Individuals acting as guardians ad litem would benefit from additional training on topics to include child abuse, child development, cultural awareness, interview techniques, and relevant laws and regulations. FAP staff may be able to facilitate some of these trainings that align within FAP's scope of practice and current programming and provide resources to military appointed guardians ad litem. For further details regarding any feedback for a need for guardians ad litem, please contact HQMC JAD.

#### **Air Force FAP Response to Q5: Additional Comments**

Air Force FAP has been in open communication with representatives from the Air Force legal community regarding the utility of a GAL program. Air Force FAP has concerns that assigning an SVC to a child victim of sexual assault may not be a suitable alternative. It would be more appropriate to assign child victims a GAL to make decisions in the best interest of the child. The unique perspectives these positions take with regard to child victims, to include risks and benefits of each, have been discussed. Air Force FAP understands that the Air Force legal community continues to explore this issue and stands by to support them in the study of this matter.

#### **Coast Guard FAP Response to Q5: Additional Comments**

The USCG has sufficient support for minor victims of sexual assault. All allegations of child sexual abuse are reported to the FAP, Child Protective Services, CG Investigative Services and

the Special Victim's Counsel Program. As appropriate, child sexual abuse victims are referred to a Child Advocacy Centers for services. The minor child victim and their family members are provided services, as required and as appropriate. Therefore, guardian ad litem services are not needed at the current time.

**Requested documents:**

1. All FAP policies, regulations, or guidance that address guardian ad litem representation of victims under the age of 18.

**Army FAP Response: FAP Policies**

- a. Army Regulation (AR) 608-18, The Army Family Advocacy Program,
- b. Department of Defense Instruction (DoDI) 6400.06, Domestic Abuse Involving DoD Military and Certain Affiliated Personnel, Incorporating Change 4, May 26, 2017.
- c. Department of Defense Manual (DoDM) 6400.01 volume 1, Family Advocacy Program (FAP): FAP Standards, July 22, 2019.

MEMORANDUM from Clinical Director, Family Advocacy Program Behavioral Health Service Line to Family Advocacy Program, subject: Family Advocacy Program / Case Review Committee (15 November 2017).

**Navy FAP Response: FAP Policies**

Navy Child Advocacy Guide for Victim Advocates (Sep 30, 2017)

OPNAVINST 1752.2B (Apr 25, 2008)

\*There are no FAP policies, regulations or guidance that address guardian ad litem

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**Marine Corps FAP Response: FAP Policies**

FAP does not have policies that address guardian ad litem representation.



**Air Force FAP Response: FAP Policies**

Air Force FAP policy does not directly discuss guardian ad litem representation. Nonetheless, AFI 40-301 provides the basis of Air Force policy guidance regarding the prevention of and response to domestic abuse, child abuse, and neglect.

**Coast Guard FAP Response: FAP Policies**

No response.

2. MOAs/MOUs between FAP and State/Local Child Protection Service organizations or other organizations that address the appointment of guardians ad litem for victims under the age of 18 in criminal cases involving Service member subjects. If there are more than five such MOAs/MOUs, please provide five as a representative sample. If there are fewer than five, please provide all relevant MOA/MOUs.

**Army FAP Response: MOAs/MOUs**

The request for Memorandum's of Understanding specific to Guardian Ad Litem services cannot be provided. The installations do not establish specific MOUs for this support since these services are appointed by the civilian court or child welfare services.

**Navy FAP Response: MOAs/MOUs**

- CNIC has no knowledge of a MOA/MOU that exist to address the appointment of guardian ad litem for victims under the age of 18.
- OSD has a Child Welfare Information Sharing Initiative that they have been working since 2015. OSD is working with state liaisons in all 50 states to create legislation or policy that directs state CPS to inform the closet military FAP of CAN allegations in AD military families. This is not a Navy program but when the Navy is informed of changes to state legislation, the Navy informs the regions. As of Feb 2020, 19 states had developed child protective services to FAP notification policies.
- The Navy is currently collaborating with the Coordinator for Services to Military Families, from the National Child Alliance to develop an MOU between CNIC Counseling, Advocacy and Prevention Program and the NCA. This MOU will serve to guide and support the collaborative relationship between the installation Navy FAP programs and their local Child

Advocacy Centers. This agreement will outline each entity's responsibilities in providing services and support to families impacted by PSB-CY.

#### **Marine Corps FAP Response: MOAs/MOUs**

Installation FAPs have MOUs/MOAs with their local Child Welfare Systems; however, these agreements do not speak to the appointment of guardians ad litem. We recommend reaching out to Marine Corps Installations Command (MCICOM) at HQMC to gather more information about installation level MOUs/MOAs.

#### **Air Force FAP Response: MOAs/MOUs**

Example MOUs from Air Force installations

- Buckley AFB, CO
- Keesler AFB, MS
- Nellis AFB, NV
- Seymour Johnson AFB, NC
- Whiteman AFB, MO

*Example MOUs not releasable by the DAC-IPAD*

#### **Coast Guard FAP Response: MOAs/MOUs**

No response.

3. Training materials and FAP policies, regulations, or guidance relating to FAP services and treatment for child victims of alleged sex-related offenses.

#### **Army FAP Response: Training Materials**

No response.

#### **Navy FAP Response: Training Materials**

- a. Non-offending caregivers guide.
- b. Reporting requirements (OPNAV 1752.2B, Enclosure 7)
- c. The Family Advocacy Command Assistance Team (FACAT):

- The FACAT is DoD’s rapid-response team, which may be deployed when there are numerous child sexual abuse victims in an out-of-home care program. The FACAT provides a coordinated and comprehensive DoD response through the deployment of the members to assist the Military Department upon DoD Component request to address allegations of extra familial child sexual abuse in DoD-sanctioned activities. The FACAT helps local personnel manage the case and provides expert advice and on-site training. It is a multidisciplinary joint-service, or “purple,” team of trained experts brought to an installation to investigate the allegations while ensuring the welfare of child victims, their families, and the military community.
- The FACAT fosters cooperation among the DoD, other Federal agencies, and responsible civilian authorities when addressing allegations of extra familial child sexual abuse in DoD-sanctioned activities. It promotes timely and comprehensive reporting of all incidents covered by DoDI 6400.03. The DOD team is especially useful to ensure adequate and prompt investigation and to avoid the appearance of Service cover-up in highly sensitive cases. Team size may vary from five to seven individuals based on the needs of the installation.

#### **Marine Corps FAP Response: Training Materials**

Counseling services are delivered in accordance with DoDI 6400.01, DoDM 6400.01 V-1, DoDM 6400.01 V-4, and MCO 1754.11. In accordance with MCO 1754.11, Marine Corps FAP clinicians use evidence-based treatment modalities and must be trained in the modality prior to use.

#### **Air Force FAP Response: Training Materials**

The starting point for the Air Force FAP is AFI 40-301. It lays the foundation for the FAP response to the spectrum of domestic abuse and child abuse and neglect incidents, as well as aspects of the coordinated community response. With regard to the specific topic of child sex-related offenses, information regarding the CSMRT found in paragraph 2.2.7 may be of particular interest.

The Air Force FAP maintains a wealth of other training and informational resources, much of which is tied to past basic skills trainings and annual advanced trainings for FAP field staffs. As examples most pertinent to the discussion of child victims of sex-related offenses, current training available for our Air Force DAVA team members can be found within the supporting documents at Attachment 2. These documents include a briefing that outlines how the DAVA is incorporated into the FAP crisis response protocols, the DAVA training workbook, and expanded guidance that allows DAVAs to support non-offending caregivers.

#### **Coast Guard FAP Response: Training Materials**

No response.

**Request for Information**  
**From the Trial Judiciary of the Military Services**  
**RFI Set 17, Questions 1-6, Documents 1-2**  
**Topic: Appointment of Guardians ad Litem for Minor Victims**  
**of Sex-Related Offenses Date of Request: March 19, 2020**

**I. Purpose**

- A. The DAC-IPAD is a federal advisory committee established by the Secretary of Defense pursuant to section 546 of the National Defense Authorization Act for Fiscal Year 2015 (Public Law 113-291), as amended.
- B. The mission of the Committee is to advise the Secretary of Defense on the investigation, prosecution, and defense of allegations of rape, forcible sodomy, sexual assault, and other sexual misconduct involving members of the Armed Forces.
- C. The DAC-IPAD requests the below information to facilitate its required review of cases involving allegations of sexual misconduct on an ongoing basis for purposes of providing advice to the Secretary of Defense.

**II. Summary of Requested Response Dates**

Suspense	Question(s)	Proponent
<b>April 22, 2020</b>	Questions 1-6 and Documents 1-2	Provide narrative responses regarding guardians ad litem for minor victims of sex-related offenses in courts-martial; and the requested policies, regulations, and guidance.

**III. Narrative Questions for Members of the Trial Judiciary Regarding Guardians ad Litem for Minor Victims of Sex-Related Offenses**

**Background:**

U.S. House of Representatives Report 116-120, part 1, (2019), accompanying H.R. 2500, contains a request for the DAC-IPAD to evaluate the need for, and feasibility of, the appointment of guardians ad litem for minor victims of sex-related offenses. Specifically, Section 421 of the House Report states the following:

***Appointment of Guardian ad Litem for Minor Victims***

The [Committee on Armed Services of the U.S. House of Representatives] is concerned for the welfare of minor, military dependents who are victims of an alleged sex-related offense. The committee acknowledges the

Department of Defense's continued efforts to implement services in support of service members who are victims of sexual assault and further, to expand some of these services to dependents who are victims. However, the committee remains concerned that there is not an adequate mechanism within the military court- martial process to represent the best interests of minor victims following an alleged sex-related offense.

Therefore, not later than 180 days after the date of the enactment of this Act, the Defense Advisory Committee on Investigation, Prosecution, and Defense of Sexual Assault in the Armed Forces shall submit to the Committees on the Armed Services of the Senate and the House of Representatives a report that evaluates the need for, and the feasibility of, establishing a process under which a guardian ad litem may be appointed to represent the interests of a victim of an alleged sex-related offense (as that term is defined in section 1044e(g) of title 10, United States Code) who has not attained the age of 18 years.

**Request for Information from Trial Judges: For the following questions, please respond generically, without identifying specific cases or individual names. This request does not seek commentary on policy proposals. All answers can be provided as narrative responses.**

- Question 1: In your experience as a trial judge, please describe any situations in which a guardian ad litem (GAL) represented a child victim of a sex-related offense, and include your assessment of the GAL's role in the process. In such cases, please explain whether the GAL was appointed as the Article 6b representative in the case, and whether the child victim also was represented by legal counsel/SVC/VLC.
- Question 2: In your experience as a trial judge, please describe your assessment of the role of the legal counsel/SVC/VLC assigned to a child victim of a sex-related offense in a court-martial and whether there were challenges that the legal counsel/SVC/VLC could not address.
- Question 3: In your experience as a trial judge, please describe any trial situations or scenarios in which it would be helpful or relevant to consider a child victim's "best interest" rather than the "expressed interest" of the child. Please identify any characteristics of the situation informing this answer, such as the age of the victim at the time of the offense, whether the child victim was represented by legal counsel/SVC/VLC, and any other factors.
- Question 4: In your experience as a trial judge, please describe any situations in a court-martial proceeding in which a child victim's "expressed interest" conflicted with a "best interest of the child" consideration.
- Question 5: Can you suggest a situation in which three separate representatives for a child victim

of a sex-related offense would be helpful in the court-martial process: a legal counsel/SVC/VLC, an Article 6b representative, and a GAL?

Question 6: Please provide any additional comments or feedback regarding the role of a guardian ad litem for minor victims of sex-related offenses that would be helpful for the DAC-IPAD to consider in its evaluation and report to Congress on this issue.

#### **IV. Request for Policies, Regulations, and Other Written Documents Related to Guardians ad Litem Appointed for Minor Victims**

##### **Requested documents:**

1. All trial judiciary guidance, training materials, or rules relating to treatment of or protections for child victims or witnesses in courts-martial from all sources, including the Service Judge Advocate General's Schools, National Judicial College, and materials originating within the Trial Judiciary.
2. All trial judiciary guidance, training materials, or rules that address guardian ad litem representation or involvement for victims or witnesses under the age of 18 in courts-martial from all sources, including the Service Judge Advocate Schools, National Judicial College, and materials originating within the Trial Judiciary.

### **RFI Set 17 Military Service Responses**

#### **Topic: Appointment of Guardians ad Litem for Minor Victims of Sex-Related Offenses**

**RFI Set 17 Question 1:** In your experience as a trial judge, please describe any situations in which a guardian ad litem (GAL) represented a child victim of a sex-related offense, and include your assessment of the GAL's role in the process. In such cases, please explain whether the GAL was appointed as the Article 6b representative in the case, and whether the child victim also was represented by legal counsel/SVC/VLC.

#### **Army Trial Judiciary Response to Q1: Assessment of Guardians ad Litem**

Excel Spreadsheet, Art 6b Report (2020), submitted by the Criminal Law Division, Office of The Judge Advocate General in response to RFI 15 indicates that the trial judiciary was only aware of the appointment of one GAL in an Army court-martial proceeding. As a single appointment prevents us from protecting the anonymity of that individual, the Army Trial Judiciary is precluded by the Code of Judicial Conduct for Army Trial and Appellate Judges, 16 May 2008 (Code of Conduct) from assessing the performance of the GAL.

#### **Navy-Marine Corps Trial Judiciary Response to Q1: Assessment of Guardians ad Litem**

It is extremely rare for a GAL of a child victim to enter an appearance in a Department of the Navy court-martial. I never presided over a case in which a GAL entered an appearance or where I directed Trial Counsel or the VLC to identify a GAL for appointment. I am only aware of one case in which the appointment of a GAL was a litigated issue, and the circumstances of that case are fully set forth in Colonel David Bligh's letter to you of March 12, 2020. There was a VLC in that case in addition to the GAL.

#### **Air Force Trial Judiciary Response to Q1: Assessment of Guardians ad Litem**

The Air Force Trial Judiciary defers to the Air Force military justice division (AFLOA/JAJM) and responses of the United States Air Force in RFI Set 15 (Attachment 1 hereto) for descriptions of situations in which a guardian ad litem represented a child victim of a sex-related offense, and for explanations of possible involvement by an Article 6b representative, a guardian ad litem, or legal counsel/SVC/VLC.

Furthermore, mindful of the requirements of the Air Force Uniform Code of Judicial Conduct (Attachment 2 hereto), and given the limited number of cases involving GALs, the trial judges are not able to provide an assessment of each respective GAL's performance as it would reflect directly on those particular GALs and could potentially invade the judge's deliberative process as to those



particular cases. Furthermore, this would potentially violate the Air Force Uniform Code of Judicial Conduct, which is modeled on the ABA Model Code of Judicial Conduct (August 1990), specifically Canon 1A, the commentary to which states that “Congress has created a military judiciary which is intended to be independent. Accordingly, judges must recognize and safeguard against any affront to the independence of a court, such as attempted unlawful influence by a commander or other superior, or invasion of the deliberative process.” The commentary goes on to state that “[m]ilitary judges must ensure that their conduct comports, and is perceived to comport, with the principle of judicial independence and integrity. That principle includes maintaining the confidentiality of the deliberative process and the invocation, when necessary, of qualified judicial privilege.”

### **Coast Guard Trial Judiciary Response to Q1: Assessment of Guardians ad Litem**

The Coast Guard Trial Judiciary defers to the Coast Guard Office of Military Justice (CG-LMJ) and responses of the United States Coast Guard in RFI Set 15 (Attachment 1 hereto) for descriptions of situations in which a guardian ad litem represented a child victim of a sex-related offense, and for explanations of possible involvement by an Article 6b representative, a guardian ad litem, or legal counsel/SVC/VLC.

Furthermore, mindful of the requirements of the Code of Judicial Conduct for Coast Guard Trial and Appellate Judges (Enclosure (6) to Coast Guard Legal Professional Responsibility Program, COMDTINST M5800.1. Included as attachment 2 hereto), and given the limited number of cases involving GALs, the trial judges are not able to provide an assessment of each respective GAL’s performance as it would reflect directly on those particular GALs and could potentially invade the judge’s deliberative process as to those particular cases. Furthermore, this would potentially violate the Code of Judicial Conduct, which is modeled on the ABA Model Code of Judicial Conduct (August 1990), specifically Canon 1A, the commentary to which states that “Congress has created a military judiciary which is intended to be independent. Accordingly, judges must recognize and safeguard against any affront to the independence of a court, such as attempted unlawful influence by a commander or other superior, or invasion of the deliberative process.” The commentary goes on to state that “[m]ilitary judges must ensure that their conduct comports, and is perceived to comport, with the principle of judicial independence and integrity. That principle includes maintaining the confidentiality of the deliberative process and the invocation, when necessary, of qualified judicial privilege.”

**RFI Set 17 Question 2:** In your experience as a trial judge, please describe your assessment of the role of the legal counsel/SVC/VLC assigned to a child victim of a sex-related offense in a court martial and whether there were challenges that the legal counsel/SVC/VLC could not address.

### **Army Trial Judiciary Response to Q2: Assessment of SVC/VLC Role**

The Trial Judiciary, governed by the requirements of the Code of Conduct, defers any assessment of current policy and recommendations to the Criminal Law Division of The Office of The Judge Advocate General.

### **Navy-Marine Corps Trial Judiciary Response to Q2: Assessment of SVC/VLC Role**

The VLCs I observed in court were always professional. I never observed a challenge the VLC could not address. I presumed that each VLC was attempting to effectuate their client's expressed interest, unless the client was too young to express an interest, in which case I presumed that the Article 6b Representative and VLC were acting in the minor child's best interest. I never observed anything that contradicted that assumption.

### **Air Force Trial Judiciary Response to Q2: Assessment of SVC/VLC Role**

Air Force trial judges cannot provide an assessment of any child victim's legal counsel/SVC/VLC or to identify any challenges they could not address. This would again potentially violate Canon 1A cited above. Additionally, to the extent such an assessment would also be used to promote or effect legislative changes in the rights of representation for victims, it could also implicate Canon 2B which states that a judge shall not lend the prestige of judicial office to advance the private interests of the judge or others; Canon 3B(2) which states that a judge shall be faithful to the law and that a judge shall not be swayed by partisan interests, public clamor, or fear of criticism; Canon 3B(5), the commentary to which states that a judge must perform judicial duties impartially and fairly; Canon 3B(9) which states that judge shall not, while a proceeding is pending or impending in any court, make any public comment that might reasonably be expected to affect its outcome or impair its fairness or make any nonpublic comment that might substantially interfere with a fair trial; Canon 4A, which states that a judge shall conduct the judge's extrajudicial activities so as to minimize the risk of conflict with judicial obligations; and Canon 4C which states that a judge shall not appear at a public hearing before, or otherwise consult with, an executive or legislative body or official except on matters concerning the law, the legal system or the administration of justice or except when acting pro se in a matter involving the judge or the judge's interests.

### **Coast Guard Trial Judiciary Response to Q2: Assessment of SVC/VLC Role**

Coast Guard trial judges are unwilling to provide an assessment of any child victim's legal counsel/SVC/VLC or to identify any challenges they could not address. This would again potentially violate Canon 1A cited above. Additionally, to the extent such an assessment would also be used to promote or effect legislative changes in the rights of representation for victims, it could also implicate Canon 2B which states that a judge shall not lend the prestige of judicial office to advance the private interests of the judge or others; Canon 3B(2) which states that a judge shall be faithful to the law and that a judge shall not be swayed by partisan interests, public clamor, or fear of criticism; Canon 3B(5), the commentary to which states that a judge must perform judicial duties impartially and fairly; Canon 3B(9) which states that judge shall not, while a proceeding is pending or impending in any court, make any public comment that might reasonably be expected to affect its outcome or impair its fairness or make any nonpublic comment that might substantially interfere with a fair trial; Canon 4A, which states that a judge shall conduct the judge's extrajudicial activities so as to minimize the risk of conflict with judicial obligations; and Canon 4C which states that a judge shall not appear at a public hearing before, or otherwise consult with, an executive or

legislative body or official except on matters concerning the law, the legal system or the administration of justice or except when acting pro se in a matter involving the judge or the judge's interests.

**RFI Set 17 Question 3:** In your experience as a trial judge, please describe any trial situations or scenarios in which it would be helpful or relevant to consider a child victim's "best interest" rather than the "expressed interest" of the child. Please identify any characteristics of the situation informing this answer, such as the age of the victim at the time of the offense, whether the child victim was represented by legal counsel/SVC/VLC, and any other factors.

**Army Trial Judiciary Response to Q3: Need for Best Interest Advocate**

The Trial Judiciary, governed by the requirements of the Code of Conduct, defers any assessment of current policy and recommendations to the Criminal Law Division of The Office of The Judge Advocate General.

**Navy-Marine Corps Trial Judiciary Response to Q3: Need for Best Interest Advocate**

In the vast majority of cases the parties agree on who the Article 6b representative should be. I was never presented with any issue in which the action or decision of an Article 6b representative or a VLC was alleged not to be in the child's best interest by any party or participant. Conflicts between a child's expressed interest and best interest might theoretically arise in an alleged victim's choices and election of whether to exercise certain rights, but I was never presented with that type of disagreement.

**Air Force Trial Judiciary Response to Q3: Need for Best Interest Advocate**

Air Force trial judges cannot provide any commentary on situations where the "best interest of the child" standard would be more helpful than the "expressed interest" of the child, or discuss situations where the two standards might be in conflict. Answering these questions would potentially implicate Canons 1A, 2B, 3B, 4A, and 4C for the responding judge, even if the answers were provided anonymously.

**Coast Guard Trial Judiciary Response to Q3: Need for Best Interest Advocate**

Coast Guard trial judges are unwilling to provide any commentary on situations where the "best interest of the child" standard would be more helpful than the "expressed interest" of the child, or discuss situations where the two standards might be in conflict. Answering these questions would potentially implicate Canons 1A, 2B, 3B, 4A, and 4C for the responding judge, even if the answers were provided anonymously.

**RFI Set 17 Question 4:** In your experience as a trial judge, please describe any situations in a court-

martial proceeding in which a child victim’s “expressed interest” conflicted with a “best interest of the child” consideration.

**Army Trial Judiciary Response to Q4: Conflicts Between Expressed and Best Interest**

The Trial Judiciary, governed by the requirements of the Code of Conduct, defers any assessment of current policy and recommendations to the Criminal Law Division of The Office of The Judge Advocate General.

**Navy-Marine Corps Trial Judiciary Response to Q4: Conflicts Between Expressed and Best Interest**

Military judges resolve issues that are presented to them or that are raised by the evidence. I was never presented with any issue in which the action or decision of an Article 6b representative or a VLC was alleged not to be in the child's best interest. I tried never to speculate about why the victim, Article 6b representative, and/or VLC made the choices or election of rights they did because I recognized there was an array of information those participants possessed that was never presented to the military judge.

**Air Force Trial Judiciary Response to Q4: Conflicts Between Expressed and Best Interest**

Air Force trial judges cannot provide any commentary on situations where the “best interest of the child” standard would be more helpful than the “expressed interest” of the child, or discuss situations where the two standards might be in conflict. Answering these questions would potentially implicate Canons 1A, 2B, 3B, 4A, and 4C for the responding judge, even if the answers were provided anonymously.

**Coast Guard Trial Judiciary Response to Q4: Conflicts Between Expressed and Best Interest**

Coast Guard trial judges are unwilling to provide any commentary on situations where the “best interest of the child” standard would be more helpful than the “expressed interest” of the child or discuss situations where the two standards might be in conflict. Answering these questions would potentially implicate Canons 1A, 2B, 3B, 4A, and 4C for the responding judge, even if the answers were provided anonymously.

**RFI Set 17 Question 5:** Can you suggest a situation in which three separate representatives for a child victim of a sex-related offense would be helpful in the court-martial process: a legal counsel/SVC/VLC, an Article 6b representative, and a GAL?

**Army Trial Judiciary Response to Q5: Need for Another Representative for Children**

The Trial Judiciary, governed by the requirements of the Code of Conduct, defers any assessment of current policy and recommendations to the Criminal Law Division of The Office of The Judge Advocate General.

**Navy-Marine Corps Trial Judiciary Response to Q5: Need for Another Representative for Children**

As indicated, I have never been presented with a situation in which I thought a GAL was required. However, I would think the situation is not dissimilar to the situation in which an adult victim has both a civilian counsel and a Navy or Marine Corps Victims' Legal Counsel. I observed that situation on a couple of occasions and understood that the alleged victim had both elected a civilian advocate and also retained the VLC because the civilian counsel was not familiar with the court-martial process. I defer to the Chief of Staff of the Victims' Legal Counsel Program as to whether both are required to provide adequate representation to an alleged child victim.

**Air Force Trial Judiciary Response to Q5: Need for Another Representative for Children**

Air Force trial judges cannot provide any commentary on situations where it might be helpful to have a victim counsel, Art 6b designee, and a GAL. Answering this question would potentially implicate Canons 1A, 2 , 3B, 4A and 4C for the responding judge, even if the answers were provided anonymously.

**Coast Guard Trial Judiciary Response to Q5: Need for Another Representative for Children**

Coast Guard trial judges are unwilling to provide any commentary on situations where it might be helpful to have a victim counsel, Art 6b designee, and a GAL. Answering this question would potentially implicate Canons 1A, 2B, B, 4A and 4C for the responding judge, even if the answers were provided anonymously.

**RFI Set 17 Question 6:** Please provide any additional comments or feedback regarding the role of a guardian ad litem for minor victims of sex-related offenses that would be helpful for the DACIPAD to consider in its evaluation and report to Congress on this issue.

**Army Trial Judiciary Response to Q6: Additional Comments**

The Trial Judiciary, governed by the requirements of the Code of Conduct, defers any assessment of current policy and recommendations to the Criminal Law Division of The Office of The Judge Advocate General.

**Navy-Marine Corps Trial Judiciary Response to Q6: Additional Comments**

I do not have additional information to provide.

**Air Force Trial Judiciary Response to Q6: Additional Comments**

Given the limited number of cases involving GALs, Air Force trial judges cannot provide an assessment of each respective GAL's performance as it would reflect directly on those particular GALs and could potentially invade the judge's deliberative process as to those particular cases.

**Coast Guard Trial Judiciary Response to Q6: Additional Comments**

Given the limited number of cases involving GALs, Coast Guard trial judges are not able to provide an assessment of each respective GAL's performance as it would reflect directly on those particular GALs and could potentially invade the judge's deliberative process as to those particular cases.

**Requested documents:**

1. All trial judiciary guidance, training materials, or rules relating to treatment of or protections for child victims or witnesses in courts-martial from all sources, including the Service Judge Advocate General's Schools, National Judicial College, and materials originating within the Trial Judiciary.

**Army Trial Judiciary Response: Policies Relating to Protection of Child Victims**

Rules of Practice before Army Courts-Martial 20190101, Template PTO-2020, and the Code of Conduct.

**Navy-Marine Corps Trial Judiciary Response: Policies Relating to Protection of Child Victims**

The Judge Advocate General of the Army's Legal Center and School (TJAGLCS) in Charlottesville, Virginia, is where all new judges from all services are trained and is the appropriate release authority for materials related to the Military Judge's Course. The National Judicial College in Reno, Nevada, would be the appropriate release authority for any materials developed by the National Judicial College. In 2017, the Navy-Marine Corps Trial Judiciary (NMCTJ) conducted a training for the NMCTJ that focused on various issues that arise in cases involving child victims, and the itinerary for that course is attached. Rule 38 of the NMCTJ's Uniform Rules of Practice and Procedure concerns Article 6b representatives and was previously provided as an enclosure to Colonel David Bligh's letter to you of March 12, 2020.

**Air Force Trial Judiciary Response: Policies Relating to Protection of Child Victims**

The Air Force Trial Judiciary has no published guidance or training materials specifically

applicable to child victims or GALs. The Uniform Rules of Practice before Air Force Courts-Martial include Rule 8.4, which concerns persons of limited standing and their counsel. No Rules specifically address GAL appointments.

**Coast Guard Trial Judiciary Response: Policies Relating to Protection of Child Victims**

The Coast Guard Trial Judiciary has no published guidance or training materials specifically applicable to child victims or GALs. The Court Rules of Practice and Procedure Before Coast Guard Courts-Martial includes Rule 4.3, which concerns Special Victim Counsel and Rule 5, which concerns appointment of a designee for certain alleged victims. (Attachment 3 hereto.)

2. All trial judiciary guidance, training materials, or rules that address guardian ad litem representation or involvement for victims or witnesses under the age of 18 in courts-martial from all sources, including the Service Judge Advocate Schools, National Judicial College, and materials originating within the Trial Judiciary.

**Army Trial Judiciary Response: Policies and Training Materials on Guardians ad Litem**

Enclosed are the schedule for the Military Judge's Course from The Judge Advocate General Legal Center and School and training slides from that course regarding representation of minors.

**Navy-Marine Corps Trial Judiciary Response: Policies and Training Materials on Guardians ad Litem**

Again, TJAGLCS is the appropriate release authority for materials related to the Military Judge's Course. The National Judicial College in Reno, Nevada, would be the appropriate release authority for any materials developed by the National Judicial College. The NMCTJ has not developed training materials specific to GAL.

**Air Force Trial Judiciary Response: Policies and Training Materials on Guardians ad Litem**

The Air Force Trial Judiciary has no published guidance or training materials specifically applicable to child victims or GALs. The Uniform Rules of Practice before Air Force Courts-Martial include Rule 8.4, which concerns persons of limited standing and their counsel. No Rules specifically address GAL appointments.

**Coast Guard Trial Judiciary Response: Policies and Training Materials on Guardians ad Litem**

The Coast Guard Trial Judiciary has no published guidance or training materials specifically applicable to child victims or GALs. The Court Rules of Practice and Procedure Before Coast Guard Courts-Martial includes Rule 4.3, which concerns Special Victim Counsel and Rule 5, which concerns appointment of a designee for certain alleged victims. (Attachment 3 hereto.)

## APPENDIX J. ACRONYMS AND ABBREVIATIONS

<b>ABA</b>	American Bar Association
<b>ACMO</b>	Advisory Committee Management Officer
<b>CAC</b>	Child Advocacy Center
<b>CAPTA</b>	Child Abuse Prevention and Treatment Act of 1974
<b>CASA</b>	court-appointed special advocate
<b>C.F.R.</b>	Code of Federal Regulations
<b>CID</b>	Criminal Investigation Command
<b>CONUS</b>	continental United States
<b>DAC-IPAD</b>	Defense Advisory Committee on Investigation, Prosecution, and Defense of Sexual Assault in the Armed Forces
<b>DAVA</b>	domestic abuse victim advocate
<b>DFO</b>	Designated Federal Officer
<b>DoD</b>	Department of Defense
<b>FACA</b>	Federal Advisory Committee Act
<b>FAP</b>	Family Advocacy Program
<b>FR</b>	Federal Register
<b>GAL</b>	guardian ad litem
<b>GC DoD</b>	General Counsel for the Department of Defense
<b>HASC</b>	Armed Services Committee of the U.S. House of Representatives
<b>HQE</b>	highly qualified expert



<b>MCIO</b>	military criminal investigative organization
<b>MDT</b>	multidisciplinary team
<b>MOA</b>	memorandum of agreement
<b>MOU</b>	memorandum of understanding
<b>NACC</b>	National Association of Counsel for Children
<b>NCA</b>	National Children's Alliance
<b>NCIS</b>	Naval Criminal Investigative Service
<b>NCVLI</b>	National Crime Victim Law Institute
<b>NDAA</b>	National Defense Authorization Act
<b>NIJ</b>	National Institute of Justice
<b>OCONUS</b>	outside the continental United States
<b>RFI</b>	request for information
<b>RGE</b>	regular government employee
<b>SAFE</b>	special advocate for the elderly
<b>SCCA</b>	Support Center for Child Advocates
<b>SGE</b>	special government employee
<b>SVC</b>	special victims' counsel
<b>SVP</b>	special victims' prosecutor
<b>SPVWL</b>	special victim witness liaison
<b>UCMJ</b>	Uniform Code of Military Justice
<b>UNLV</b>	University of Nevada, Las Vegas

<b>U.S.C.</b>	United States Code
<b>VA</b>	victim advocate
<b>VLC</b>	victims' legal counsel
<b>VWL</b>	victim witness liaison
<b>VWAP</b>	Victim Witness Assistance Program

## APPENDIX K. SOURCES CONSULTED

### 1. Legislative Sources

#### a. Federal Statutes

5 U.S.C. App. §§ 1–16 (Federal Advisory Committee Act)

10 U.S.C. § 806b (Article 6b, Uniform Code of Military Justice)

10 U.S.C. §1044e (Special Victims’ Counsel for victims of sex-related offenses)

18 U.S.C. § 3509 (Child victims’ and child witnesses’ rights)

42 U.S.C. § 5101 et seq. (Child Abuse Prevention and Treatment Act)

National Defense Authorization Act for Fiscal Year 1995, Pub. L. No. 103-337, 108 Stat. 2663 (1994)

National Defense Authorization Act for Fiscal Year 2013, Pub. L. No. 112-239, 126 Stat. 1632 (2013)

National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016)

#### b. State Statutes

Ariz. Rev. Stat. Ann. §13-4403 (Inability to exercise rights; lawful representatives; notice; definition)

Colo. Rev. Stat. Ann. § 24-4.1-304 (Child victim or witness—rights and services)

Conn. Sup. Ct. R. § 44-20 (Appointment of a Guardian ad litem)

D.C. Code Ann. § 23:1908 (Sexual assault victims’ rights)

Del. Code Ann. tit. 11, § 5134 (Additional rights and services)

Fla. Stat. Ann. § 39.822 (Appointment of guardian ad litem for abused, abandoned, or neglected child)

Fla. Stat. Ann. § 914.17 (Appointment of advocate for victims or witnesses who are minors or intellectually disabled)

705 Ill. Comp. Stat. Ann. § 405/1-3(10) (Juvenile Court Act of 1987)

725 Ill. Comp. Stat. Ann. § 5/111-2 (Commencement of prosecutions)

Iowa Code Ann. § 915.37 (Guardian ad litem for prosecuting child witnesses)

Ky. Rev. Stat. Ann. § 26A.140 (Accommodation of special needs of children)

Me. Rev. Stat. Ann. tit. 19-A, § 1507 (Appointment of guardian ad litem in contested proceedings)

N.C. Gen. Stat. Ann. § 7B-601 (Appointment and duties of guardian ad litem)

N.D. Cent. Code Ann. § 12.1-20-16 (Appointment of a Guardian ad litem in prosecution for sex offenses)

N.D. Cent. Code Ann. § 12.1-35.02 (Additional services)

Nev. Rev. Stat. Ann. § 178A.170 (Right to consult with sexual assault victims' advocate; right to designate attendant to provide support; attendant may be excluded under certain circumstances)

Okl. Stat. Ann. tit. 21, § 843.7 (Appointment of representatives for child)

42 Pa. Stat. and Cons. Stat. Ann. § 5983 (Rights and services)

12 R.I. Gen. Laws Ann. § 28-8 (Child victims)

42 R.I. Gen. Laws Ann. § 72-15 (Children's bill of rights)

Tenn. Code Ann. § 37-1-610 (Guardian ad litem; reimbursement of expenses)

Vt. Stat. Ann. tit. 1, § 173 (Minors)

Wash. Rev. Code Ann. § 7.69A.030 (Rights of child victims and witnesses)

Wis. Stat. Ann. § 950.055 (Child victims and witnesses; rights and services)

## **2. Judicial Decisions**

*State ex rel. Romley v. Dairman*, 208 Ariz. 484, 95 P.3d 548 (Ct. App. Div. 1 2004)

*Stewart v. Superior Court In and For County of Maricopa*, 163 Ariz. 227, 787 P.2d 126 (Ct. App. Div. I 1989)

### **3. Rules and Regulations**

#### **a. Executive Orders**

Manual for Courts-Martial, United States (2019 edition)

#### **b. Department of Defense**

AFI 40-301, *Family Advocacy Program* (Nov. 16, 2015)

AFI 51-110, *Professional Responsibility Program* (Dec. 11, 2018)

Air Force Guidance Memorandum to AFI 51-201, *Administration of Military Justice* (Apr. 8, 2020)

Army Reg. 27-26, *Rules of Professional Conduct for Lawyers* (June 28, 2018)

Army Reg. 608-18, *The Army Family Advocacy Program* (Nov. 30, 2007)

Army Reg. 608-18, *The Army Family Advocacy Program* (Sept. 13, 2011)

*Army Special Victims' Counsel Handbook*, 4th Edition (June 2017)

COMDTINST M5800.1, *Coast Guard Legal Rules of Professional Conduct* (June 1, 2005)

DoD Instruction 6400.01, *Family Advocacy Program (FAP)* (May 1, 2019)

DoD Instruction 6400.06, *Domestic Abuse Involving DoD Military and Certain Affiliated Personnel* (Aug. 21, 2007, incorporating Change 4, May 26, 2017)

DoD Instruction 6495.02, *Sexual Assault Prevention and Response (SAPR) Program Procedures* (Mar. 28, 2013, incorporating Change 3, May 24, 2017)

JAGINST 5803.1E OJAG (Code 13), *Professional Conduct of Attorneys Practicing Under the Cognizance and Supervision of The Judge Advocate General* (Jan. 20, 2015)

JAGINST 5810.3, *Navy Victims' Legal Counsel Program Manual* (July 10, 2015)

JAGINST 5810.3A, *Navy Victims' Legal Counsel Program Manual* (Apr. 23, 18)

OPNAV Instruction 1752.2B, *Family Advocacy Program (FAP)* (Apr. 25, 2008)

*The U.S. Marine Corps Victims' Legal Counsel Manual* (June 1, 2018)

**c. State**

N.C. Sup. and Dist. Ct. R. 7.1 (*Appointment of a Guardian Ad Litem*)

N.H. R. Crim. P. 44 (*Special Procedures in Superior Court Regarding Sex-Related Offenses Against Children*)

Pa. R. Crim. P. 122 (*Appointment of Counsel*)

Vt. R. Crim. P. 44.1 (*Appointment of guardian ad litem for victim who is a child*)

**4. Meetings and Hearings**

**a. Public Meetings of the DAC-IPAD**

Transcript of DAC-IPAD Public Meeting (May 15, 2020)

**b. Preparatory Sessions of the DAC-IPAD**

Transcript of the DAC-IPAD Preparatory Session (May 14, 2020)

**5. Civilian Federal Policy**

*Attorney General Guidelines for Victim and Witness Assistance 2011 Edition* (rev. May 2012)

**6. Official Reports**

H.R. Rep. No. 116-120

*President's Task Force on Victims of Crime: Final Report* (1982)

United States Government Accountability Office Report, *Child Welfare: Increased Guidance and Collaboration Needed to Improve DoD's Tracking and Response to Child Abuse*, GAO 20-110 (Feb. 2020)

**7. Scholarly Works**

- Russell Butler, “Child Victims Need Lawyers Too: Tips for Child’s Counsel in Criminal Cases,” *ABA Child Law Practice* 27 (2009): 177–185
- Jon Caroulis, “A Promise to Make a Difference,” *Pennsylvania Lawyer* (Jan./Feb. 2020), available at [http://bt.conditionsbyfry.com/publication/index.php?m=36933&i=642084&view=articleBrowser&article\\_id=3559731](http://bt.conditionsbyfry.com/publication/index.php?m=36933&i=642084&view=articleBrowser&article_id=3559731)
- Child Welfare Information Gateway, *Determining the Best Interests of the Child* (Washington, DC: U.S. Department of Health and Human Services, Children’s Bureau, 2016)
- Child Welfare Information Gateway, *Representation of Children in Child Abuse and Neglect Proceedings* (Washington, DC: U.S. Department of Health and Human Services, Children’s Bureau, 2018)
- Heather Colacicco, “Is There Room for Another Advocate? A Proposal for Incorporating Guardians ad Litem in Military Courts-Martial” (2017)
- John Crouch, “The Child’s Attorney: New ABA Rules Clarify the Roles of Lawyers Who Represent Children,” *Family Advocate* 26, no. 3 (2004): 31–34
- Marguerite Gualtieri, “Two Decades of Representing Child Victims and Witnesses in Criminal Proceedings” (2006) (provided by Support Center for Child Advocates, on file with the DAC-IPAD staff)
- Mark Hardin, “Guardians ad Litem for Child Victims in Criminal Proceedings,” *Journal of Family Law* 25 (1987): 687–728
- Andrea Khoury, “ABA Adopts Model Act on Child Representation in Abuse and Neglect Cases,” 30 no. 7 *Child Law Practice* 106 (2011)
- Captain Nicholas K. Leslie & Captain Aaron R. Matthes, “A Roadmap for Leaders of SVCs,” *Army Lawyer*, no. 4 (2019): 41–43
- John Myers, “A Decade of International Legal Reform Regarding Child Abuse Investigation and Litigation: Steps Toward a Child Witness Code,” *Pacific Law Journal* 28 (1996): 169–241
- National Association of Counsel for Children, *American Bar Association Standards of Practice for Lawyers Who Represent Children in Abuse and Neglect Cases (NACC Revised Version)* (1999)

National Association of Counsel for Children, *NACC Recommendations for Representation of Children in Abuse and Neglect Proceedings* (2001)

National Children's Alliance, *Status of CAC-Military Partnerships Report* (2019)

National Crime Victim Law Institute, *ABA Endorses Attorneys for Child Victims in Criminal Cases* (2009)

National Crime Victim Law Institute, *Child-Victims: Better Served by a Traditional Attorney or by a Guardian ad Litem?* (2011)

National Crime Victim Law Center, *Survey of Select State and Federal Laws Providing Victims' Rights and Protections that are Specific to Children* (Oct. 2016)

Robert Pantell & American Academy of Pediatrics Committee on Psychosocial Aspects of Child and Family Health, "The Child Witness in the Courtroom," *Pediatrics* 139, no. 3 (2017): 1–9

Jean Koh Peters, "The Roles and Content of Best Interests in Client-Directed Lawyering for Children in Child Protective Proceedings," *Fordham Law Review* 64 (1996): 1505–70

Hollis Peterson, "In Search of the Best Interests of the Child: The Efficacy of the Court Appointed Special Advocate Model of Guardian ad Litem Representation," *George Mason Law Review* 13 (2006): 1083–341

"Recommendations of the Conference on Ethical Issues in the Legal Representation of Children," *Fordham Law Review* 64 (1996): 1301–11

"Recommendations of the UNLV Conference on Representing Children in Families: Child Advocacy and Justice Ten Years After Fordham," *Nevada Law Journal* 6 (2006): 592–615

Victoria Sexton, "Wait, Who am I Representing? The Need for States to Separate the Role of Child's Attorney and Guardian ad Litem," *Georgetown Journal of Legal Ethics* 31 (2018): 831–845

Support Center for Child Advocates, "Chapter Three: Criminal Cases" (Training Materials provided by Support Center for Child Advocates, on file with the DAC-IPAD staff)

Susanne Walters, "Working with the Non-Offending Caregiver," *National Center for Prosecution of Child Abuse*, 15, no. 11 (2002)



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Debra Whitcomb, *Guardians Ad Litem in the Criminal Courts* (U.S. Department of Justice, National Institute of Justice, 1988)

Colonel Louis P. Yob, “The Special Victim Counsel Program at Five Years: An Overview of its Origins and Development,” *Army Lawyer*, no. 1 (2019): 65–73

## **8. American Bar Association Publications and Materials**

ABA Crim. Just. Sec., Resolution, Child Victims in the Criminal Justice System (Feb. 2009)

ABA Formal Op. 96-404 (1996)

American Bar Association, *A Legislative History: The Development of the ABA Model Rules of Professional Conduct, 1982–2013* (2013)

American Bar Association, *Model Act Governing the Representation of Children in Abuse, Neglect, and Dependency Proceedings* (Aug. 2011)

American Bar Association, *Standards of Practice for Lawyers Representing Children in Custody Cases* (Aug. 2003)

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Center for Professional Responsibility, American Bar Association, *Annotated Model Rules of Professional Conduct* (9th ed. 2019)

## **9. DAC-IPAD Requests for Information and Responses**

Services’ Responses to DAC-IPAD Request for Information Set 15 (Jan. 28, 2020), Appointment of Guardians ad Litem for Minor Victims of Sex-Related Offenses (Special Victims’ Counsel / Victims’ Legal Counsel)

Services’ Responses to DAC-IPAD Request for Information Set 16 (Mar. 19, 2020), Appointment of Guardians ad Litem for Minor Victims of Sex-Related Offenses (Family Advocacy Programs)

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Appointment of Guardians ad Litem for Minor Victims of Sex-Related Offenses (Trial  
Judiciary)

## **10. Websites**

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