

136. What are the Services’ policies and procedures for investigators, prosecutors, and commanders to follow when they suspect a victim may have committed collateral misconduct in a sexual assault case?

USA	<p>Investigators: Article 31b, UCMJ, provides that before anyone subject to the code interrogates or requests a statement from an accused or person suspected of an offense, the accused or person suspected of an offense must be advised of his/her rights. Since most victim “collateral misconduct” is an offense under the UCMJ, the code requires that military investigators must advise the victim of his/her rights before asking any questions about that misconduct or requesting a statement from the victim that might incriminate him/her in some collateral misconduct.</p> <p>Commanders: Pursuant to SecDef Directive, dated 20 April 2012, the authority to dispose of any offenses committed by a victim arising from or related to an allegation of a penetrative sexual assault is withheld to the Special Court-Martial Convening Authority. Pursuant to Army Regulation (AR) 600-20, para. 8-5m(5), the authority to dispose of allegations of contact sexual assault offenses is withheld to the Battalion Commander (O5). Army Regulation 600-20, para. 8-5o(24), further advises commanders “to determine, in a timely manner, how to best dispose of alleged victim collateral misconduct, to include making the decision to defer the disciplinary actions regarding such misconduct until after the final disposition of the sexual assault case. Commanders and supervisors should take into account the trauma to the victim and respond appropriately so as to encourage reporting of sexual assault and the continued cooperation of the victim.”</p> <p>Prosecutors: Victims who are suspected of collateral misconduct will be referred to Trial Defense Service for advice and representation. Trial counsel will also advise commanders on the policy requirements set forth above. In practice, Special Victim Prosecutors, and the trial counsel they supervise, trained and experienced in the complexities of sexual assault allegations, typically advise commanders not to take any action, other than administrative measures, for minor collateral misconduct like underage drinking. Special Victim Prosecutors, and the trial counsel they supervise, understand that a victim’s cooperation in the case is the most critical element of a successful prosecution.</p>
USAF	<p>Trial Counsel: AFI 51-201, <i>Administration of Military Justice</i>, Atch 3, Air Force Standards for Criminal Justice, Standard 3-3.2, Relations with Prospective Witness, provides that “A trial counsel should advise a witness who is to be interviewed of his or her rights against self-incrimination and the right to counsel whenever the law so requires. It is also proper for a trial counsel to advise a witness whenever the trial counsel knows or has reason to believe that the witness may be the subject of a criminal prosecution. However, a trial counsel should not so advise a witness for the purpose of influencing the witness in favor of or against testifying.”</p>

	<p>Article 32 Investigating Officers: AFI 51-201, <i>Administration of Military Justice</i>, provides that “An IO who suspects a witness of an offense should advise the witness of his or her rights under Article 31, UCMJ.”</p> <p>Commanders and Supervisors: <i>The Military Commander and the Law</i>, pg. 140, provides commanders and supervisors with guidance on advising suspects of rights. The guidance states in part: “The moment a commander or supervisor suspects someone of an offense under the Uniform Code of Military Justice (UCMJ) and starts asking questions or taking any action in which an incriminating response is either sought or is a reasonable consequence of such questioning, the individual must advise the suspect of his/her rights.”</p> <p>There may be circumstances where a rights advisement is not given to a victim who has allegedly committed misconduct collateral to a sexual assault allegation. For example, if evidence separate from the victim’s statement already exists of the collateral misconduct, the Trial Counsel may consult with the Commander or Staff Judge Advocate and vice versa and determine whether a rights advisement is necessary. Additionally, if the victim is represented by an Area Defense Counsel (ADC) or Special Victims Counsel (SVC) prior to questioning, the general topics of discussion may be discussed with the ADC or SVC so they can properly advise their client in advance.</p> <p>AFOSI agents are to comply with the requirements of Military Rule of Evidence, Rule 305, <i>Warnings about rights</i>, which states, in part, “...A person subject to the code who is required to give warnings under Article 31 may not interrogate or request any statement from an accused or a person suspected of an offense without first [advising the person of their Article 31 rights].”</p>
USN	<p>NAVADMIN 195/12 withheld initial disposition authority over collateral misconduct by victims reporting allegations of sexual assault offenses to the Sexual Assault Initial disposition Authority (SA-IDA), who is at least an O-6 with special court-martial convening authority. Commanders, who are not SA-IDA, may not act on collateral misconduct by an alleged victim without authorization from the SA-IDA. This policy has been in place since June 2012. In practice, any misconduct by a victim of sexual assault is typically deferred until completion of the sexual assault case before a disposition determination is made.</p>
USMC	<p>Marine Corps Order (MCO) 1752.5B guides Marine Corps Convening Authorities in how to deal with collateral misconduct by victims in sexual assault cases. MCO 1752.5B withholds the authority to dispose of any victim collateral misconduct to the Sexual Assault Initial disposition Authority (SA-IDA), who is at least an O-6 with special court-martial convening authority. The Order advises SA-IDAs to defer a victim’s disciplinary proceedings until final disposition of the more serious sexual assault case.</p> <p>A trial counsel’s conduct in dealing with a victim suspected of collateral misconduct is</p>

	<p>primarily guided by the service ethics instruction. The ethical conduct of Marine Corps and Navy trial counsel is guided by Rules 4.2 and 4.4 of JAGINST 5803.1D. Pursuant to Rule 4.2 of this JAG Instruction, if a victim is represented by a victim legal counsel (VLC), the trial counsel must request permission from the VLC to speak to the victim and would inform the VLC of any suspected collateral misconduct by the victim, so the VLC can properly advise the victim on how he or she may want to proceed. The VLC may or may not refer the victim to obtain assistance of a defense counsel depending on the seriousness of the collateral misconduct.</p> <p>Before speaking to any victim or witness about suspected potential misconduct, Rule 4.4 of JAGINST 5803.1D requires the trial counsel to inform the victim of his or her rights under Article 31, UCMJ. Additionally, once a trial counsel is aware of potential misconduct, the trial counsel may seek immunity for the victim pursuant to paragraph 0138 of JAGINST 5800.7F. The ultimate decision of whether or not to pursue punitive action against the victim or witness ultimately resides with that individual's SA-IDA pursuant to MCO 1752.5B.</p>
USCG	<p>Coast Guard policy, as stated in the Sexual Assault Prevention and Response (SAPR) Program Manual, COMDTINST M1754.10D, Section 5.F.1, is to allow commanders to exercise their discretion and to consider not taking action on a victim's collateral misconduct (e.g. minor offenses such as underage drinking) until the final disposition of the sexual assault case to ensure priority is placed on the sexual assault and not the collateral misconduct.</p>