

75. (Services) Please describe the minimum experience, education, and rank required for the following military personnel to be assigned to a sexual assault case, and describe all relevant training and provide all relevant training materials used for:

75a. An investigator,

USA	a. Investigators: <i>See</i> the SVC CONOP and SVC Initiative paper, previously provided in response to a question from above.
USAF	<p>i. For an AFOSI agent to conduct any type of criminal investigation, including a sexual assault investigation, the investigator must be credentialed. To be credentialed, an agent must have successfully completed the Criminal Investigator Training Program (CITP) taught at the Federal Law Enforcement Training Center (FLETC), by FLETC instructors, and at the follow-on USAF Special Investigations Academy (USAFSIA) Basic Special Investigators Course (BSIC), taught by AFOSI staff, also located at FLETC. During this rigorous (combined) 16 week training program, all AFOSI Special Agents acquire the fundamentals to conduct criminal investigations. For their first year-and-a-half after graduation from basic training, all special agents must participate in structured upgrade training, where their investigative skill and work are closely monitored by experienced investigators and unit leaders. Agents who successfully complete this training are upgraded to journeyman investigators. This upgrade is entered into the Air Force personnel system.</p> <p>Based on the unique rank structure of AFOSI, consisting of enlisted, officer, and civilian special agents, there is no minimum required rank to conduct sexual assault investigations.</p> <ol style="list-style-type: none"> 1. Enlisted Agents: Most enlisted agents conducting criminal investigations are in the grades E-5, E-6, and some E-7s. After the grade of E-7, enlisted special agents usually assume unit leadership or staff positions and provide investigative oversight on investigations. 2. Officer Agents: Most of officer special agents who conduct investigations are in the grades O-1 through O-3. After the grade of O-3, officer special agents typically assume leadership or staff positions within the command and often provide investigative oversight on criminal cases. 3. Civilian Agents: Most of the civilian special agents within AFOSI who conduct investigations are in the grades of GS-7 through GS-13. AFOSI has 22 civilian special agents specifically designated to conduct sexual assault investigations. They are located at the units that historically conduct the highest number of sexual assault investigations annually. <p>Additionally, there are two advanced courses at USAFSIA with training pertaining to sexual assault investigations: Sexual Crimes Investigations Training Program (SCITP) and the Advance Criminal Investigations Course (AGCIC).</p> <p>SCITP - SCITP is an eight-day course and supplements the already extensive training AFOSI special agents receive during basic investigator training. SCITP</p>

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	<p>content includes advanced training on the following topics: DoD sexual assault policy, cognitive biases, psychology of victims and offenders, advanced victim and suspect interviewing techniques, legal perspectives, Sexual Assault Nurse Examiner (SANE) role, advanced crime scene processing, the use of technical services techniques, information related to alcohol & drug facilitated assaults, working with sexual assault response coordinators (SARCs), etc.</p> <p>AGCIC - AGCIC encompasses a wide variety of topics related to criminal investigations. This course is designed to provide experienced investigators with a greater understanding of crime scene management and processing, as well as equip them to create and provide individualized crime scene training to AFOSI detachments, Security Forces Investigators, and local law enforcement partners. Topics include interviewing, photography, crime scene processing, crime scene staging, and sexual assault investigations. This course is designed as a train the trainer course.</p> <p>Lesson plans and training materials for these courses are provided via separate DVD.</p>
USN	<p>For a.-c., please also see response to question 50, Special Victim Capability.</p> <p>a. An investigator</p> <p>All sexual assault offenses are investigated by NCIS special agents who are DoD civilians, not military personnel. NCIS special agents are US federal job series 1811s. All NCIS agents must have an accredited baccalaureate degree. NCIS criminal investigators receive their initial training in the Criminal Investigator Training Program (CITP) at the Federal Law Enforcement Training Center (FLETC), followed by a Navy-specific follow-on investigative training program, which includes sexual assault investigation training. Typically, entry-level agents are GS-9s, with promotion to GS-11 within a year.</p> <p>NCIS created the Adult Sexual Assault Program (ASAP) approach to provide distinct and recognizable groups of specially trained NCIS special agents and personnel to investigate adult sexual assault offenses. ASAP special agents and first line supervisors must attend the Advanced Adult Sexual Violence Training Program (AASVTP). The AASVTP is a two-week advanced course collaboratively created by NCIS and Army CID. Within the AASVTP, students receive advanced training on victim and offender dynamics as well as interview techniques designed for trauma survivors. Students conduct case reviews and “table top” exercises facilitated by nationally recognized experts and military senior trial counselors. Students must complete a comprehensive examination at the conclusion of the course.</p>
USMC	<p>All sexual assault offenses are investigated by NCIS special agents who are DoD civilians, not military personnel. NCIS special agents are US federal job series 1811s. All NCIS agents must have an accredited baccalaureate degree. NCIS criminal investigators receive their initial training in the Criminal Investigator Training Program (CITP) at the Federal Law Enforcement Training Center (FLETC), followed by a Navy-specific follow-on investigative training program, which includes sexual assault investigation training. Typically, entry-level agents are GS-9s, with promotion to GS-11 within a year.</p>

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USCG	<p>CGIS’s agent pool is a mixture of active duty military personnel, reserve military agents, and civilian agents. <u>Minimum</u> standards for each type of agent are as follows:</p> <ul style="list-style-type: none"> • CGIS civilian (full-time) agents. <ul style="list-style-type: none"> o CGIS civilian special agents/investigators may be hired at the GS-7 (through GS-14) level. A combination of education and law enforcement experience is considered during the hiring process. o Minimum training attendance: <ul style="list-style-type: none"> □ Criminal Investigator Training Program (CITP), Federal Law Enforcement Training Center (FLETC), Glynco, GA. f Special Agent Basic Training Program (SABTP), FLETC, Glynco, GA (or its equivalent *) • * SABTP initiated in 2009. Prior to that, CGIS agents received modules of specialized training, including Sexual Assault Deviant Behavior, Homicide, Interview/Interrogations and Crime Scene Investigations training. o New CGIS agents are under a one year probationary period and during that time, work with more experienced agent(s), who report to Special Agents in Charge (SAC) and Assistant Special Agents in Charge (ASAC) to monitor the progress of those new agents. • CGIS active duty military (full-time) agents. <ul style="list-style-type: none"> o Must be at least E-6 (or E-7), not above the cut on the E-8 advancement list on the day of application and have at least 30 credits of education from an accredited college. o Minimum training attendance: <ul style="list-style-type: none"> f Criminal Investigator Training Program (CITP), Federal Law Enforcement Training Center (FLETC), Glynco, GA. f Special Agent Basic Training Program (SABTP), FLETC, Glynco, GA (or its equivalent *) • * SABTP initiated in 2009. Prior to that, CGIS agents received modules of specialized training, including Sexual Assault Deviant Behavior, Homicide, Interview/Interrogations and Crime Scene Investigations training. f New CGIS agents are under a one year probationary period and during that time, work with more experienced agent(s), who report to Special Agents in Charge (SAC) and Assistant Special Agents in Charge (ASAC) to monitor the

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	<p>progress of those new agents.</p> <ul style="list-style-type: none"> • CGIS reserve military agents (CG reserves are all full-time law enforcement officers in Federal, State or local agencies). <ul style="list-style-type: none"> o Minimum E-4 with CG reserves, able to complete a lateral transfer to the Investigator (IV) rating for their current rating; must present a complete résumé to the CGIS regional Special Agent in Charge for consideration of acceptance as CGIS agent. o Minimum training attendance: <ul style="list-style-type: none"> <input type="checkbox"/> Agency-specific police academy. <input type="checkbox"/> CGIS Indoctrination Training Program (ITP), Yorktown, VA or FLETC, Glynco, GA. <p><i>f</i> New CGIS agents are under a one year probationary period and during that time, work with more experienced agent(s), who report to Special Agents in Charge (SAC) and Assistant Special Agents in Charge (ASAC) to monitor the progress of those new agents.</p> <ul style="list-style-type: none"> • Supporting information for CITP, SABTP and ITP is as follows: <ul style="list-style-type: none"> o <u>Criminal Investigator Training Program (CITP)</u>: The CITP provides basic and fundamental training in the techniques, concepts, and methodologies of conducting criminal investigations and is 56 days in length. Basic training includes lecture, laboratories, practical exercises, and tests that are used to ensure each trainee acquires all of the critical knowledge, skills and abilities required of new criminal investigators. <p>Throughout the program, each trainee must participate as a member of a small task force team in a continuing case investigation. Interviewing of witnesses along with surveillance and undercover operations enable the students to develop a case, write and execute search and arrest warrants, write a criminal complaint, obtain an indictment, and testify in a courtroom hearing.</p> <p>Trainees are also mentored by Continuing Case Investigation Coordinators. Subjects in the training include:</p> <ul style="list-style-type: none"> • Interviewing, surveillance, criminal case management, legal training, physical techniques and conditioning, tactical training, firearms, vehicle handling skills, physical evidence, and other courses that provide the essential knowledge, skills and abilities needed by the new Federal criminal investigator. o <u>Special Agent Basic Training Program (SABTP)</u>: Basic training is delivered during the NCIS Special Agent Basic Training Program (SABTP), which CGIS agents attend. The SABTP is 47 training days in length, is for newly hired investigators and generally attended within the first year after graduation of CITP. <p>A total of 26 hours in SABTP is focused exclusively on sexual assault investigations which are comprised of classroom lecture and a multi- phase sexual assault continuing case investigation. Lecture topics include myths and prejudices, DOD sexual assault policy, victim and offender specific issues, and sex crimes investigative protocol.</p> <ul style="list-style-type: none"> <input type="checkbox"/> The continuing case investigation includes practical laboratories where the students actively conduct interviews and interrogations utilizing role players,
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crime scene processing, seizure of evidence, execution of search authorization, report writing and testifying at a mock court martial.

Sex Crimes classroom presentation (6 hours)

Sexual Assault Continuing Case Investigation (6 phases; 26 hours total):

- Major Crime Scene Examination
- Victim Interview
- Eight (8) Witness Interviews
- Two (2) consent searches
- Three (3) Suspect Interrogations
- One (1) Suspect Apprehension
- Article 32 courtroom testimony
- Related Report Writing (26 hrs)

NOTE 1: Information regarding SABTP has already been provided to DoD by NCIS due to SABTP training being controlled by DoD/NCIS.

NOTE 2: Supporting documents regarding SABTP are offered as Enclosure 3 to this response.

o CGIS Indoctrination Training Program (ITP): The ITP is training conducted for CGIS reserve agents as soon as practical after the agent enters the Investigator (IV) program with CGIS. The training encompasses a total of (10) training days. Below is prior training relevant sexual assaults and the new training proposed for launch during CY2014:

Previous Course (2012 Version) – Four (4) hour lecture reference Sexual Assault Investigations.

New Course (2014 Version) –

¾ Four (4) hour lecture referencing Sexual Assault Investigations

¾ Eight (8) hour lab - Sexual Assault Crime Scene Processing, Victim Interview, and Subject Interview.

¾ Six (6) Hours of Report Writing supporting the lab

• In addition to the basic “minimum” training entering agents receive as listed, CGIS agents are being or have been sent to the following advanced sexual assault investigations training:

Advanced Sexual Assault training

• Sexual Assault Investigations and Victim Interviewing (SAIVI) or the later version of Advanced Family and Sexual Violence Training (AFSVT), taught by the Navy Criminal Investigative Service (NCIS) at FLETC, Glynco, GA, and/or,

• Special Victims Unit Investigations Course (SVUIC), taught by the U.S. Army Military Police School, Fort Leonard Wood, MO.

In September 2013, all CGIS agents (active duty, reserve and civilian) also completed an online interactive training entitled, “Sexual Assault: The Patrol Response”, presented by the California Commission on Peace Officer Standards & Training (POST).

Additionally in September 2013, a cadre of CGIS special agents participated with the following programs focused on sexual assault prevention and response:

o CGIS Embedded Agent Program: CGIS agents worked alongside detectives at the

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	<p>Boston Police Department (PD), Austin PD, Phoenix PD and Philadelphia PD, to learn best practices and lessons-learned, and sharpen investigative skills via on-the-job training.</p> <p>o A cross disciplinary team of CGIS agents (e.g. training staff, headquarters staff, experienced field agents) met with the Los Angeles Police Department (LAPD) Training Staff. The purpose was to review and “learn” the California POST approved course on sexual assault investigations. LAPD subject matter experts (SME) provided an overview of their current course for CGIS including all lesson plans and training aids. CGIS is now in the process of developing a complete in-house sexual assault training plan that CGIS trainers could deliver as needed to all CGIS agents in the future.</p>
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75b. Prosecutors/trial counsel who handle non-penetrative sexual assault cases

USA	<p>Prosecutors/trial counsel who handle non-penetrative sexual assault cases: The minimum requirement for assignment to prosecute a non-penetrative sexual assault case is certification under Article 27(b) by the Judge Advocate General that a counsel is competent to perform these duties at a general court-martial after graduation from the Judge Advocate Officer Basic Course. In practice, trial counsel attend the New Prosecutors Course, the Intermediate Trial Advocacy Course, and the Essential Skills for Sexual Assault Prosecution courses prior to prosecuting a sexual assault offense. Staff Judge Advocates are entrusted with the responsibility for ensuring that any trial counsel assigned to any case, whether sexual assault or another offense, are qualified to do so. Technical supervision and oversight is provided to trial counsel through a Senior Trial Counsel, Chief of Justice, Deputy Staff Judge Advocate and reach back expertise from the Trial Counsel Assistance Program.</p>
USAF	<p>AFI 51-103, <i>Judge Advocate Professional Development</i>, discusses criteria for judge advocate designation (paras. 2 and 3) and certification to perform the duties of trial and defense counsel IAW UCMJ Art. 27 (para. 4). http://static.e-publishing.af.mil/production/1/af_ja/publication/afi51-103/afi51-103.pdf</p> <p>Judge advocates that have not been certified may be detailed as trial counsel or assistant trial counsel for special courts-martial and assistant trial counsel for general courts-martial. Judge advocates that have not been certified may not be detailed as trial counsel for general courts-martial.</p> <p>There is no rank requirement. JAGs without any prior time as officers in the military receive commissions as First Lieutenants and so long as they are designated as judge advocates are eligible to serve as trial counsel or assistant trial counsel in sexual assault cases as described above.</p>
USN	<p>Sexual assault cases are typically detailed to “core attorneys” assigned to a Region Legal Service Office (RLSO). A RLSO core attorney is a judge advocate (O-3 or above), certified to practice by the Judge Advocate General in accordance with Article 27b, UCMJ, and a member in good standing with a state bar, that have completed at least one full tour prior to assuming the duties of a prosecutor. All trial counsel are</p>

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	<p>supervised by a Senior Trial Counsel (O-4 or above judge advocate) and a Commanding Officer (O-6 judge advocate) and have access to 24/7 support from the Trial Counsel Assistance Program (TCAP). All trial counsel complete a 10-week basic lawyer course, including classes on military evidence, criminal procedure and crimes, and lengthy professional development standards (on-the-job-training standards) prior to transferring into a core trial counsel billet. After reporting for duty, trial counsel attend additional specialized courses including trial counsel orientation and basic trial advocacy.</p>
USMC	<p>In the Marine Corps, prior to being detailed as a trial counsel (TC) to any sexual assault case, judge advocates must be certified in writing as "Special Victim Qualified Trial Counsel" (SVTC). This requires achieving specific training and performance milestones: (1) being a General Court Martial Qualified TC; (2) written recommendation from the regional trial counsel (RTC) that the judge advocate possesses the requisite expertise to try a special victim's case; (3) demonstrated to the O-6 Officer-in-Charge of the Legal Services Support Section (OIC, LSSS) that the judge advocate possesses the requisite expertise, experience, education, innate ability, and disposition to competently try special victim cases; (4) tried a contested court-martial in a special victim case as an assistant trial counsel; and (5) attended an intermediate level trial advocacy training course for the prosecution of special victim cases. These requirements apply to both penetrative and non-penetrative sexual assaults. When determining whether to detail a counsel to a more complex case, the regional trial counsel selects the most appropriate SVTC qualified counsel based on that individual's experience, education, disposition, expertise, and innate ability.</p>
USCG	<p>The Coast Guard conducts relatively few general and special court-martial per year. In FY13, the Coast Guard prosecuted 11 general courts-martial and 14 special courts-martial. Out of this number, Judge Advocates prosecuted 8 cases involving sexual assault (6 general and 2 special courts-martial). Because of this relatively low number, Coast Guard Judge Advocates are not able to accumulate the experience that the larger services may be able to through handling only Coast Guard cases. However, the Coast Guard has made significant efforts to bolster its trial counsel capability.</p> <p>Most trial counsel in the Coast Guard are in the rank of Lieutenant Commander (O-4) and Lieutenant (O-3). However, for especially complex cases it is not unusual for the Coast Guard to assign an especially experienced Commander (O-5) as lead trial counsel.</p> <p>All counsel have completed the 9-week Basic Lawyer Course at the Naval Justice School. Beginning in FY 2013 Coast Guard Judge Advocates began attending, along with their CGIS Special Agent counterparts, the US Army Special Victim Investigator Unit course. To date seventeen Coast Guard Judge Advocates and forty-three CGIS agents have complete the course. Eighteen additional trial counsel are scheduled to receive training by the end of FY 2014. In addition, two Coast Guard Judge Advocates completed the Prosecuting Alcohol Facilitated Sexual Assault Cases course at the Naval Justice School in FY 2013.</p>

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	<p>Over the last eight years, the Coast Guard has sent Judge Advocates to gain experience as prosecutors with the Marine Corps at Marine Corps Base Quantico, Camp Lejeune, and Camp Pendleton, , with the Army at the Military District of Washington, as well as assignment to Navy Regional Legal Service Offices. In this fashion, Judge Advocates gain significantly more trial experience than would be generated only handling Coast Guard cases. More importantly, the Coast Guard maintains a close working relationship with the Army and Navy Trial Counsel Assistance Programs to assist field Trial Counsel in prosecuting cases.</p> <p>Coast Guard also has boosted its trial advocacy capacity by selecting a number of Coast Guard Direct Commission Lawyers who have significant prosecutorial experience in civilian district attorney offices or in sister service JAG Corps prior to joining the Coast Guard legal program.</p> <p>In fact, one such attorney, with five years of prosecutorial experience as an assistant DA from New York City recently obtained a 10-year conviction in a contested alcohol facilitated sexual assault case.</p>
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75c. Special Victim Prosecutors/Senior Trial Counsel who handle the more complex sexual assault cases, including penetrative offenses,

USA	<p>Special Victim Prosecutors/Senior Trial Counsel who handle the more complex sexual assault cases, including penetrative offenses: Other than certification under Article 27(b), there are no minimum requirements for selection of Special Victim Prosecutors (SVP). However, SVPs are selected based on their knowledge of criminal law, their experience and skill in the courtroom, and their ability to work with not only victims, but the wide range of professionals involved in investigating and prosecuting special victim cases. Of the current 23 SVPs, two are Lieutenant Colonels, ten are Majors and eleven are senior Captains. Although both prosecution and defense experience is not required for selection, it is preferred. SVPs are selected based on recommendations from military judges, staff judge advocates, military justice senior practitioners, and peers. Within the first six months of duty, they should complete on the job training with a civilian Special Victim Unit; attend a two-week Sexual Assault Trial Advocacy Course; attend a five day New Prosecutor/Essential Strategies for Sexual Assault Prosecution course; and attend the three-day Special Victim Prosecutor course.</p>
USAF	<p>Since 1972, the Air Force has selected its best and most experienced litigators to serve as Senior Trial Counsel (STC) and try the most difficult cases, including the vast majority of the AF's sexual-assault prosecutions.</p> <p>Information on the experience and education of STCs was provided as a response to a previous RFI. While there is no rank requirement to serve as an STC, JAGs are not eligible for STC assignments as first assignments, resulting in the minimum rank being Captain.</p> <p>A subset of STCs with substantial training and experience in investigating and prosecuting particularly difficult cases (e.g. sexual assault, crimes against children, homicides) are designated as members of the Air Force SVU. These SVU-STCs have primary responsibility for early interaction with local counsel for offenses involving a</p>

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	<p>“special victim,” including consultation with investigators and trial counsel, prior to the first legal office interview of the victim, and prior to preferring of charges.</p> <p>The Chief, Government Trial and Appellate Counsel Division, Air Force Legal Operations Agency (AFLOA/JAJG), makes the final decision on which STC will be designated as SVU-STC, taking into account the following criteria:</p> <ol style="list-style-type: none"> 1. Completion of one year as a STC or two years as a Senior Defense Counsel (SDC); 2. Attendance at two or more advanced litigation-skills-focused courses, such as the following (and their equivalents): (a) Advanced Trial Advocacy Course (AF); (b) Prosecuting Complex Crimes Course (Navy); (c) National District Attorneys Associations Sexual Assault & Related Crimes; (d) Special Victims Unit Prosecutors Course (Army); (e) Prosecuting Alcohol-Based Sex Crimes (Navy). 3. Effective presentation of issues related to prosecution of complex cases at an AF training conference (e.g. CONUS/OCONUS Trial Advocacy Courses; Trial & Defense Advocacy Courses). 4. Demonstrated ability to prosecute a variety of sexual assault and/or complex cases. NOTE: There is no minimum number/type of cases required to meet this criteria. Skills being reviewed include courtroom demeanor; mastery of the rules and law; ability to handle expert witnesses; and ability to appropriately manage victims, among others. 5. To the extent approved by TJAG as appropriate career vector, commitment to remain as SVU-STC for up three years (or up to four total years assigned to AFLOA/JAJG; two year commitment for former SDCs). <p>Chief, AFLOA/JAJG will be guided in making SVU-STC personnel decisions by these criteria, but can deviate from the same where he or she deems it appropriate.</p>
USN	<p>Senior judge advocates (typically O-4 and above) are hand-selected by the Judge Advocate General to fill one of nine Senior Trial Counsel billets. All Senior Trial Counsel are military justice litigation qualified (MJLQ). Upon reporting, all Senior Trial Counsel complete a two week special victims investigation course and participate in additional specialized training including: intermediate trial advocacy, litigating complex cases, prosecuting alcohol facilitated sexual assaults, TCAP targeted mobile training, and monthly online special victims offense or litigation training. All Senior Trial Counsel are supervised by a Commanding Officer (O-6 judge advocate) and regularly provide information to TCAP on all pending felony investigations and prosecutions. Additionally, uniformed members of TCAP may also be detailed to cases.</p>
USMC	See part (b).
CG	Answer completed under #75(b).

75d. Defense counsel.

USA	<p>Established in 1980, the mission of the U.S. Army Trial Defense Service (TDS) is to provide independent, competent, and ethical defense services to Soldiers, wherever they are located. There are currently 155 defense counsel serving on active duty in the</p>
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U.S. Army. Organized into nine geographic regions (six in CONUS and three OCONUS), each headed by an O5/LTC Regional Defense Counsel (RDC), defense counsel are assigned to one of 49 field offices led by a Senior Defense Counsel (SDC), normally an O4/MAJ or an experienced O3/CPT.

Before a judge advocate is assigned to TDS, he/she must be a graduate of the Judge Advocate Officer Basic Course (JAOBC) and certified as competent to perform duty as defense counsel under Article 27(b)(2) by The Judge Advocate General.

The vast majority of defense counsel also have prior experience as a military trial counsel or civilian experience in the criminal justice system. Once assigned to TDS, new counsel undergo the following training:

(1) DC 101: This three-day course provides instruction on the duties and expectations of defense counsel essential to the effective representation of their clients. The following areas are addressed: attorney-client relationships; discovery; expert witnesses and consultants; motions practice; trial practice; sentencing; and clemency.

(2) Intermediate Trial Advocacy Course (ITAC) at TJAGLCS (if they have not previously attending this training as a trial counsel): This two-week course presents intermediate trial skills instruction and practical exercises covering issues regarding courts-martial using a sexual assault case scenario, from case analysis through presentencing argument. The following areas are addressed: trial procedure; trial advocacy; professional responsibility; and topical aspects of current military law, with particular emphasis on the military rules of evidence.

(3) DC 201: This three-day course updates defense counsel on current trends in military justice. Attendees hone trial tactics, strategies, and advocacy skills participating in a seminar and practical exercises involving foundation and evidence issues that frequently arise in sexual assault cases.

Specific defense counsel are also selected to attend Advanced Trial Communications (32 seats in FY 14) and the Sexual Assault Trial Advocacy Course (SATAC) (16 seats in FY 14) to enhance their advocacy skills. Defense counsel may also attend non-DOD training, such as that offered by the National Association of Criminal Defense Lawyers (NACDL), on a case-by-case basis.

The above centralized training to enhance the professional qualifications of defense counsel is further supplemented by weekly training conducted by SDCs/RDCs at the field office level.

When court-martial charges are preferred against a Soldier, the SDC reviews the charges and assigns the case to a qualified counsel. The Army does not have a case assignment policy specific to sexual assault; however, all charges are reviewed and considered prior to detailing counsel. Where appropriate, the SDC may assign a second counsel to assist on any case. In all cases, defense counsel are qualified and

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	<p>prepared to zealously represent the Soldier-client. Soldier-clients may also retain civilian defense counsel at their own expense. Military counsel will normally remain on the case as co-counsel, though are not required to be retained.</p> <p>Defense counsel may also reach-back to the Defense Counsel Assistance Program (DCAP) for advice on cases. Established in 2007 and staffed by five experienced trial practitioners, including two civilian Highly Qualified Experts (HQEs), DCAP provides expert support to defense counsel. The program's primary role is assistance to defense counsel with legal issues that may arise in their cases. This can be given by researching case law, answering specific questions, and providing sample motions, expert requests, and other trial documents that might be helpful in the defense of the case. DCAP also maintains an online library of motions, information papers, expert pages, and new developments in the law that are available 24/7 to defense counsel.</p>
USAF	<p>The same certification process described in subsection 48.b applies to defense counsel. In addition, Air Force judge advocates are not eligible to serve as defense counsel as a first assignment.</p> <p>Information on the experience level of area defense counsel and senior defense counsel was provided on 1 September 2013, in response to a previous RFI.</p>
USN	<p>Sexual assault cases are typically detailed to “core attorneys” assigned to a Defense Service Office (DSO). A DSO core attorney is a judge advocate (O-3 or above), certified to practice by the Judge Advocate General in accordance with Article 27b, U.C.M.J., and a member in good standing with a state bar, that have completed at least one full tour prior to assuming the duties of a defense counsel. Detailing of counsel is within the discretion of the DSO Commanding Officer (O-6 judge advocate), who takes into consideration such matters as competence, experience and training, existing caseload, and availability of counsel, as well as case specifics and opportunities for training of counsel. A Commanding Officer may detail one or more counsel to a particular case and will often detail both an experienced attorney and a less-experienced attorney in part to provide the opportunity for practical mentoring. Additionally, uniformed members of TCAP may also be detailed to cases.</p> <p>The Navy requires that all core attorneys assigned to DSOs receive Basic Trial Advocacy training and attend Defense Counsel Orientation, a week-long course held twice a year, prior to or shortly after arriving at a DSO to serve as a core defense counsel. Defense Counsel Orientation is aimed at introducing counsel to the duties of a defense counsel and the court-martial process. Additionally, as the budget allows, the JAG Corps funds several Defense Counsel to attend Defending Sexual Assault Cases, a weeklong course held once a year, with the intent for all Defense Counsel to attend early in their tour. Defending Sexual Assault Cases is a course designed to deal with the legal issues and complexities involved in a sexual assault case and includes practical exercises along with lectures. Defense counsel also may attend training in intermediate trial advocacy and litigating complex cases.</p> <p>Finally, the Defense Counsel Assistance Program (DCAP) sends Mobile Training Teams (MTTs) to each DSO at least twice yearly to work closely with the command and individual counsel, with a focus on practical issues in defense work and trial advocacy based on current or recent case scenarios.</p>

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	<p>Navy DSO and DCAP respectfully decline to provide actual defense training materials, as doing so would unnecessarily compromise case tactics and overall defense strategies and theories.</p>
USMC	<p>The Chief Defense Counsel (CDC) of the Marine Corps is designated as the OIC of the Defense Services Organization (DSO) and as such has detailing authority and Individual Military Counsel (IMC) approval authority for defense. The CDC has established detailing criteria and IMC approval authority. When detailing DCs to cases, supervisory DCs consider the criteria in paragraph 1 and ensure that: 1) standard detailing criteria are used; 2) the needs of the local commands are taken into consideration; 3) every accused receives zealous representation by a fully qualified counsel; and 4) every accused is detailed counsel in a timely manner.</p> <p>Formal Marine Corps Defense Services Organization (DSO) training programs have been established since the formation of the DSO in 2011, and informally before then. The training requirements are set forth in Chapter 2 of the LEGADMINMAN, and in more detail in CDC Policy Memoranda published annually.</p> <p>At a minimum, each defense counsel must attend two Continuing Legal Education (CLE) training events each year. This requirement runs in concert with the counsel's requirement to maintain currency for their state bar licenses. The DSO has an annual CLE each year that every defense counsel and enlisted support staff attends, in addition to monthly training conducted by the Senior Defense Counsel (usually a Major or experienced Captain) at the local Branch Office and quarterly training by the Regional Defense Counsel (usually a Lieutenant Colonel or experienced Major). The topics of these individual training events vary depending on identified needs within the DSO, but range from practical exercises such as mock cross-examinations and opening statements/closing arguments to more academic classes on new developments in the law or motions, for example.</p>
USCG	<p>By long standing memorandum of agreement between the Coast Guard and the Navy JAG Corps, the Navy is principally responsible for defending Coast Guard members accused of crimes under the UCMJ. The Coast Guard depends on the Navy JAG Corps to provide fully qualified defense counsel for Coast Guard cases. In return, four Coast Guard judge advocates are detailed to work at various Navy Defense Service offices on two year rotations, which provide another significant source of trial experience to Coast Guard judge advocates.</p>

Narrative responses have been consolidated by the Response Systems Panel (RSP). Please forgive formatting errors in text and data. Source documents for narrative responses can be obtained by contacting the RSP.



Defense Counsel Basics



Objectives

401806

- **1. Understand your professional responsibilities**
- **2. Know how to act professionally at all times**
- **3. Always obey the law**
- **4. Know how to avoid conflicts of interest**
- **5. Understand the need to put your client's interests ahead of your own**
- **6. Learn to seek help from all available sources**



Obey the Golden Rule

There is no cause, no principle, no client, no supervisor and no amount of money that is worth putting your law license in jeopardy!



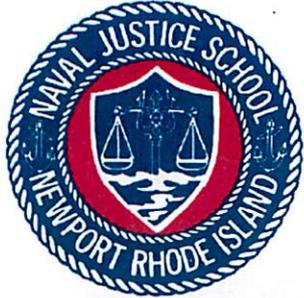
JAGINST 5803.1D

- Rules apply to “covered attorneys”
 - ✓ Broad definition:
 - Active duty JAs & other attorneys working under cognizance/supervision of the JAG, including civilian defense counsel.



JAGINST 5803.1D

- Rules do not apply to non-attorneys
 - Rules serve as “models” of ethical conduct for
 - ✓ Legalmen/legal service specialists, legal interns & civilian support personnel
 - ✓ For Navy—Lawyer Assistants? General Attorneys are of course covered, but may not be detailed in some cases
 - ✓ For Marines – See CDC PM 1-11. Requires support personnel to follow JAGINST 5803.1D



Practice Tips

401810

1. Communicate with your client;
Do it early & often
Establish rapport and trust
Ensure he knows you're on his side
2. Educate your client in order to
create realistic expectations;
Brutal honesty is sometimes required



Practice Tips

3. When unforeseen negative developments occur in a case, be prompt and candid about notifying your client;

Bad news does not get better with time

4. Practice law defensively:

Document everything especially those communications pertaining to client decisions about the representation.



Practice Tips

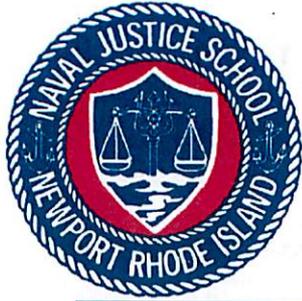
401812

5. Be careful of what you promise clients, but when you make a promise, keep it.
Do the same w/opposing counsel and the Court.
6. Run situations by experienced lawyers and never ever be afraid to ask questions.
7. Set the tone for ethical & professional behavior in your office.



Defense Counsel's Duty

- A defense counsel's primary duty is to provide zealous, ethical, and effective representation to Marines/Sailors; this duty is limited only by law, regulation, and the Rules of Professional Conduct (JAGINST 5803.1D).
- Defense Counsel must guard the interest of the accused zealously within the bounds of the law without regard to personal opinion as to the guilty or the accused. Discussion RCM 502.



Basic Ethics for Defense Counsel

401814

- The defense counsel's duty to represent the client's interests is balanced by his duty to act in an ethical and professional manner.

- Unscrupulous or unethical behavior damages the reputation and credibility of the defense counsel. As the representative of the client, such acts also damage the reputation and credibility of the (accused) Marine / Sailor.
 - An unethical or unscrupulous DC does not provide effective representation



Causes of Violations

- Ignorance
- Complacency
- Time Restraints
- Too much empathy
- “Refuse to lose” mentality



Competence-Rule 1.1

- A covered attorney shall provide competent, diligent, and prompt representation to a client.
 - Requires legal knowledge, skill, thoroughness and expeditious preparation and continuing study and education to maintain it.
- Determination as to competence made by supervising attorney.



Communication-1.3 & 1.4

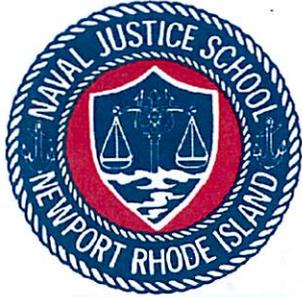
- Reasonable diligence and promptness (1.3).
- Consult with client as soon as practicable and as often as necessary (1.3).
- Keep client informed and promptly comply with requests for info (1.4).
- Explain matters to allow for informed decisions (1.4).



Fees and Gifts-1.5 & 1.8

- 1. Active duty cannot charge fees and cannot accept gifts from clients...

What do you do if you are given a gift by a client?



Confidentiality-1.6

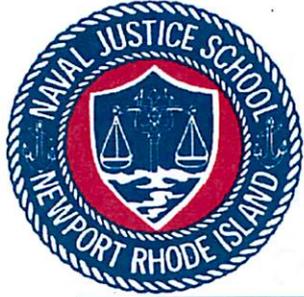
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-
- No disclosure of client confidence UNLESS:
 - Necessary to prevent criminal act which JA reasonably believes is likely to result in:
 - a. Death;
 - b. Substantial bodily harm;
 - c. Significant impairment of National Security;
 - d. Significant impairment of units, aircraft, vessel or weapons system.
 - Beware: State bars may have different rules – the JAG’s rules trump.
 - What about revealing the whereabouts of a client?



Conflict of Interest-1.7

- Interests of client conflict with:
 - Another client (including former client);
 - Responsibilities to third party;
 - Personal interests of atty.
 - Must disclose preexisting conflict.
 - Client must consent
 - For Marines – See CDC PM 2-12 Advising Clients of Conflicts of Interest
 - What happens when you discover the conflict after you have begun representation?



Candor Toward the Tribunal-

Rule 3.3

401821

1. Means no false evidence, or false or misleading representations or legal authority, and full disclosure to the tribunal - especially in an ex parte proceeding.
2. An advocate has a duty to disclose directly adverse authority in the controlling jurisdiction which has not been disclosed by the opposing party.



Extra-Tribunal Statements-

Rule 3.6

401822

-
- A lawyer shall not make public statements that will have a substantial likelihood of prejudicing a proceeding.

 - Prejudicial if comment on :
 - Character of party, witness, victim;
 - Possibility of guilty plea;
 - Existence of confession;
 - Physical evidence;
 - Opinion on guilt/ innocence;
 - Inadmissible information; or
 - Attack credibility of military officials.



Extra-Tribunal Statements- Rule 3.6

➤ May Comment on:

- **General info of claim, offense, or defense;**
- **Info in public record;**
- **Investigation in progress;**
- **Litigation steps;**
- **Request for assistance in obtaining evidence;**
- **Warning of danger concerning individual;**
- **Info needed to counter adverse publicity;**
- **ID of accused;**
- **Info necessary to apprehend accused;**
- **Info regarding apprehension; and**
- **Info of apprehending officers.**



Professional Misconduct

401824

- Rule 8.3: Mandatory Reporting
-
- Rule 8.4 defines Misconduct as:
 - Violation of the PR rules;
 - Criminal act reflecting adversely on honesty, trustworthiness, or fitness;
 - Dishonesty, fraud, deceit, or misrepresentation; or
 - Conduct prejudicial to administration of justice;
 - Complaints and Review — lengthy process but authority ultimately rests with JAG



USMC DSO & USN COS- NLSC Policy

- Never utter the word “unethical” about an attorney or judge, or allege UCI, without consulting your RDC or DSO CO.
- TC is unethical = I intend to file a formal complaint that will follow the TC forever.



Bottom Line

- Obey the law and counsel clients to do same;
- Protect the rights of clients;
- Manage your client's expectations from the beginning;
- Be honest and truthful in all dealings;
- "My word is My Bond" – Say it, mean it & act it;
- Understand that your reputation is important;
- Be courteous towards all opposing counsel;
- Never utter the word "unethical" about an attorney or judge without consulting your RDC or DSO CO.
- Never go into court unprepared



Defense Counsel Basics

Questions?

Fall 2013 New Defense Counsel Orientation Course – Norfolk, VA

Mon, Sep 09

0800-0900	Getting Started	*CDR King
0915-1045	Persreps/Adboards	Mr. Puckett/LCDR Gross
1100-1130	Proof Analysis	Capt Shinn
1130-1300	Lunch	
1300-1430	Pretrial Responsibilities/Discovery/ Investigation	Maj Grimm
1445-1545	Litigating for Resources	Maj Grimm
1630	Ice breaker	

Tue, Sep 10

0800-0900	Article 32s	LCDR Gross
0915-1015	Initial Client Meeting	Mr. Puckett
1030-1130	Motions	*CDR King
1130-1300	Lunch	
1300-1450	Daubert and Experts	Mr. Puckett/CDR King
1500-1630	706 Boards	CDR King

Wed, Sep 11

0800-0900	PTAs and Providency	LCDR Gross
0915-1130	Voir Dire (SA and UCI)	Capt Shinn
1130-1300	Lunch	
1300-1400	Making the Record for Appeal	CAPT LeBlanc
1415-1515	Instructions	CDR King
1530-1630	Sentencing	LtCol Plummer

Thu, Sep 12

0800-0900	Ethics for DCs	CAPT Purnell
0915-1015	Interviewing Complaining Witness	Ms. Coyne
1030-1130	Suicide Awareness/Vicarious Trauma	CAPT Purnell
1130-1300	Lunch	
1300-1400	Managing Civilian Defense Counsel	Mr. Puckett
1415-1630	Service Breakouts/Case Consults/ One-on-Ones	

Fri, Sep 13

0800-0900	MJs Perspective	CAPT Reismeier
0915-1015	Dealing with TC, MJ and SJA	*CDR King
1030-1130	What I Wish I Knew Then...	Panel
1130-1200	Concluding Remarks & Course Critiques	

Panel

CDR King, LtCol Plummer, LCDR Gross, Capt Shinn, Mr. Puckett, Ms. Coyne

NAVY . 0.75

401829

Drug Facilitated Sexual Assault: The Science

401829

COL TIMOTHY LYONS

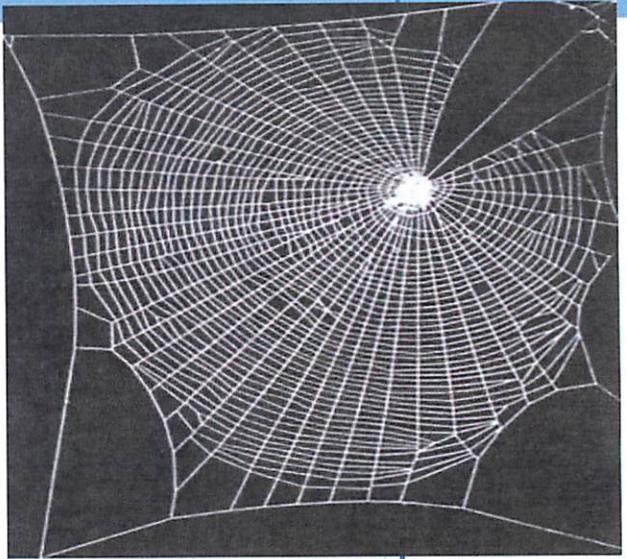
Director, Forensic Toxicology

Office of the Armed Forces Medical Examiner

Poison?

**All things are poison and nothing is without
poison, only the dose permits something
not to be poisonous (Paracelsus)**

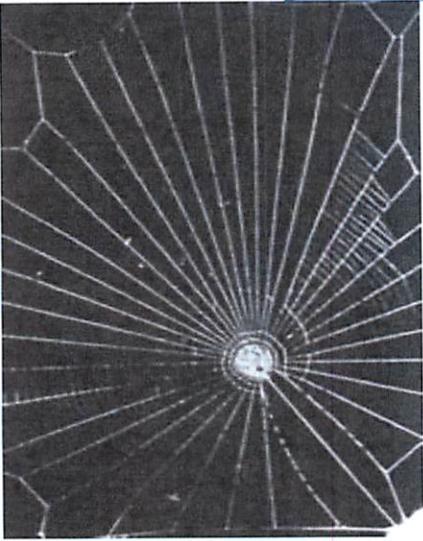
Dose alone defines the poison



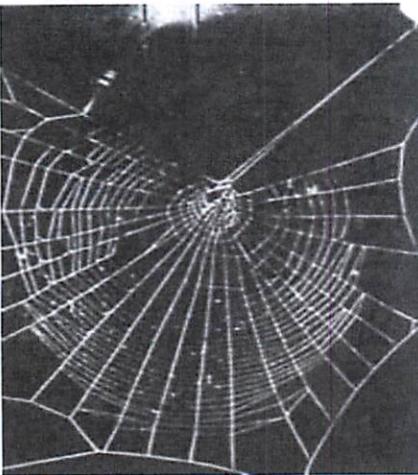
NORMAL



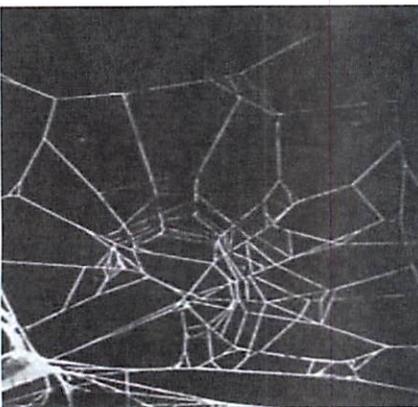
ON HASH



LSD



MESCALINE



CAFFEINE

Expert Basics

- ❖ Even experts lack integrity
 - Background/credential checks
 - Previous testimony transcripts
- ❖ Review and question their proposed testimony-
get a second opinion
- ❖ Good to go- then trust their judgement and
advice
- ❖ Consult early and often

The Expert Code of Conduct

- ❖ All testimony must be scientifically and forensically valid and substantiated-Daubert
- ❖ All personal opinions must be clarified as such
- ❖ All assumptions must be stated
- ❖ “I do not know”-is often a good and right answer

DFSA

- ❖ **Incapacitate an unsuspecting individual(s) for the purpose of sexual assault.**
- ❖ **Can involve incapacitation of a male, female, or both with intent to commit sexual assault against the victim.**
- ❖ **Can involve levels of impairment:**
 - **Judgment**
 - **Ability to resist**
 - **Memory Blackout**
 - **Loss of Consciousness (Passed out)**

Challenges with Evidence Collection

- ❖ Proper Specimen(s)
 - Blood
 - Urine
 - Breath
- ❖ Enough Specimen
- ❖ Preservation of Specimen
- ❖ Time delay in collection
- ❖ No single analytical test will detect all potential drugs used to facilitate sexual assault
- ❖ Immunoassays / Detection Limits
- ❖ Non-Existent/complex procedures

DOES IT HAPPEN???

- ❖ Beynon et al, 2008
 - 3 year review of cases in UK
 - Involuntary DFSA very rare (except ETOH)
 - No rohypnol detected in 3 years
 - Only 18 cases out of 1014 = 2% (eliminate voluntary consumption)
 - Prevalence exaggerated- covert administration virtually non-existent in case studies

ALCOHOL IS THE REAL ISSUE

Drugs Reportedly Used to Commit DFSA

401837

- ❖ Ethanol
- ❖ Benzodiazepines
 - Flunitrazepam
 - Clonazepam
 - Lorazepam
 - Alprazolam
 - Triazolam
 - Chlordiazepoxide
 - Diazepam
 - Temazepam
- ❖ Zolpidem
- ❖ Barbiturates
- ❖ GHB, GBL, and 1,4-BD
- ❖ Ketamine
- ❖ Opiates
- ❖ Synthetic Opiates
- ❖ Antihistamines
- ❖ Hallucinogens
- ❖ Sedative Antidepressants
- ❖ Chloral Hydrate
- ❖ Muscle Relaxants
- ❖ Scopolamine
- ❖ Herbal Sedatives
- ❖ Marijuana

INCAPACITANTS

401838

- ❖ Barbiturates Butalbital
- ❖ Benzodiazepines Valium / Rohypnol
- ❖ Sleep Aids Ambien
- ❖ Hypnotic's Chloral Hydrate
- ❖ Narcotics Codeine / Meperidine

Other illicit drugs such as THC taken alone or in combination with ethanol for purposes of reducing judgment, memory or ability to resist assault.

Flunitrazepam (Rohypnol)

- ❖ Not available for medical use in U.S.
- ❖ 0.5, 1, or 2 mg tablets
- ❖ Central Nervous System (CNS) depressant
- ❖ A benzodiazepine 10 times more potent than Valium
- ❖ The most widely prescribed sedative in Europe. No longer available by Rx in US
- ❖ Taken orally, snorted or injected

Pharmacology

401840

❖ Side-effects:

- Profound Sedation
- Dizziness
- Lack of coordination
- Slurred speech
- Confusion
- Anterograde Amnesia
- Impaired Psychomotor Function

ROHYPNOL

401841

- ❖ Readily absorbed/ Effects begin within 30 minutes
- ❖ Peak at 2 hours and can last up to 8 hours depending on total dose
- ❖ Symptoms:
 - SLOWING OF PSYCHOMOTOR PERFORMANCE
 - MUSCLE RELAXATION
 - DECREASED BLOOD PRESSURE
 - SLEEPINESS
 - AMNESIA
- ❖ Package insert reads: **“Some patients may have no recollection of any awakenings occurring in the 6-8 hours during which the drug exerts it’s action.”**

GHB (Gamma-hydroxybutyric acid)

- ❖ **Made From: gamma butyrolactone (GBL) and Sodium Hydroxide or Potassium Hydroxide - basically it is degreasing solvent or floor stripper mixed with drain cleaner.**
- ❖ **Originally developed as an anaesthetic drug.**
- ❖ **Readily absorbed after oral administration and rapidly metabolized in the liver.**

What Makes GHB Good DFSA Drug

- ❖ Easy to obtain
- ❖ Fast acting, sedative properties (20 min)
- ❖ Mimics ethanol
- ❖ Amnesiac, CNS depressant, hypnotic
- ❖ Rapidly eliminated from the body
- ❖ Liquid form, clear, colorless
- ❖ Many labs don't have assays for GHB
- ❖ Naturally occurring

GHB (cont.)

- ❖ An intoxicating dose is 15 mg/kg
- ❖ Typical dose is 10 ml in liquid form (equivalent to ~ 1 gram)
- ❖ Small doses encourage a reduction of of social inhibitions and an increased libido
- ❖ Other effects include:
 - Vomiting
 - Drowsiness
 - High blood pressure
 - Vertigo
 - Mood swings
 - Liver tumors
 - Violent behavior
 - Dizziness
 - Seizures

GHB (cont.)

401845

- ❖ At higher doses the euphoria gives way to feelings of sedation
- ❖ Excessive dose can lead to:
 - Loss of Consciousness
 - Irregular and Depressed Respiration
 - Tremors
 - Coma
 - Death – Doses of 4g
- ❖ GHB produces a similar feeling to alcohol, and it's effects are exacerbated by combining it with alcohol.
- ❖ GHB has a TERMINAL HALF LIFE of 20 minutes to 1 hour.
- ❖ After 12 hours the drug is not detectable

KETAMINE

- ❖ Low doses (25 – 100mg) produce psychedelic effects quickly.
- ❖ Large doses can produce vomiting, convulsions and may lead to O² starvation in the brain and muscles.
- ❖ 1 Gram can cause death.
- ❖ The effects of a Ketamine 'high' usually last an hour but can last for 4-6 hours.
- ❖ 24 – 48 hours are generally required before the user will feel completely "normal" again.

What Makes Ketamine a Good DFSA Drug ?

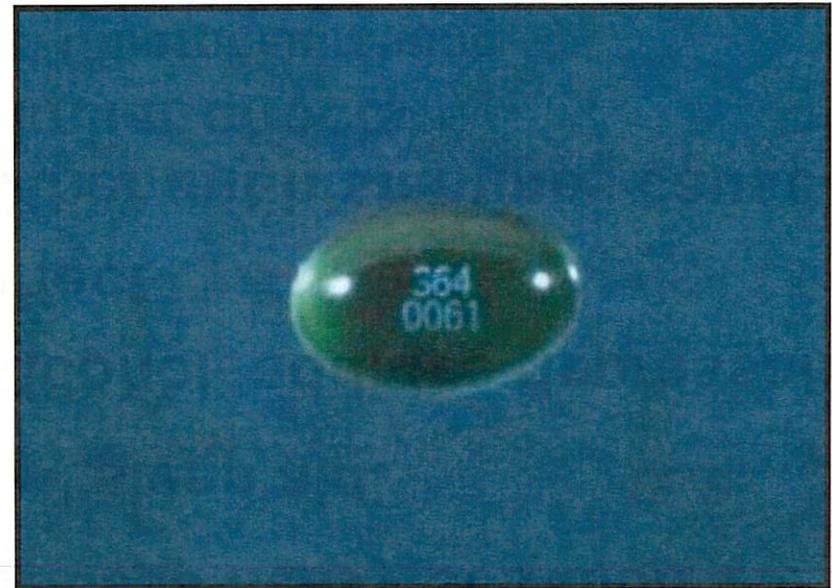
- ❖ **Has dissociative, analgesic, and mild sedative effects**
- ❖ **Becoming popular drug of abuse**
 - **More readily available**
 - **Rave scene**
- ❖ **Many times victim voluntarily ingests**

Miscellaneous Drugs

- ❖ Chloral Hydrate
- ❖ Diphenhydramine (Antihistamines)
- ❖ Dextromethorphan (Robitussin)
- ❖ Zolpidem (Sleep Aids, Ambien)
- ❖ Carisoprodol
- ❖ Psilocybin (Mushrooms)

Chloral Hydrate

- ❖ “Mickey Finn”
 - Chicago bar shut down in 1903 because its customers were served spiked drinks and then robbed
- ❖ Oldest Sedative/Hypnotic still used today
- ❖ Liquid-filled gel-cap or syrup
- ❖ Very rapidly metabolized; must look for metabolite (TCE)
- ❖ Very strong sedative effect



Diphenhydramine (Benadryl®)

401850

- ❖ **Antihistamine**
 - One of the first effective
- ❖ **Increased popularity**
- ❖ **Hallucinogenic properties at high doses**
- ❖ **Available OTC**
- ❖ **Causes heavy sedation**
 - “sleep aid”
- ❖ **Alcohol- additive depressant effect**
- ❖ **Other antihistamines cause similar effects:**
 - Chlorpheniramine
 - Doxylamine
 - Hydroxyzine
 - Promethazine
 - Tetrahydrozoline
 - Brompheniramine

DEXTROMETHORPHAN

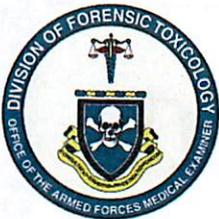
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- ❖ Robo-dosing
- ❖ Alcohol substitute
- ❖ Is a sedative hypnotic when taken in large doses
- ❖ Readily available in over the counter medications (cough syrup, Robitussin)
- ❖ It's metabolite (levorphanol) is a scheduled opioid
- ❖ Increased Abuse
 - DoD
 - Civilian

DXM Effects

401852

- ❖ Mood lift, euphoria
- ❖ Giggling, laughing
- ❖ Dissociation of mind from body
- ❖ Dream like experiences
- ❖ Feeling of empathy, closeness to others
- ❖ Visual and aural hallucination
- ❖ Confusion, disorientation
- ❖ Zombie like walking
- ❖ Uncoordinated agility
- ❖ Racing pounding heart
- ❖ Hangover depression
- ❖ Vomiting, dizziness
- ❖ Body itching, rash, blotchy skin
- ❖ Diarrhea, fever



Zolpidem (Ambien)

401853

- ❖ Newer and popular hypnotic agent
- ❖ Low dosage medication (5-10mg)
- ❖ Small pill
- ❖ Metabolites difficult to detect
- ❖ Many laboratories not equipped or experienced to detect or report

Carisoprodol

401854

- ❖ Carisoprodol (Soma®):
 - Used primarily as a muscle relaxant
 - Acts by depressing the CNS
 - Has a pronounced sedative action
 - Metabolized to meprobamate
- ❖ Meprobamate (Equanil®):
 - Older sedative
 - Still occasionally prescribed

Detectability Before Ingestion

401855

- ❖ Most “drugs” will dissolve or disperse in beverages or food
- ❖ Tablets and some capsules have inert fillers that will not dissolve
 - May not be noticeable depending on beverage, physical and social circumstances, and if victim is intoxicated
- ❖ Most medications are bitter
 - May not be noticed if the beverage is strong tasting, victim is not familiar with the “normal” taste of the drink, and degree of intoxication of victim

Commercial Detection Kits

401856

- ❖ **Marketed in Europe**
- ❖ **Claimed to detect various date-rape drugs**
- ❖ **Seem to only detect GHB**
- ❖ **Efficacy not proven**
- ❖ **Drink coasters etc**

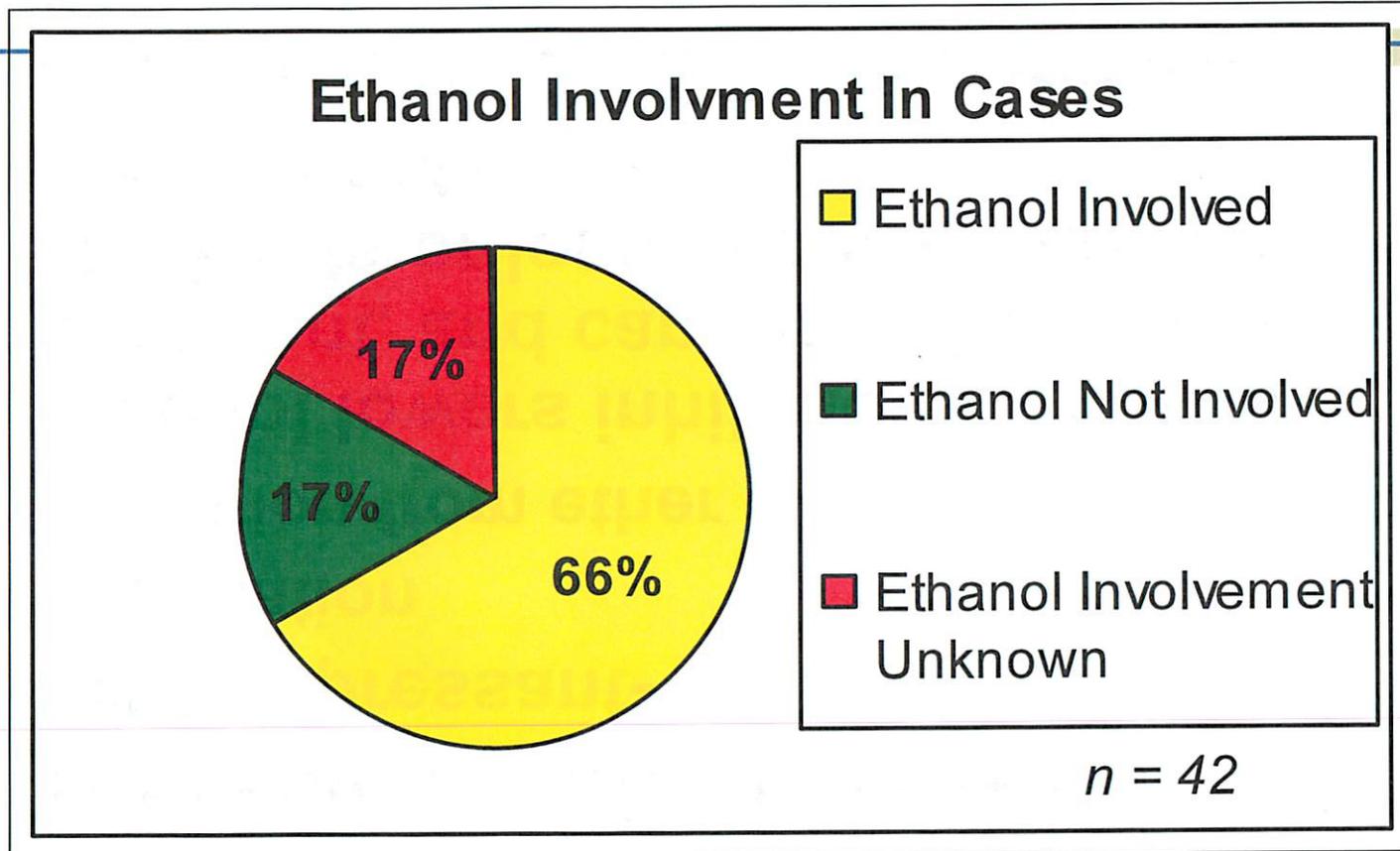


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Ethanol and DFSA

- ❖ **Alcohol remains the most frequently used drug in sexual assaults.**
- ❖ **Bureau of Justice Statistics, 1998:**
 - ◆ **1/3 of offenders convicted of sexual assault reported drinking at the time of the assault**
- ❖ **“College Alcohol Survey”, 1997:**
 - ◆ **Believed to be involved in 75% of acquaintance rapes on campuses**
- ❖ **EISohly Study, 1999:**
 - ◆ **40% of 2,366 urine specimens contained alcohol**

DoD Ethanol DFSA



- ❖ Ethanol has been reported to be involved in the majority of the cases of DFSA the OAFME has been involved in.

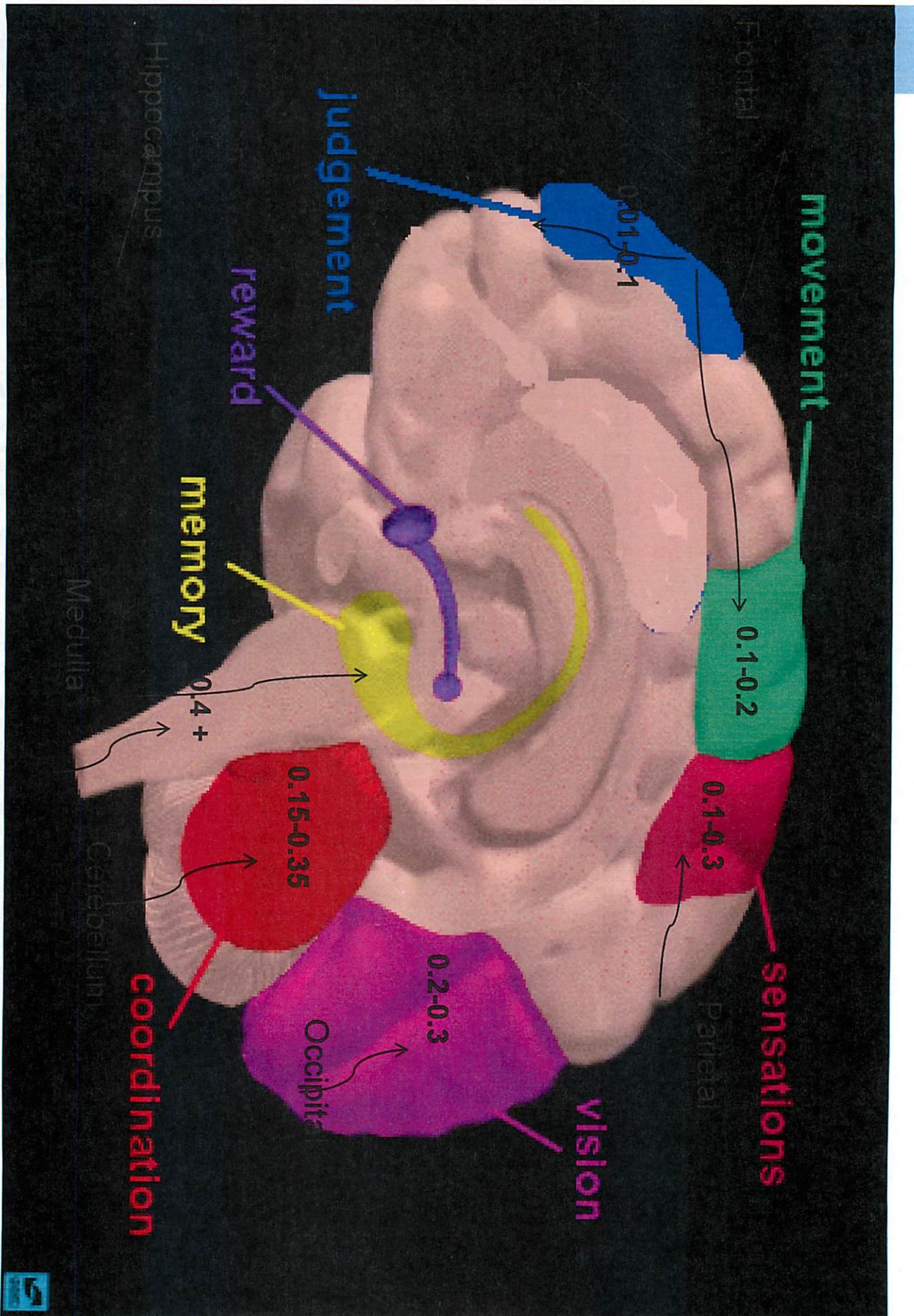
Alcohol Facts

401860

- ❖ **Toxic- strong irritant to tissues**
- ❖ **CNS Depressant-**
 - **Sedation**
 - **1 H ion from ether**
- ❖ **Alcohol lowers inhibitions, impairs judgment, and can result in memory blackouts or loss of consciousness (passed out)**
- ❖ **Chronic Use- CNS, kidney and liver damage**
- ❖ **Variability in response**

What Makes Ethanol a Good DFSA Drug

- ❖ Easy to obtain
- ❖ Victims commonly consume voluntarily
- ❖ Can cause decreased inhibitions, impaired perceptions, loss of consciousness and amnesia
- ❖ Prosecution may not be likely
- ❖ Public perception of intoxication



Modified: Effects of Alcohol on CNS Functioning at Various BACs: SR Gerber, MD in JC Garriott (see references)

CNS Depression of Ethanol

- ❖ **Impairs judgment**
- ❖ Depresses learned social and cultural inhibitions
- ❖ Impairs self-evaluation
- ❖ Euphoria
- ❖ **Memory loss**
- ❖ Shortened attention span
- ❖ **Sedation**
- ❖ Blurred vision
- ❖ Nystagmus
- ❖ Altered distance perception
- ❖ Impaired hearing
- ❖ **Reduced muscle coordination**
- ❖ Increased reaction time
- ❖ Light fixation

Responses

- ❖ Alcohol lowers inhibitions, impairs judgment, and can result in memory blackouts or loss of consciousness (passed out).
- ❖ Physiologic effects of alcohol can be noticed with levels of 0.02% ethanol one drink.
- ❖ .35 to .40 and higher coma and death. Reported cases of .6 to .7 BAC

Alcohol and Sexual Assault

- ❖ Alcohol-facilitated sexual assault
- ❖ Scott-Ham & Burton (2006) study
 - 60% of alleged victims = .15 BAC
 - 36% = .20 BAC
 - 4% = .30 BAC
 - High BACs reflective of significant levels of impairment
- ❖ Alcohol can be an attributing factor to the assault.



401866

Ethanol

- ❖ A single alcoholic beverage* will result in a blood alcohol concentration of 0.03% (w/v) in a 140 lb individual.
- ❖ A single alcoholic beverage is defined as:
 - 1.5 oz of 80 proof (40% ethanol)
 - 12 oz of beer (4-6% (w/v))
 - 4 oz of table wine.
- ❖ Beer ethanol content can vary however from 3.92%(w/v) to 15.66% (w/v)

*(Case et al. J Analytical Tox (24) 2000, 202)

Ethanol Induced Amnesia

- ❖ Ethanol interferes with the ability to form new memories.
- ❖ Leaves intact previously established long-term memories
- ❖ Leaves intact the ability to keep new information active in memory for brief periods.
- ❖ As the amount of ethanol consumed increases, so does the magnitude of the memory impairment.

Aaron White, Ph.D. "What Happened? Alcohol, Memory Blackouts, and the Brain" (<http://www.niaaa.nih.gov/publications/arh27-2/186-196.htm>)

ETHANOL AND BLACKOUTS

401869

- ❖ Blackout: Periods of memory loss for which events that transpired while a person was drinking (No loss of consciousness - not passed out).
- ❖ Ethanol induced memory impairment includes disruption to the hippocampus which plays a central role in the formation of new memory.
- ❖ Large amounts of ethanol, particularly if consumed rapidly, can produce partial (i.e. fragmentary) or complete (i.e. en bloc) memory blackout.
- ❖ Aaron White, Ph.D. "What Happened? Alcohol, Memory Blackouts, and the Brain"
(<http://www.niaaa.nih.gov/publications/arh27-2/186-196.htm>)

401869

Who is? Who Isn't

- ❖ Blacked out- can not detect
- ❖ May not appear impaired
 - Rent & drive cars
 - Perform surgery
 - Fly planes
- ❖ May black out before staggering & slurring & falling
- ❖ Susceptibility varies- not everyone prone to them
- ❖ Unpredictable

Contributing Factors

- ❖ Rapid rise in BAC
 - Empty stomach
 - Rapid intake
 - Stronger drinks
- ❖ Experienced Drinker- functions blacked out
- ❖ Novice Drinker- may pass out before black out or soon after

Duration

- ❖ Most people- minutes to hours
- ❖ Extreme cases- days
- ❖ Depends on consumption and individual threshold
- ❖ Black Out Test- 3 word test

TYPES

❖ FRAGMENTARY

- More common
- Occur at lower BAC
- Can recall some events
- Recall certain events with cues

❖ En Bloc

- Higher BAC
- No recall- ever
- Distinct onset

PASS OUT-

- ❖ Alcohol induced unconsciousness
- ❖ Similar to anesthetic- sedation
- ❖ Long lasting- slow to recover
- ❖ Unaware of many environmental and physical stimuli- to include physical manipulation and sexual assault.
- ❖ Can occur without a preceding blackout period

BAC DETERMINATION

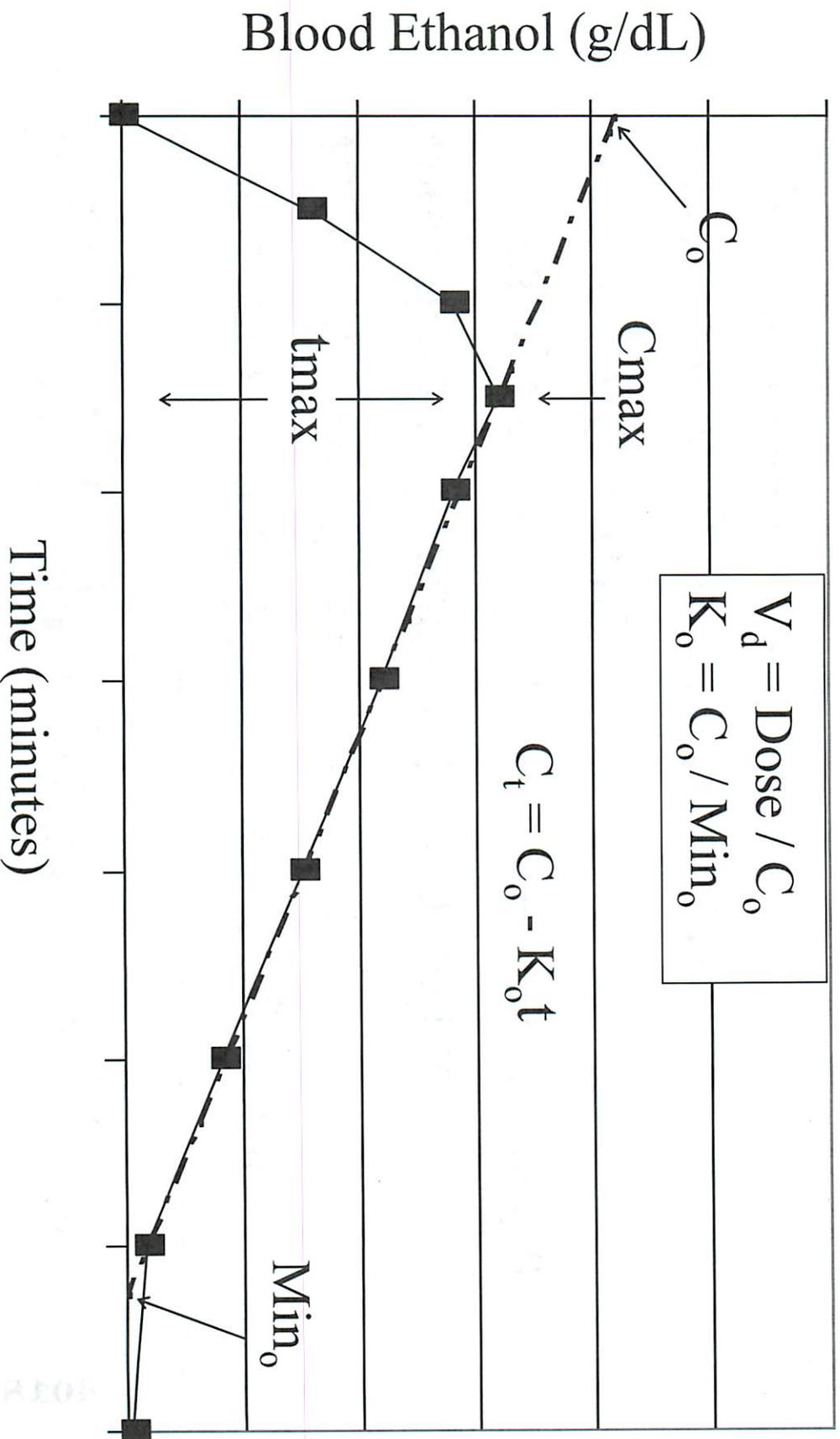
401875

- ❖ Measured- with back-extrapolation
 - Blood
 - Breath
 - Least variables/most accurate
- ❖ Calculated- Widmark equation
 - No measurements
 - Several variables
 - Can have significant variance undermining accuracy

Individual Variability

- ❖ **Drinking History/Tolerance**
- ❖ **Weight**
- ❖ **Body Composition**
- ❖ **Food ingestion**
- ❖ **Time span over which drinking occurs**
- ❖ **Genetics/Ancestry**
- ❖ **Other meds or drugs onboard**
- ❖ **Mode of ingestion**
- ❖ **Gender**
 - **Decreased enzyme activity**
 - **Decreased liver size and function**

BAC Time Profile

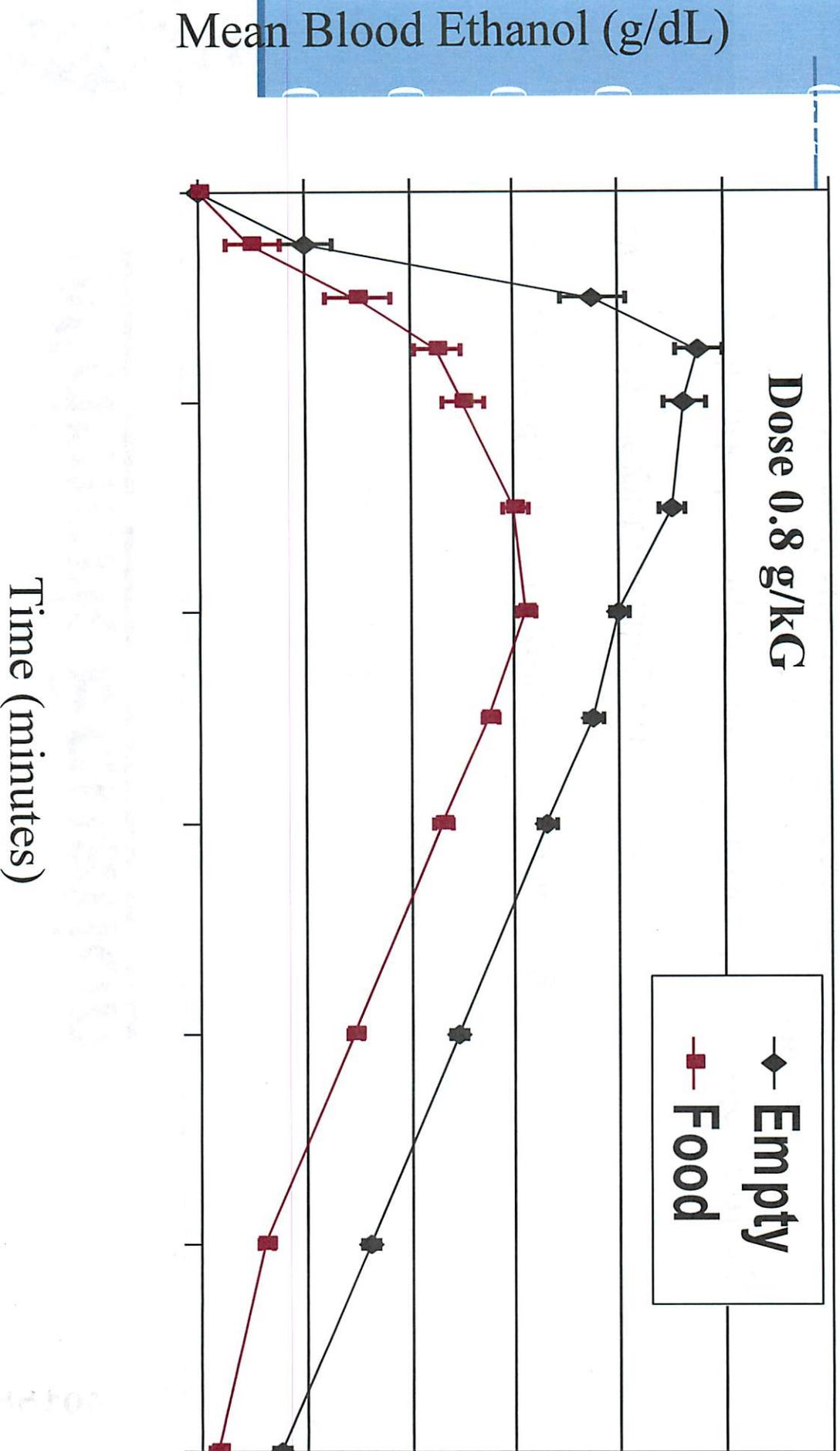


BACK EXTRAPOLATION

- ❖ Need measured BAC as starting point
- ❖ Need time of alleged incident
- ❖ Need time of breath or blood collection
- ❖ Use range of elimination rates- only variable
- ❖ $BAC = BAC + (t)B$
 - *t=time from incident to collection*
 - *B= elimination rate*

Effect of Eating a Meal

401879



Widmark Equation

401880

$$\text{Estimated BAC} = \frac{A}{R \times W}$$

A = mass of ethanol ingested (in grams, g)

W = body weight (in kilograms, kg)

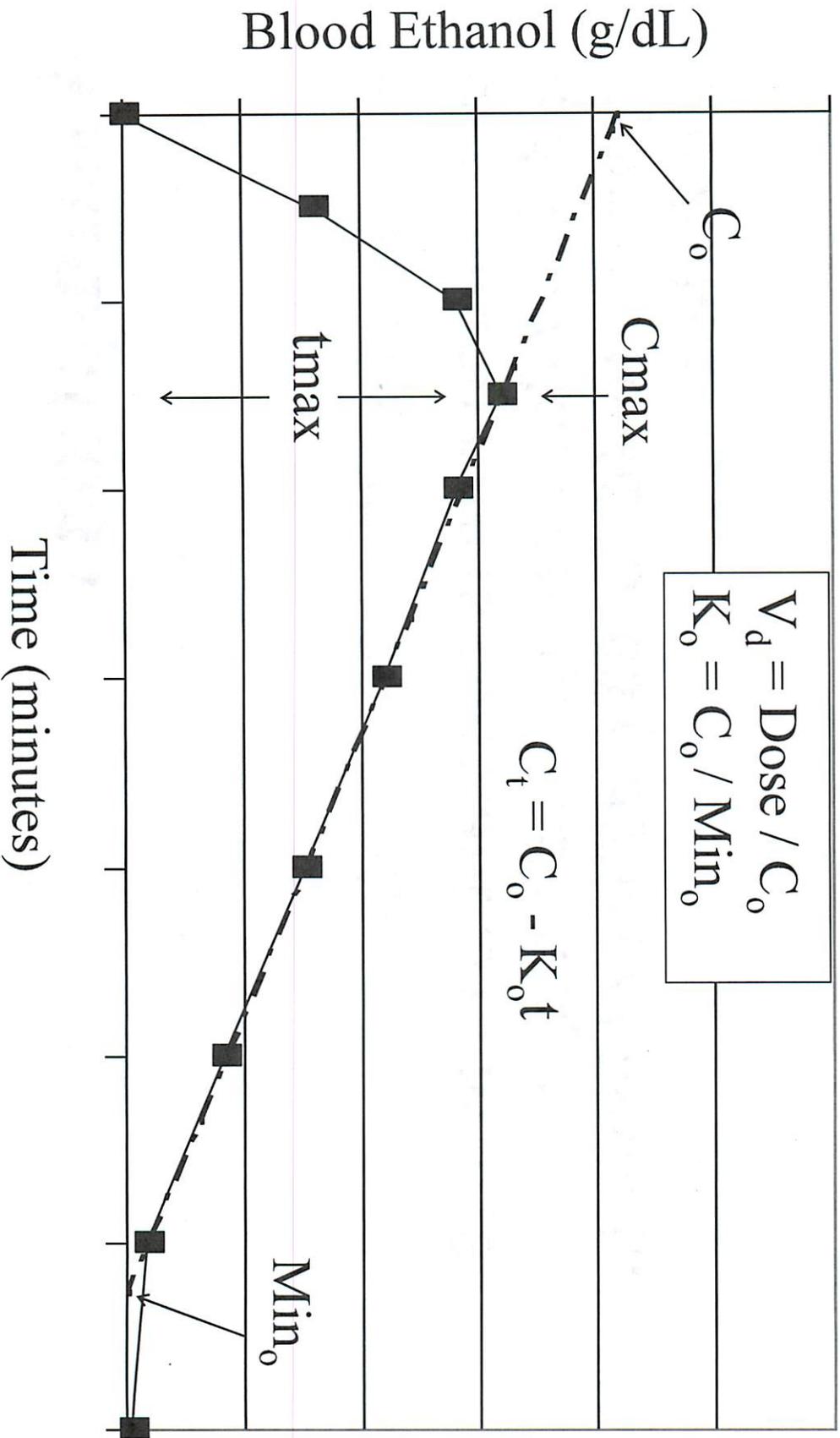
R = Widmark distribution ratio (in liters, L, per kilogram, kg)

(R= 0.55 L blood/ kg body weight for an adult female)

0.68 L blood/ kg body weight for an adult male)

(some support to use TBW calculation- similar)

BAC Time Profile



Assumptions

- ❖ Absorption within 30-60 min
- ❖ Elimination rate is constant .015 to .018 g/dl/hr (%/hr) average - can range upwards to .02 to .03 g/dl/hr or higher in alcoholics

Issues

401883

- ❖ **Need blood or breath collection next day at latest**
 - Does not happen
 - Delayed reporting- days, weeks, months, years
- ❖ **Depend on testimony/statements to estimate alcohol consumed**
 - Inconsistent- varies between witnesses
 - Unreliable- everyone drinking/ time elapsed
- ❖ **Very often can only make general statements and estimations**
 - without real scientific evidence (measured BAC)
 - Lots of room for error

Dangers of Drug Cocktails

- ❖ Many drugs are central nervous system depressants and when taken in combination can result in death.
- ❖ Ethanol and barbiturates; or ethanol and opiates can be a lethal combination.
- ❖ Ethanol and benzodiazepines have been found in the in the blood / urine of individuals who have been assaulted.

Evidence & Investigation

- ❖ Too late for Toxicology
 - Collection within 24 h
 - Alcohol & GHB- 12 h
- ❖ Test unknown liquid
- ❖ Alcohol
 - What?
 - When?
 - How much?
 - Collaborated from witnesses?
- ❖ **WITNESS STATEMENTS ON PHYSICAL AND MENTAL STATE BEFORE AND AFTER INCIDENT- OFTEN BEST DETERMINANT OF IMPAIRMENT WITH OR WITHOUT BAC**
- ❖ Check prescription records

Expert Testimony

401886

- ❖ **Widmark- only if reliable statements on alcohol consumed**
 - Rough estimate
 - Give range, state assumptions
- ❖ **Drugged-**
 - Hard to comment on since no toxicology report
 - Is physical and mental condition consistent with date rape drugs? GHB?
- ❖ **Is victim's physical and mental state consistent with amount of ETOH consumed?**
- ❖ **Amount of ETOH consistent with black out/pass out?**

Outcome

- ❖ With Toxicology testing and report
 - Results can prove or disprove victim's ability to consent
 - Essential to prove level of impairment
 - Solid BAC estimate at time of incident or detection of date rape drugs
- ❖ **Without it- expert is limited**
 - Depend on victim and witness statements and testimony
 - Often inconsistent
 - Rough estimate of BAC at best and no evidence of drugging
- ❖ What really happened? Conviction vs Acquittal?
More reliable and factual outcome if have tox report



401888

JAG Sexual Assault Related Training**BLC - Basic Lawyer Class**

Sex Offenses - 90 Minutes
 SAPR & SAIDA - 60 Minutes
 VWAP - 30 Minutes
 Charging Exercise - 180 Minutes
 (Students given a sexual assault factual scenario and asked to draft charges)
 Stevens Final Mock Trial (Sexual Assault Case)
 (The blocks of instruction below are trial advocacy skill classes, seminars, or discussion groups without written training materials)
 Motions Writing - 60 Minutes
 Motion Prep Time - 180 Minutes
 Motion Argument - 250 Minutes
 Opening Workshop - 135 minutes
 Closing Workshop - 135 Minutes
 Final Mock Trial - 480 Minutes

TCO - Trial Counsel Orientation

VWAP
 Working with investigators - 60 Minutes
 Working with Victims & practical - 250 Minutes
 Prosecuting Sexual Assault cases - 90 Minutes

DCO - Defense Counsel Orientation

Interviewing the Victim and witnesses - 60 Minutes
 Article 120: the basics - 30 Minutes
 The Sexual Assault Case - 60 Minutes

BTA - Basic Trial Advocacy (POC - Ms. Asha Vaghela at code 20)

Evidence in a Sexual Assault Case - 60 Minutes

The common fact pattern for BTA is a sexual Assault case, so all practical exercise time is dedicated to sexual assault litigation:

Opening Statement - 180 Minutes
 Closing statement - 180 Minutes
 Direct examination Practical - 180 Minutes
 Video Review of Practical Exercises - 120 Minutes

TC Ethics

Professional Responsibility of TC - 30 Minutes
 TC's PR rules and the Victim - 30 Minutes

DC Ethics:

DC: Ethical Basics and the Rules - 30 Minutes

LCC Trial Counsel

Forensic Toxicology
Working with Victims and Victim Rights
Working with Experts, Parts 1, 2, and 3
Forensic Psychiatry Part 1, an overview
Forensic Psychiatry Part 2, PTSD and TBI issues for litigators
DNA and other physical forensic evidence
LCC Defense Counsel

LCC Defense Counsel

Forensic Toxicology
Working with Experts, Parts 1, 2, and 3
Forensic Psychiatry Part 1, an overview
Forensic Psychiatry Part 2, PTSD and TBI issues for litigators
DNA and other physical forensic evidence

NJS Online Legal Education

SA-IDA - 60 Minutes
SAPR JAG - 180 Minutes

New Article 120

from 6/28/12 → until the next change

Pre – October
2007



Appendix 27,
MCM 2012

October 2007 –
June 27, 2012



Appendix 28,
MCM 2012

June 28, 2012 -
onwards



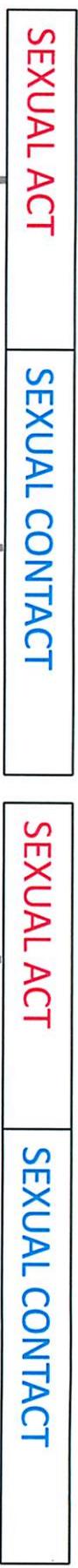
Part IV
2012 MCM

Structure of Sexual Offenses

401890

- Article 120 → Adult Victim
- Article 120a → Stalking
- Article 120b → Child Crimes
- Article 120c → Other Sexual Misconduct

VICTIM = ADULT (over 16 years)



- Commits SA/SC By:
1. Unlawful force
 2. Force causing /likely to GBH to any person
 3. Threatening/placing in fear that *any* person subjected to death/GBH/kidnapping
 4. Rendering unconscious
 5. Administering drug/intoxicant by force/without consent to impair

Rape

Agg. Sex Contact

1. Commits SA/SC By:
 - a. Threatening
 - b. Causing bodily harm
 - c. Fraudulent representation for professional purposes
 - d. Inducing a belief that person is another person
2. When person knows that other person is asleep, unconscious, unaware of sex
3. Other person is incapable of consenting due to:
 - a. Impairment by drug/intoxicant
 - b. Mental disease/disability

Sex Assault

Abusive Sex Contact

Comparison of Definition of Sexual Act

2007

- Sexual Act = Penis + Vulva ONLY OR penetration of the Vulva only
- Penetration by hand or finger or object of the genital opening
 - With the intent to abuse, humiliate, harass, or degrade/gratify the sexual desire of any person

2012

- Sexual Act = Penis + vulva, **anus or mouth**; OR penetration of vulva, **anus, or mouth**
- Penetration of the **vulva, anus or mouth by any part of the body** or object
 - With the intent to abuse, humiliate, harass, or degrade/gratify the sexual desire of any person

Comparison of Definition of Sexual Contact

2007

- Intentional touching directly or through clothing of:
 - Genitalia, anus, groin, breast inner thigh or buttocks
 - With intent to humiliate, abuse, harass or degrade or to arouse or gratify sexual desire
- Intentionally causing another person to touch...
- With intent to abuse, etc.

2012

- ~~Intentional~~ touching directly or through clothing of:
 - Genitalia, anus, groin, breast inner thigh or buttocks
 - With intent to humiliate, abuse, harass or degrade or to arouse or gratify sexual desire
- ~~Intentionally~~ causing another person to touch...
- Touching (or causing) **any body part** with intent to arouse/gratify sexual desire

Comparison of Modalities

-Force-

401897

2007

- Using Force Against other person
 - Use/display of dangerous weapon
 - Suggestion that possess DW or cause another to believe have DW
 - Physical violence/strength/power applied to other person can't escape or avoid

2012

- Unlawful force – no legal justification
- Force –
 - Use **display of a dangerous** weapon
 - Use of physical strength/violence to overcome, restrain or injure a person (obj. standard)
 - Inflicting physical harm sufficient to coerce/compel submission

Comparison of Modalities

-GBH-

401898

2007

- Causing GBH
 - Serious bodily injury
 - Fractured/dislocated bones, deep cuts, torn part of the body, serious damage to internal organs, and other severe bodily injuries
 - Does not include minor injuries like black eye or bloody nose
 - Same as in Art 128, but not like 18 USC ♣2246(4)

2012

- Using force causing/likely to cause death or GBH
 - Serious bodily injury
 - Fractured/dislocated bones, deep cuts, torn part of the body, serious damage to internal organs, and other severe bodily injuries
 - Does not include minor injuries such as a black eye or bloody nose
 - ~~Same as in Art 128, but not like 18 USC ♣2246(4)~~

Comparison of Modalities

-Threats or Placing person in fear-

401899

2007

- Threatening/placing in fear
 - Communication/action that is of sufficient consequence to cause reasonable fear in V/another person that = anything less than death/kidnapping/GBH
 - Physical injury to others
 - Could be accused of a crime
 - Expose a secret
 - Abuse of military rank to affect someone

2012

- Threatening/placing in fear
 - Communication/action that is sufficient consequence = reasonable fear that noncompliance = V or another person **is subjected to the wrongful action contemplated by the communication/action**
- Does not need to prove that person actually intended to carry out the threat **or had ability to carry out the threat**

in fcs

Comparison of Modalities

-Bodily Harm-

401900

2007

- Any offensive touching no matter how slight

2012

- Any offensive touching no matter how slight, including any nonconsensual sexual act or nonconsensual sexual contact
- ***** **What is this really saying?**

Comparison of Defenses

-Consent-

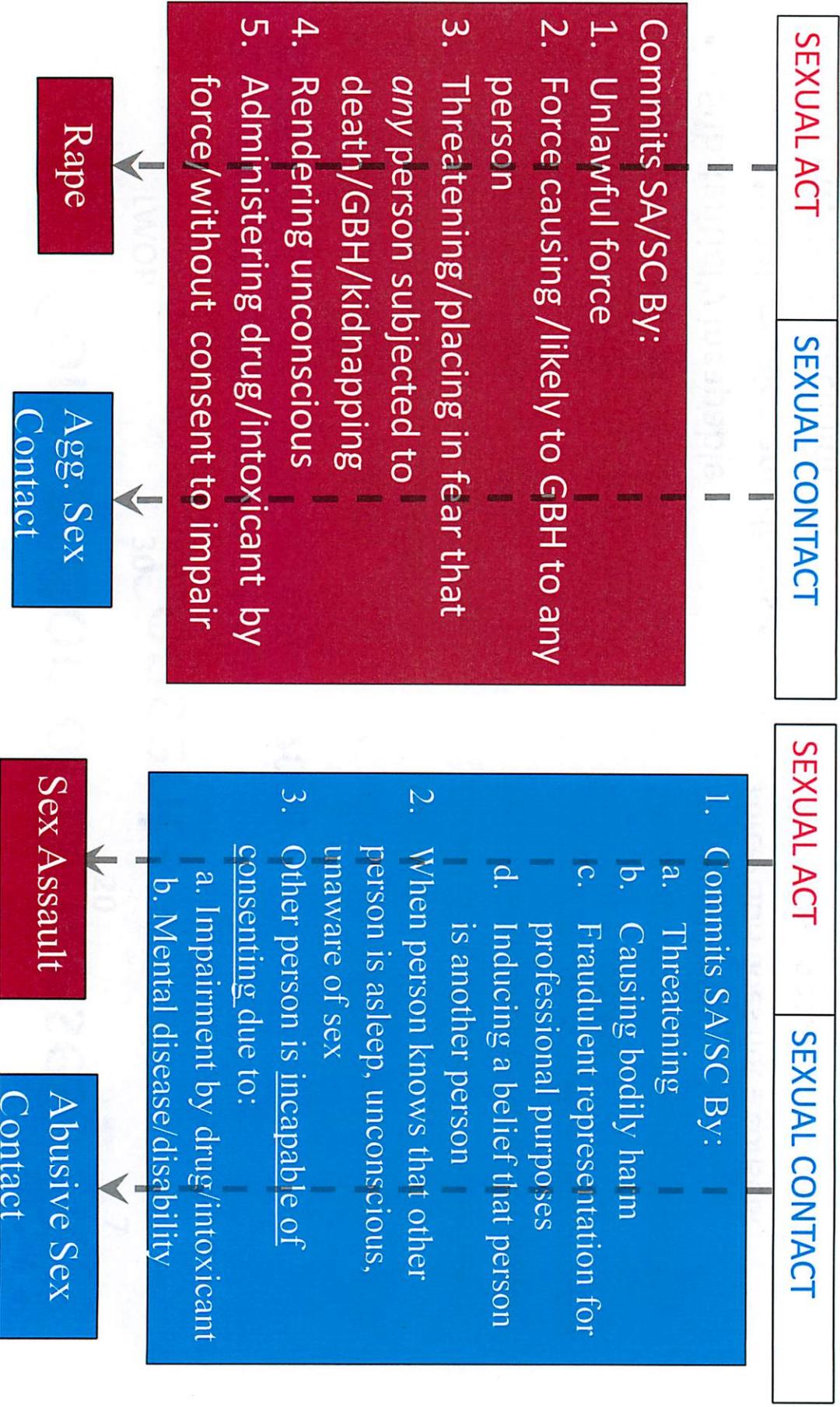
2007

- Must be overt; freely given
- Lack of consent = no consent
- Lack of resistance or submission to threats/fear does not = consent
- Current/previous relationship; dress does not = consent
- Substantially incapable
 - Mental impairment/disease
 - Physically declining
 - Physically communicating unwillingness

2012

- **Overt Act**; Freely given agreement to conduct
- Express lack of consent = no consent
- Lack of resistance does not = consent
- Current/previous relationship or dress does not = consent
- Sleeping; unconscious; incompetent cannot consent
- Force/GBH does not = consent
- Threat/fear does not = consent
- **No consent to fraud rep/inducing/pretense**
- **Lack of consent based on circumstances**

VICTIM = ADULT (over 16 years)



Sexual Assault Abusive Sexual Contact

- Commits an sexual act/contact upon another when the person is incapable of consenting to the sexual act due to →
 - Impairment by any drug/intoxicant or other similar substance, and that condition is known or reasonably should be known by the person
 - Mental disease or defect or physical disability and that condition is known or reasonably should be known by the person

Comparison of Defenses

-Mistake of Fact -

2007

- Accused believed, as result of mistake/ignorance the incorrect belief that other person consented
- Must have been reasonable under all circumstances
- Reasonable, sober, prudent, ordinary person standard
- Cannot be negligent failure/due care
- Accused's intoxication does not matter

2012

- No defense enumerated; does that matter?
- Look to RCM 916

Defenses -Marriage-

2007

- It is a defense for:
 - Agg. Sexual assault
 - Child sex crimes
 - Wrongful sex contact
 - Indecent exposure

2012

- For Art 120
 - Marriage is NOT a defense

Article 120b

Crimes where Child is the Victim

What is a Lewd Act? (2012)

401908

1. Sexual Contact with Child
2. Intentionally exposing genitalia, anus, buttocks, nipple by any means, incl technology with intent to abuse, humiliate, etc. OR intent to gratify...
3. Intentionally communicating indecent language by any means, incl tech, with intent to abuse, humiliate, etc. OR intent to gratify...
4. Any indecent conduct, intentionally done with/in presence of child, including via tech = immorality which is grossly vulgar, obscene, etc. AND tends to excite sexual desire/depraved morals

Comparison of Child Crimes

2007

- Agg. Sex assault of child
- Agg. Sex abuse of child
- Agg. Sex contact with child
- Abusive Sex contact with child
- Indecent liberty with child
- Indecent acts
- Indecent exposure

2012

- Sexual abuse of child
 - Cover:
 - All sexual contact crimes
 - Indecent liberty
 - Indecent act
 - Indecent exposure
 - Key – adds via communication technology

Defenses -Marriage-

401910

- For Art 120b
 - It is NOT a defense to RAPE
 - It is a defense for Sexual Assault/Abuse to be proven by POE
 - EXCEPT if the person is asleep, unconscious or otherwise unaware/incapable of consenting

Defenses

-Consent-

- A child **not legally married** to the person committing the act cannot consent to any sexual act, etc...

Defense

-I thought she was 18-

- Not an affirmative defense that the accused reasonably believed that the child was 12 (strict liability)
- Accused must prove by POE that he/she reasonably believed child was at least 16, *if the child was in fact at least 12.*

Article 120c
Other Sexual Misconduct

Indecent Viewing, Visual Recording, or Broadcasting

Art. 120c(a)

401914

- Person who w/o legal justification
 - Knowingly/wrongfully views the private area of another person w/o consent where Reasonable expectation of privacy (Peeping Tom)
 - Proposed Punishment – 1 year
 - Knowingly photographs, video, films, records the private area w/o consent...
 - Proposed Punishment – 5 years
 - Knowingly broadcasts/distributes any such recording, that the person should have known was made w/o consent where Reasonable Expectation of Privacy
 - Proposed Punishment – 7 years

Forcible Pandering

Article 120c(b)

401915

- 2007 and 2012 are basically the same, just took out some minor confusing language.
- Any person who compels another to engage in an act of prostitution is guilty of forcible pandering
 - 12 years

Indecent Exposure

Article 120c(c)

- Anyone who intentionally exposes in an indecent manner, genitalia, anus, buttocks, female areola/nipple
- Difference with 2007 – took out “expected to be viewed by people other than family/household”
 - 1 year

Definitions

- Private area – naked/underwear clad genitalia, anus, buttocks or female areola/nipple
- Reas. Exp. Privacy – circumstances in which a reasonable person believe he/she could disrobe in private or believe that a private area would not be visible to the public.
- Broadcast – electronically transmit a visual image with intent that someone else is going to see it
- Distribute – delivering actual or constructive possession
- Indecent manner – sexual impurity which is grossly vulgar/obscene/repugnant, and tends to excite sexual desire etc.

Comparison

-Definition of Prostitution-

401918

2007

- Sexual act, sexual contact or lewd act for the purposes of receiving money or other compensation

2012

- Sexual act or sexual contact on account of which anything of value is given to or received by any person

Sodomy

-Article 125-

- Still in effect; b/c w/o it there is not crime under UCMJ for bestiality
- *Marcum Factors*
 - Is this private, consensual sexual activity between adults?
 - Any factors/behavior outside the *Lawrence* analysis? (i.e. child, competent, public, prostitution, etc.)
 - Is there a military nexus?
- See US v. Stratton (NMCCA 201000637, Unpub. 2012)

NEW PROPOSALS

- Article 134(61) – Animal Abuse
- Article 134 (90) – Indecent Conduct

THE END

Questions??



Expert Witnesses



Expert Witnesses

➤ M.R.E. 702/ 703

- “scientific, technical, or other specialized knowledge.” (M.R.E. 702).
- “opinion based on data reasonably relied upon by experts in the field.” (M.R.E. 703).

➤ *Daubert/ Kumho Tires/ Houser*

- Reliability and relevance



Expert Witnesses

401924

➤ Proponent must demonstrate:

- Qualifications of expert (M.R.E. 702);
- Subject matter of the testimony (M.R.E. 702);
- Reliability of the evidence (M.R.E. 702); and
- The basis for the opinion or testimony (M.R.E. 703).

United States v. Billings, 61 M.J. 163 (C.A.A.F. 2005)



Expert Witnesses

401925

-
- Military Judge serves as “gatekeeper,” and must determine whether evidence is reliable and relevant.
 - Non-exhaustive, non-dispositive list for determining reliability:
 - ✓ Whether theory or technique has been tested;
 - ✓ Subject to peer review and publication;
 - ✓ Known error rate;
 - ✓ Acceptance by the particular community
 - Relevance is the M.R.E. 403 test.



Expert Witnesses

- Interplay between M.R.E. 702 & 703
 - M.R.E. 702 is the “big picture”
 - ✓ is the “science” or “technique” established (“generally accepted?”) enough to serve as the basis of expert testimony/ opinion?
 - M.R.E. 703 is the “specifics”
 - ✓ are the things the expert relied upon to develop opinion “reliable” enough to allow the testimony?
 - ✓ allows for introduction of normally inadmissible evidence.



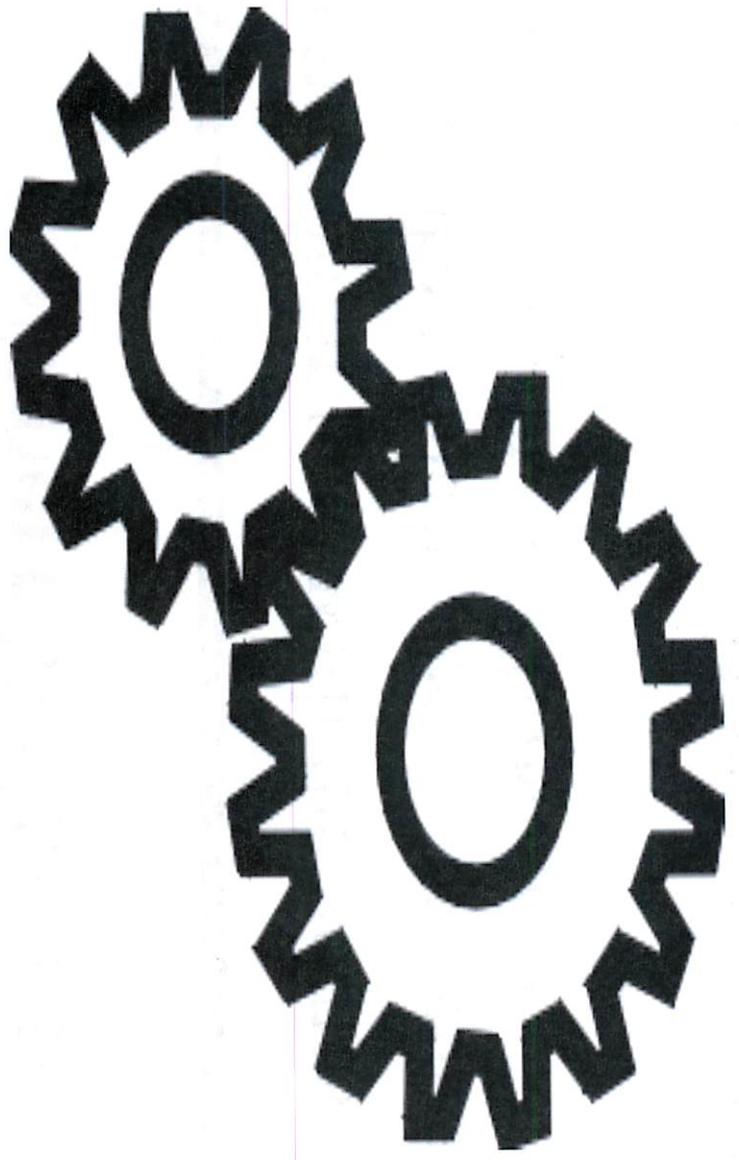
Expert Witnesses

- M.R.E. 704 and the “ultimate issue”
 - Allows for testimony that evidence is “consistent with” assault, rape, drug use, etc.
 - Does not allow testimony:
 - ✓ That D did it; or
 - ✓ That D is lying or W is telling the truth.



Expert Witnesses

Mechanics of presenting an expert witness...





Expert Witnesses

401929

- Determine your goal with the witness:
 - To teach the members about a particular theory, principle, concept, etc.? (*Educator*)
 - To give an opinion based on an evaluation of the facts of the case? (*Opinion Witness*)



Expert Witnesses

-
- Demonstrate expertise (CV, experience, etc.);
 - “teach” members on subject matter;
 - explain basis for opinion;
 - give opinion;
 - explain opinion.



Expert Witnesses

1) Qualifications for Expert:

- Witness can be qualified based on *experience* not just education.
- Fundamental question is that witness's specialty will be helpful to the trier of fact.



Expert Witnesses

401932

2) The general theory or principle for opinion:

- This is where you build the credibility for the theory or principles.
- Even if the MJ has already found evidence admissible, you still want to do this for the members.
- Do not relate to the facts of the case yet . . . Just credit the theory, principle in general.

1/11



Expert Witnesses

If just using expert as the educator, then your work is done. But, if witness will give opinion, you must go further.



Expert Witnesses

- 3) Basis for opinion:
 - Personal knowledge of facts?

- Facts given to expert (Hypo, another's report, etc)?

Be careful of Crawford issues!



Expert Witnesses

4) Give the opinion:

- self explanatory



Expert Witnesses

5) Explain opinion:

- This is your chance again to highlight the reliability of the theory, principle, etc.
- The more abstract or tenuous the conclusion, the more you need to explain it.



Expert Witnesses

Crawford and Experts



Expert Witnesses

- *Melendez-Diaz*, 557 U.S. 305 (2009)
 - “Certificates of analysis” = testimonial and violate Confrontation Clause
- *Bullcoming*, 564 U.S. ____, 131 S. Ct. 2705 (2011)
 - “Surrogate” expert who did personally participate in/ oversee testing violates Confrontation Clause



Expert Witnesses

- *Williams v. Illinois*, 2012 U.S. LEXIS 4658 (June 18, 2012)
 - A MESS!
 - Facts:
 - ✓ Alleged rape, no identified suspects;
 - ✓ Investigators send swab to Cellmark (private lab for analysis);
 - ✓ Cellmark sends back a male DNA profile;
 - ✓ Investigator Lambatos compares profile to State database and finds match for D;
 - ✓ Testifies as expert at ***bench trial*** and asked whether there was a computer match between “DNA profile *found*” in Cellmark’s analysis to profile of D? ANSWER – “Yes;”
 - ✓ Cellmark report not admitted at trial



Expert Witnesses

- *Williams v. Illinois*, 2012 U.S. LEXIS 4658 (June 18, 2012)
 - Plurality Opinion:
 - ✓ Comment about Cellmark “not offered for truth,” but to put into perspective basis for expert’s testimony;
 - ✓ Even if it was offered for truth, its “primary purpose” was not to “accus[e] a targeted individual.”



Expert Witnesses

- *Williams v. Illinois*, 2012 U.S. LEXIS 4658 (June 18, 2012)
 - Justice Breyer's Concurrence:
 - ✓ Frames issues really well:

Confrontation Clause problem lies in the fact that Lambatos did not have personal knowledge that the male DNA profile that Cellmark said was derived from the [swab] was in fact correctly derived from that sample. And no Cellmark expert testified that it was true.

- ✓ Wanted re-argument;
- ✓ In the absence of that, adhered to dissents in *Melendez-Diaz* and *Bullcoming* this is not “testimonial.”



Expert Witnesses

- *Williams v. Illinois*, 2012 U.S. LEXIS 4658 (June 18, 2012)
 - Justice Thomas' Concurrence:
 - ✓ Not testimonial b/c of lack of formality to report (not certified, sworn, affidavit, etc.).

 - Dissenting Opinion:
 - ✓ This is *Bullcoming* all over again!



Expert Witnesses

- *Williams v. Illinois*, 2012 U.S. LEXIS 4658 (June 18, 2012)
 - Scorecard:
 - ✓ No majority opinion;
 - ✓ Plurality's "Not offered for truth" justification 5-4 against (dissent + Justice Thomas);
 - ✓ Plurality's "primary purpose" test targeting specific suspect 5-4 against (dissent + Justice Thomas);
 - ✓ Justice Thomas' non-formal= nontestimonial justification 1-8 against (plurality + dissent);
 - ✓ General nontestimonial justification 5-4 in favor (plurality + Justice Thomas)



Expert Witnesses

- *Williams v. Illinois*, 2012 U.S. LEXIS 4658 (June 18, 2012)
 - What do you do:
 - ✓ Get as close to the real thing as possible;
 - ✓ Prepare your witness not to talk about anything other than (1) his/her own opinions; (2) things of which he/she has personal knowledge;
 - ✓ If not the real thing and you use hypos, make sure you're clear the hypo facts are not being offered for truth;
 - ✓ Pre-trial ruling from MJ (M.R.E. 403, 703);
 - ✓ Limiting instruction (if necessary).



Combating the Other Side's Expert



Expert Witnesses

- Challenging the other side's expert:
 - With very few exceptions, you should ALWAYS request a *Daubert/ Houser* hearing.
 - 3 areas for challenge:
 - ✓ Qualifications of person giving opinion;
 - ✓ Reliability of the “theory” or “science;” and
 - ✓ Relevance of the “theory” or “science” to facts.



Expert Witnesses

401947

- If the witness does get to testify - ATTACK:
- Credentials;
 - Application of the theory, principle, etc.;
 - Basis for their opinion (lying witness, botched investigation, etc.);
 - In light of *Williams*, undercut “hypothetical” or presumptions upon which opinion is based.



Expert Witnesses

- Getting your own expert:
 - At trial:
 - ✓ What will he or she say that is different from the opponent's expert;
 - ✓ Is it better to just cross the opponent's expert (will he or she say what you want?); and
 - ✓ How will it look to members if the other side has an expert and you don't?

8/9/2013



Working with Victims

Teresa Scalzo
Deputy Director, Navy TCAP



Objectives

- Training Objective – Trial Counsel should understand the complexity of protecting the victim in a complex case through the proper attitude, keeping the victim informed, and extensive preparation.
- Training Objective – Trial Counsel should understand the law regarding victim rights

2



References

- | | |
|------------------------------|---|
| ➤ JAGINST 5803.1 | ➤ DODI 6495.02 |
| ➤ DDODD 1030.1 | ➤ SECNAV 1752.4 |
| ➤ DODI 1030.2 | ➤ OPNAVINST 1752.1B |
| ➤ OPNAVINST 5800.7A | ➤ LRM vs. Kastenberg, No. 13-5006 (CAAF, July 18, 2013) No. 13-5006 |
| ➤ Marine Corps Order 5800.14 | ➤ (CAAF, July 18, 2013) |
| ➤ COMNAVLEGSVCCOM 5800.4 | ➤ Danger assessment form |
| ➤ DODD 6495.01 | |

3



IT'S NOT OFFICIALLY YOUR JOB, BUT YOU ARE A TC NOW...

4



Keeping Both Goals in Sight

➤ Military Justice:

- Maintenance of Good Order and Discipline
- Successful Prosecution of Offenders
- Transformation of Institutional Culture

➤ Victim Wholeness:

- Potential Re-Victimization in MJ Process
- Helping Victims Regain Wholeness
- Rebuilding Trust at the Unit Level

➤ BOTH GOALS MUST REMAIN IN SIGHT TO ACHIEVE EITHER

5



Victim Support & Offender Accountability

➤ Effective victim support increases ability to hold offenders accountable

- Victims who receive SANE / SART services are more likely to participate in the criminal justice system than those who do not. One of the strongest predictors of conviction is the victim's participation in the process.
 - Nugent-Borakove, Elaine, et al., "Testing the Efficacy of SANE / SART Programs: Do They Make a Difference in Sexual Assault Arrest and Prosecution Outcomes?" (2006)
- Support from system personnel can positively impact victim participation.
 - Greeson, Megan and Campbell, Rebecca, "Rape Survivors' Agency Within the Legal and Medical Systems," *Psychology of Women Quarterly* 35(4):582-595 (2011)
- Victim cooperation, which is critical to successful prosecution, can be strengthened by compassionate treatment by response personnel.
 - Pittman, Debra, "The Linkage Between Secondary Victimization by Law Enforcement and Rape Case Outcomes," *Intergroup Violence* 2011: 24-32



Resources for Victims

- **Active duty and dependents**
 - FAP and Fleet and Family Center Services
 - Counseling
 - Medical treatment, including SAFE if applicable
 - Legal assistance
- **Active duty, dependents and maybe civilians:**
 - SARC (civilians – humanitarian basis)
 - SAPR VA (civilians - humanitarian basis)
 - Chaplain
- **All victims**
 - VWAC
 - Civilian resources

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SAPR / VWAP Support

- Is the victim being supported well?
 - All VA's are not created equal
 - Victim may be more comfortable with a support person from their own service or a civilian
- If not, request additional support to ensure victim can make it through the process

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Medical Challenges

- Educate yourself on medical issues
 - For active duty and dependents, SAFEs done on base are free and SAFEs off base should be paid for by Tri-care
- Train providers about court, if possible
- Victims may encounter challenges in medical care that can cause them to disengage
 - SAFE issues - Wait time, payment, provider skill and training
 - Concerns over STIs

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P101



DV Victims

- May be reluctant to cooperate and / or may recant
- May actually be in more danger from cooperating, especially if victim has left or is leaving, there are suspicions of infidelity and / or strangulation
- Review danger assessment form with victim
 - May need to attempt to force cooperation if sufficient danger exists
- Ensure victim is connected with sufficient support services

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Child Victims

- Consider filing motions for:
 - Child friendly cross examination
 - Court room modifications

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Legal Assistance

- Does victim have collateral issues that impact ability to cooperate with MJ system?
 - Need to move out of apartment but landlord won't let out of the lease
 - If civilian, issues with employer?
 - Divorce or custody issues
 - Unpaid bills or financial difficulties from the crime

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Victim Safety

- MPO vs. civilian protection order
 - See DD form 2873
 - MPO is not enforceable by civilian authorities
- Ensure that victim is aware that pretrial confinement is possible but does not happen often in the military
- NCIS TMU
- 10 U.S.C. §673 requires timely determination and action regarding sex assault victim's PCS or transfer request

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VWAP

- Know basic victim rights
- Make sure VWAP processes are in place and being followed before, during and after trial
 - Victim notification
 - Victim consultation

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Address Misconceptions

- Manage victim expectations
 - Victims may have unrealistic or inaccurate expectations of the MJ process based on civilian systems
 - ✓ Sentencing is an adversarial process where you may have to testify and be cross-examined
 - ✓ Military justice system not designed to provide restitution like a civilian system
 - ✓ No sentencing guidelines

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TC Notification – CP cases

- TC must email CP Victim Assistance at DOJ to find out victim notification preference and contact information
 - Email - CPVA@ic.fbi.gov and provide NCMEC report from NCIS
 - CPVA will provide trial counsel with a **Victim Information Report (VIR)** that contains the victim notification and impact statement preference for identified victims
 - See TCAP memo for information on obtaining **Victim Impact Statement** (on-file vs. to be submitted/ CONUS vs. OCONUS)
- TC must also comply with other VWAP requirements
- See TCAP Sharepoint for cheat sheet

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Victims, Counsel and Standing

- LRM vs. Kastenber, No. 13-5006 (CAAF, July 18, 2013)
 - In a 3-2 opinion authored by Chief Judge Baker in, the Court held that the position of the victim (LRM) as a nonparty did not preclude the limited standing to be heard in pretrial hearings under MRE's 412 and 513. Therefore, the holder of these privileges who is represented by counsel has the reasonable opportunity to attend and be heard in evidentiary hearings. However, these rights are subject to reasonable limitations and the MJ retains appropriate discretion under RCM 801. Moreover, the law does not dictate a particular outcome in the hearings.

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Medical and MH Records

- Think carefully before simply getting medical and mental health records
 - Are they relevant and exculpatory or inculpatory?
 - If so, ensure victim understands discovery and trial consequences of turning records over
- MRE 513 (Psychotherapist Patient Privilege) lays out procedures for obtaining records

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Rape Shield Law

- MRE 412 – ensure proper procedures are followed
- Rape victims deserve heightened protection against surprise, harassment and unnecessary invasion of privacy. *US v Sanchez*, 44 MJ 174, 178 (1996), quoting *Michigan v Lucas*, 500 US 145, 150 (1991)
- “Rule 412 was premised on the precept that an accused does not have a constitutional right to present irrelevant evidence, and ‘reputation and opinion concerning a victim’s past sexual behavior are not relevant indicators of the likelihood of her consent to a specific act or of her veracity.’ *US v Greaves*, 40 MJ 432 (CMA 1994) citing *US v Duncan*, 855 F2d 1528, 1533 (11th Cir)

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Rape Shield Law

- The NMCTJ Policy on MRE 412 hearings is to clear out everyone out of the court that is not detailed to the case.
- MRE 412(c)(2) clearly states that the hearing “shall be closed.” This rule is not discretionary.
- The MJ must allow liberal recesses if the counsel wish to consult with supervisory counsel.
- The policy behind MRE 412 is designed to minimize the disclosure of such information to as few persons as possible. Allowing supervisory counsel that are NOT detailed to the case is not consistent with the policy behind MRE 412.

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VA Privilege

- A victim has a privilege to refuse to disclose and to prevent any other person from disclosing a confidential communication made between the victim and a victim advocate, in a case arising under the UCMJ, if such communication was made for the purpose of facilitating advice or supportive assistance to the victim.” MRE 514
- Who may claim?
 - Victim of a sexual offense or violent offense
 - Guardian or conservator of victim
 - Trial Counsel (if authorized by victim)
 - Defense Counsel (if representing & authorized by victim)
 - Victim Advocate who received communication
 - ✓ Designated in writing as a VA OR
 - ✓ Authorized to perform VA duties IAW service regulations, and is acting in the performance of those duties OR
 - ✓ Certified as a VA pursuant to Federal or State requirements

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Exceptions – VA Privilege

- When the victim is dead;
- When Federal or State law or service regulation imposes a duty to report information contained in a communication;
- If the communication clearly contemplated the future commission of a fraud or crime or if the services of the VA are sought or obtained to enable or aid anyone to commit or plan to commit what the victim knew or reasonably should have known to be a crime or fraud;
- When necessary to ensure the safety and security of military personnel, military dependents, military property, classified information, or the accomplishment of a military mission;
- When necessary to ensure the safety of any other person (including the victim) when a victim advocate believes that a victim's mental or emotional condition makes the victim a danger; or
- When admission or disclosure of a communication is constitutionally required.

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Right to Attend Hearings

- MRE 615
 - Court must determine testimony would be materially affected if victim hears other testimony at trial
 - Must do analysis for each witness
- VWAP, DoD Directive 1030.1, sect. 4.4.4
 - A crime victim has the right to "be present at all public court proceedings related to the offense, unless the court determines that testimony by the victim would be materially affected if the victim heard other testimony at trial."
- See also SECNAV 1752.4A and OPNAVINST 1752.1B, encl. 2

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Right to Attend Hearings

- Practical tips on MRE 615
 - Explain to the victim what challenges will arise from him / her listening to the testimony of others
 - If the victim still wants to attend the Art. 32 hearing / trial, request that the analysis be done on the record or in the IO report

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Advocates at Trial

- MRE 611
- Advocates should typically be allowed to provide support to victims in court
 - When the victim is a child, additional accommodations may be made

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Contact Info

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Overview of the Center for Forensic Behavioral Science

David Johnson, M.D.

LTC, MC

Program Director, Forensic Psychiatry Fellowship

Walter Reed National Military Medical Center



Center for Forensic Behavioral Science (CFBS)

- Walter Reed National Military Medical Center
 - Off-site location
 - Composed of one O-6 (COL Malone) and two training programs
 - Forensic Psychiatry – Dr. Johnson, Dr. Yeaw
 - Forensic Psychology – Dr. Sweda, Dr. Montalbano
 - Maximum staff of 3 program directors, 4 fellows-in-training, and 3 additional forensic staff
 - Admin Asst – Ms Shauntey Williams
 - Funding for staff through TCAP is in the works
-



Roles of CFBS

- Clearinghouse for expert requests from all armed forces
- 706 requests
- OMC and OGC requests
- OTSG Policy
 - N5
 - Work done by general vs. forensic practitioners
 - Regional Consultants
 - 706 Reviews
 - Expert requests



Roles of CFBS

- Consultation with FBI NCAVC and other IC entities
- Psychological Autopsies
- Pending Roles
 - CID
 - Insider Threat Assessment
- General expert qualifications and standards – to be covered in next two blocks



Expert Requests

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- Impossible to take all requests
- Fee service for civilian forensic psychologists
- Evaluations take place at CFBS or local site
- In the event of conflicting TDY dates or other commitments, CFBS will provide an equivalent substitute expert
- Funding for both fellows and supervisors in early training stages



Expert Testimony

- All staff are trained in the specifics of providing accurate, neutral, and clear testimony in a manner designed to garner maximum attention from the trier of fact, without unnecessary distractions or theatrics
- All staff have testified multiple times
- Fellows-in-training have less testimonial experience, but are nonetheless trained in the principles and subject to oversight by staff



Ethical Issues

- There is no patient-doctor relationship
- Your opinions may be hurtful to whoever you are interviewing or assessing, or assist in letting a criminal go free or serve less time. Impact on victim(s). Death penalty.
- You may be giving opinions without benefit of an actual interview. There may be other evidence being kept from you.
- Becoming an advocate for whichever side of the court you are working for, as opposed to remaining neutral at all times. Money. Pressure to adjust one's opinion or omit selective information. Advertising your expertise in trial lawyers' journals/magazines.
- Treating psychiatrists who are asked to testify about their own patient (resulting in end of relationship) or conduct a forensic assessment (706, CDMHE, etc).



Ethical Issues

- “Dual” agency – you are working for the court or party who hired you, not the “patient”
- Little to no oversight of what you testify to, despite testimony being defined as “practice of medicine” by AMA (except Dr Death)
- Defendants identifying with the forensic interviewer, compromising their 5th amendment or expecting a beneficial outcome
- Personal biases toward disposition of criminals: punish or rehab. Choosing to work for one side of the court preferentially (“hired gun”).



Principles of Good Forensic Assessment and Testimony

- Honesty
- Objectivity (No Bias)
 - Elimination of all biases is rarely possible. Recognition of one's biases and determining whether a bias actually significantly affects one's medical opinion is more practical than saying one is immune to bias. AAPL ethical guidelines support this concept of striving toward pure objectivity and countering biases.



Principles of Good Forensic Assessment and Testimony

- Informed consent: always give a defendant a detailed explanation of the lack of complete confidentiality, nature of the interview and any report you will write, who will read the report, etc. A defendant refusing to participate in the interview should be told this will be noted in the report along with an MSE. For a 706, the evaluation may continue even if the defendant does not consent to the assessment.
- If the defendant seems unsure what to say, allow him to call his attorney in private for counsel, or finish what you can and leave the door open for a second interview once he's had time to properly consult with the attorney.



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Principles of Good Forensic Assessment and Testimony

- Give reminders about informed consent if you feel there is slippage in the interview
- If you are not allowed to interview a person who you are opining about, or to view certain reports, then you should state that the certainty of your conclusion is limited by this fact
- Deadlines for 706s may cause a rushed or less-than-optimum evaluation. Request extensions whenever needed to collect or analyze additional data



Principles of Good Forensic Assessment and Testimony

- Some 706 or expert requests may be unclear as to what the concern is, or what information is being sought. We'll contact defense to gain clarity if needed.
- 706 reports are written for non-medical professionals and for an official legal record, so explanation of jargon and good grammar/spelling are essential.



Principles of Good Forensic Assessment and Testimony

- Juries respond poorly to psychobabble and psychodynamic interpretations. Try to stick to concrete facts and how certain facts lead to one preferred conclusion (clearly and convincingly). However, there may be times where you and the attorney feel a bit of explanation of what makes a certain personality tick is needed (e.g. history of sexual abuse can lead to certain future behaviors or personality disorders).



Principles of Good Forensic Assessment and Testimony

- “Reasonable medical certainty” – defined by many as meaning 51%, though state laws may define it otherwise. Behavioral Health is one of the least precise, most subjective medical fields.
- As experts, we give an unbiased, neutral opinion, even if that opinion does not help the side who hired us.



Preparing Your Expert

- Set aside time to go over the expert's opinion, especially any opinions that help the opposing counsel
- Preparing questions and even mock testimony for younger experts
- You and expert should try to predict questions that opposing counsel is likely to ask, and have your expert formulate responses in advance



Daubert

- Four areas judge may consider in allowing expert testimony
 - Theory is subject to testing
 - Peer review, such as in journals
 - Error rates
 - General acceptance
- Behavioral health diagnoses are sometimes not amenable to easy testing, and error rates are often poorly known



Daubert

- Nonetheless, BH knowledge base is robust, with decades of observations, general acceptance, DSM handbooks, admissibility by courts, and increasing use of randomized controlled trials for medications and specific therapies
 - Extensive questions from resume is key for establishing overall experience and specific reading/preparation on the relevant topic, and informing the trier of this



Daubert

- Experts may draw on experience of having treated 1000s of patients over the years
- Haven't seen a successful Daubert challenge even for topics such as counterintuitive rape behavior
 - US v Houser (USCMA 1993) – court allowed testimony on rape victim behavior and RTS without an interview of victim





National Capital Region
Medical

WHERE THE
NATION HEALS
ITS HEROES.™

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Overview of Forensic Psychiatry

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LTC, MC

Program Director, Forensic Psychiatry Fellowship

Walter Reed National Military Medical Center



Psychiatry Training

- 4 years college
- 4 years medical school
- 4 years psychiatry residency training
- 1 year forensic fellowship training

- Psychiatrist hold a medical degree
 - M.D. or D.O.
 - Psychiatrists are well-positioned to interpret medical records for other conditions and the interplay of somatic and psychiatric conditions



Licensing

- Licensing – all physicians in the military are required to hold a State medical license.
- Individual State licensing boards may have information on any history of adverse complaints or actions against the physician



Board-certification

- Physicians may practice medicine without Board-certification.
- Current military expects its members to Board-certify, and
- Psychiatry Boards composed of two steps.
 - Frequent grading of live patient interviews by staff throughout the 4-year residency
 - 500 multiple choice questions after graduation
- Board certification is a (small) bonus pay for military physicians



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Forensic Psychiatry Training

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- Fellows receive a substantial amount of assessment of CST and criminal responsibility
 - Maryland and DC forensic hospitals
 - 706 boards
 - Expert consultation
- Experience at a correctional facility
- Work with FBI on profiling and crime scene analysis
- Psychological Autopsy



Forensic Psychiatry Training

- Legal knowledge
 - Attend a law course
 - Landmark cases (about 90 of them) including military-specific cases
- Report Writing
- Involuntary Hospitalization
 - Dangerousness
 - Least restrictive alternative



Expertise on all core forensic topics (repeated slide)

- All diagnoses within DSM-IV-TR and DSM-5
- Malingering
- Counterintuitive rape victim behavior
- Effects of alcohol on memory and consent
- Relevance of PTSD and mTBI to criminal behavior
- Risk assessment, recidivism, risk management for violent offenders and/or sex offenders
- Relevance of substance use to criminal responsibility
- False Confessions
- Child/adolescent false allegations (need CAPS training)



General Psychiatry Knowledge Base

- Forensic Psychiatrists have often served roles as Chiefs of outpatient or inpatient psychiatric services, so have great expertise in systemic and administrative aspects of delivery of health care
- Expertise in many common diagnoses:
 - PTSD
 - Depression, Anxiety
 - Substance Abuse, Dependence, and Intoxication
 - Adjustment problems and Personality Disorders
 - mTBI
 - Anger issues



Modus Operandi

- A typical day for a clinical psychiatrist:
 - New patient walks in
 - Biopsychosocial assessment
 - Collateral information
 - Initial Diagnosis
 - Treatment – medication, referral to therapist, referral to other resources, involvement of family/peers, contact with command if appropriate
 - Laboratory or imaging
 - Schedule follow-up



General Psychiatry Knowledge Base

- Medical management of substance withdrawal
- Medical management of all life-threatening conditions, including such side effects or drug interactions involving psychotropic medications
- Administration of specialized procedures such as electroconvulsive therapy and transcranial magnetic stimulation
- General medical conditions or medications that may cause or worsen psychiatric disorders



Medications

- From a treatment perspective, psychiatrists are prescribers
 - Selection of medications
 - Proper doses
 - Possible side effects, especially ones affecting mental alertness or orientation
 - SSRIs causing aggression or suicidal thoughts
 - Effects of discontinuing medications
 - Overdose
 - Interactions with other medications



Psychiatrists and Psychologists

- Psychologists possess Ph.D.s or Psy.D.s.
- Psychiatrists unable to administer certain psychological or neuropsychological tests
 - MMPI-2
 - IQ testing, quantification of memory problems
- Psychiatrists place consults as appropriate
 - Forensic psychiatrist experts may consult psychologists to get testing done, even if that psychologist is not on the defense team
- Tests are considered an additional piece of data, not conclusory on their own



Psychiatrists and Psychological

Instruments

- Psychiatrists and non-provider correctional/police personnel can administer instruments and tools that are not actual “tests.”
- Instruments and tools require a professional to gather key information through interview, as directed by the instrument’s guidebook

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Psychiatrists and Psychological Instruments

- Longterm Violence Risk Assessment
 - Actuarial risk estimates – VRAG, DVRAG, etc
 - Hare PCL-R and PCL-SV
 - Structured Professional Interviews – HCR-20, SAPROF, etc
- Longterm Risk of Sexual Violence or Crime
 - Actuarial risk estimates - Static-99, Stable 2007, etc
 - Structured Professional Interviews – SVR-20, etc



Psychiatrists and Psychological Instruments

- **Malingering –**
 - TOMM, SIMS, M-FAST, VSVT, etc

- **Concerning risk assessment:** This involve checklists of key information to gather in interview, to ensure thoroughness and to provide transparency of the technique used. The actuarial instruments then allow a score to be assigned to the information, which will produce a probability estimate of the risk of repeat behavior, on the scale of 1 year or greater later.
 - The accuracy of actuarials is in the 70% range for all of the most validated instruments, which actually means the likelihood the evaluator will give a higher score to recidivating offenders over non-recidivating offenders.



Medical Aspects of 706 Boards

- Presence of a severe mental disease or defect often requires ruling out possible non-psychiatric medical causes
- Psychiatrists seek symptoms hinting at medical diseases and can order tests or referrals to investigate the issue
 - Blood testing for electrolyte disturbances, liver problems, blood cell abnormalities may find primary diagnoses or hint at underlying diagnoses
 - Testing for diseases like syphilis, HIV that affect the brain
 - Brain imaging, by CT or MRI, to assess for tumors or disease processes
 - EEG (electroencephalogram) for seizures, tumors
 - Review of medical record and past lab values or radiological studies



Knowledge of Diseases

- Psychiatry training is heavy on causes, life cycle, and treatment of psychiatric conditions
- Such knowledge may be useful in sentencing phase
 - Patient compliance
 - How well do medications work for given condition
 - Treatment programs in the community
 - Permanence of a condition
 - Genetic component
 - Anger control



Child Assessments

- Opinions or evaluations of child witnesses and/or victims
 - Children testifying live vs. by VTC
- Seek someone dual-Boarded in Child/Adolescent Psychiatry and Forensic Psychiatry
- Assessment of adults perpetrating abuse against children would not require a Child-trained forensic psychiatrist



Medical Evaluation Boards

401994

- Until recently, psychiatrists were the only decision-makers on whether Soldiers' conditions qualify for a psychiatric MEB
- Would the defendant's condition qualify for a MEB if not for his court-martial?



Sex Offenders

- Diagnosis of DSM-IV paraphilic disorders
- Recidivism and risk factors
- Actuarial and structured interview instruments
- Pharmacological treatment of sex offenders
- Sex Offender Treatment Programs
 - Within military
 - Possible training within fellowship in the future



PTSD

- Covered in next lecture topic
- One of the most common disorders that psychiatrists treat and write MEBs for, currently



mTBI

- Psychiatry Board exam is composed of 33% Neurology questions
- Commonly assess headache complaints and treat if desired
- Treatment of mTBI involves medication for a variety of system complaints, as well as rehab and therapy
- Psychiatrists often put in charge of managing mTBI program at smaller hospitals



Thought Disorders

- Includes schizophrenia, delusional disorder, brief psychotic disorder, depression with psychotic features, bipolar disorder with mania/psychotic features
- Medication is the main staple of treatment
- Substantial experience interviewing delusional and psychotic individuals on inpatient wards
- These disorders are generally automatic grounds for a MEB



Pain

- There is substantial overlap between patients with chronic pain conditions and psychiatric issues
- Psychiatrists deal with pain meds frequently even though we aren't the ones prescribing them
 - Dependence and referral to treatment programs
 - Medication interactions
 - Withdrawal



Questions?

- David.e.johnson2@health.mil
- To receive our list of experts and expert request form:
- Shauntey.d.williams.civ@health.mil

402000





Professional Responsibility Responsibilities of Trial Counsel

Office of the Judge Advocate General
Informational

UNCLASSIFIED

May 2013



Road Map

- Governing Authorities
- Overview of Core Rules
- Highlight of Rules Important for Trial Counsel
- Conclusion

Office of the Judge Advocate General



Governing Authorities

- R.C.M. 109
 - Professional supervision of military judges and counsel
- SECNAVINST 5430.27D
 - JAG is responsible for supervision and provision of certain legal services
- JAGINST 5803.1D (32 CFR Part 776)
 - Rules of Professional Responsibility
- JAGINST 5803.2A
 - Certification of Good Standing

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Overview of Core Rules

- Rule 1.1 – Competence
- Rule 1.2 – Establishment and Scope of Representation
- Rule 1.3 – Diligence
- Rule 1.7 – Conflicts, generally
- Rule 1.10 – Imputed Disqualification

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Highlight of Specific Rules Important for Trial Counsel

- Rule 1.13 – Department of the Navy as Client
 - A covered attorney represents the Department of the Navy.
 - An A/C relationship exists between the covered attorney and the DoN as represented by the head of the organization as to matters within the official scope of the official business of the organization.
 - Must act in best interest of Naval service.
- Rule 1.6 – Confidentiality
 - Shall not reveal information relating to the representation (exceptions)
- Rule 1.14 – Client with Diminished Capacity
 - Allows an attorney to take protective action when he reasonably believes client has diminished capacity and is at risk of substantial physical harm to himself or herself unless action is taken.

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Highlight of Specific Rules Important for Trial Counsel

- Rule 4.2 – Communication with Person Represented by Counsel
 - In representing a client, a covered attorney shall not communicate about the subject of the representation with a party the covered attorney knows is represented by counsel unless the other attorney consents, or the covered attorney is authorized to do so by law or court order.
- Rule 4.2 – Dealing with an Unrepresented Person
 - When dealing on behalf of a client with a person who is not represented by counsel, a covered attorney shall not state or imply that the covered attorney is disinterested.

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Highlight of Specific Rules Important for Trial Counsel

- Rule 3.3 – Candor and Obligation Toward the Tribunal
 - Shall not knowingly make a false statement of material fact or law;
 - Shall correct a false statement previously made;
 - Fail to disclose legal authority in the controlling jurisdiction that is known to be directly adverse; and
 - Offer false evidence or permit a witness called by the covered attorney offer false evidence

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Highlight of Specific Rules Important for Trial Counsel

- Rule 3.8 - Special Responsibilities of Trial Counsel and Other Government Counsel
 - TC represent the United States in courts-martial and have special obligations in performing that role
 - TC are responsible for the administration of justice; not simply an advocate
 - Special obligations to ensure accused's rights are afforded to them, including the timely disclosure of evidence
- Applicable law may require certain measures by TC

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402002



Highlight of Specific Rules Important for Trial Counsel

- Rule 3.6 – Extra-Judicial Statements
 - Balance fair trial & right to free expression
 - Shall not make a statement:
 - About person or case pending
 - Reasonable person would expect to be disseminated by means of public communication
 - Reasonably should know statements will have substantial likelihood of materially prejudicing adjudicative proceeding or official review

- JAGMAN 0142
 - The go-to reference in advising Commanders and Public Affairs Officers about what can and cannot be released.

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Conclusion

- Administrators of Justice
- Represent the Department of the Navy
- Special Responsibilities

Office of the Judge Advocate General



Sexual Assault Prevention and Response Accountability Lines of Effort

402004



Agenda

402005

- Accountability Lines of Effort
- Recent Changes to SAPR Program
 - Restricted Reporting Updates
 - Access to Assistance
 - Documentation
 - Expedited Transfer
- New Article 120
- Sexual Assault Initial Disposition Authority
- Military Rules of Evidence Refresher
- Professional Responsibility



SAPR Mission & Lines of Effort

402006



SAPR Mission

402007

Prevent and respond to sexual assault, eliminating it from our ranks through a balance of focused education, comprehensive response, compassionate advocacy, and just adjudication in order to promote professionalism, respect, and trust, while preserving Navy mission readiness.

- <http://www.public.navy.mil/bupers-npc/support/sapr/Pages/default.aspx>



JCS Strategic Direction

402008

- Mission: Commanders reduce—with a goal to eliminate—incidents of sexual assault through improved prevention, accountability and victim advocacy/services at all levels of the Joint Force in order to preserve a culture of trust and respect consistent with the Profession of Arms and our core values and to maintain the health, discipline and readiness of the Joint Force.
- End State: Commanders, leaders and Servicemembers have fully operationalized the Sexual Assault Prevention and Response Program across the Joint Force—in our accession commands and Service academies, across our training bases and throughout our operational commands worldwide. We have reinforced our cultural imperatives of mutual respect and trust, professional values and team commitment that underscore a military culture and environment where sexual assault is not tolerated.
- [http://www.jcs.mil/content/files/2012-05/050812085404_Joint_Strategic_Direction_on_Sexual_Assault_\(7_May_12\).pdf](http://www.jcs.mil/content/files/2012-05/050812085404_Joint_Strategic_Direction_on_Sexual_Assault_(7_May_12).pdf)



Lines of Effort

- Training
- Prevention
- Response
- Accountability



Training & Prevention

402010

- FY12: SAPR-Leadership (SAPR-L): Leader's ownership of problem of SA in their commands
- FY13: SAPR-Fleet (SAPR-F): Sailor responsibility for positive changes in command/Navy with emphasis on bystander intervention
- Piloted bystander intervention programs at Navy A Schools
- Aggressive SA Awareness Month (SAAM) campaign in April; all commands conducted minimum of two hours of dedicated SA awareness



Response & Accountability

402011

- NDAA 12: Additional SARCs and VAs in targeted locations based upon SA trends to optimize intervention/prevention and victim support
- Implemented SA victim expedited transfer policy. As of January 2013, all expedited transfer requests were approved.
- DoD Safe Helpline published as Navy SA crisis response resource
- Tiered communications from COs to Flags on reported cases and from Flags to VCNO/CNO on effectiveness
- Executing SA-Initial Disposition Authority withholding



Training

(JAG Initiatives)

402012

- Litigation specialists lead trial and defense departments in RLSOs and DSOs
- Trial and defense counsel attend military and civilian SA training courses
- Post-graduate degrees in Trial Advocacy
- Externships in SA units in District Attorney offices
- Realignment of Naval Legal Service Command and First Tour Judge Advocate training development



Capability

(JAG Initiatives)

402012

- Military Justice Litigation Career Track
- Trial and Defense Counsel Assistance Programs (TCAP and DCAP) provide reach-back, training and oversight
- Trial Counsel Engagement in NCIS Sexual Assault Task Forces
- Highly Qualified Experts (HQE) provide reach-back and training
 - OJAG Headquarters recently hired an HQE with nearly 20 years experience prosecuting sex crimes
 - TCAP and DCAP each have HQEs to assist and train trial teams
 - TCAP Deputy Director (GS-15) is an expert in sexual assault prosecution and victim's rights



Future

(JAG Initiative)

402014

- **Special Victim Capability** – working to define and implement requirements
 - A multi-disciplinary approach to sexual assault investigation and prosecution involving specially trained investigators, prosecutors and paralegals, and victim advocates
- **Continued Support to Victims of Sexual Assault**
 - Training conferences for victim advocates and paralegals on support to victims



RECENT UPDATES TO SAPR PROGRAM

402015



Commander's Responsibilities

402016

Immediate actions upon unrestricted report for all Commanders

•Support (Victim and Alleged Offender)

- Ensure Victim has access to SARC, VA, medical services
- Consider MPO
- Make victim aware of expedited transfer, LA or defense counsel
- Ensure VWAP compliance
- Limit facts to those with a need to know
- Ensure alleged offender has access to counsel

•Report

- OPREP/SITREP reports – name JAG consulted; First Flag reports
- Sexual Assault Incident Data Collection Report – NAVADMIN 1752/1

•Initiate an Investigation

- Commands must immediately contact NCIS upon receipt of unrestricted report.



Restricted Reporting

402017

Unrestricted

Report to any non-restricted personnel

Command notified

NCIS investigates

SARC, SAPR VA support

Medical, counseling, advocacy

Restricted

Report to SARC, SAPR VA, health care provider

Command notified with non-identifying info

No NCIS investigation

SARC, SAPR VA support

Medical, counseling, advocacy



Restricted Reporting

402018

- Victims eligible for Restricted Reports include military or dependents, aged 18 years or older
- DoD civilians and contractors may not make Restricted Reports
- Improper disclosure of confidential communications from restricted reporting could result in UCMJ disciplinary or adverse administrative consequences



Restricted Reporting

402019

- **Important Clarifications**
- Victim Confiding in Another Person
 - *DoDI 6495.02, Encl 4, 1(e).*
- Effects of Independent Investigation
 - *DoDI 6495.02, Encl 4, 1(f)*
- Disclosure in Mandatory Reporting Jurisdiction or to Civilian Facility or Authorities
 - *DoDI 6495.02, Encl 4, 1(b),(f)*
- Disclosure to Legal Assistance Attorney or Chaplain
 - *DoDI 6495.02, Encl 4, 1(b)(3).*



Restricted Reporting

402020

- **Exceptions to Disclosure.**
- Before disclosing confidential communication under an exception, SARC shall consult with SJA on whether exception applies and the impact of MRE 514.
- If disagreement, matter shall be brought to installation commander for decision
- Following exceptions to non-disclosure of restricted report information apply:
 - Authorized by victim in writing
 - Necessary to prevent or mitigate a serious and imminent threat to the health or safety of the victim or another person; for example, multiple reports involving the same alleged suspect (repeat offender) could meet this criteria.
 - Required for fitness for duty or disability determinations to extent necessary to process.
 - Required for the supervision of coordination of direct victim treatment or services.
 - Ordered by a military official (e.g., TC subpoena), Federal or State judge, or as required by a Federal or State statute or applicable U.S. international agreement.

DoDI 6495.02, Encl 4, 5



Non-participating Victim

402021

- A victim's decision to decline to participate in an investigation or prosecution should be honored by all personnel charged with the investigation and prosecution of sexual assault cases.
- *But* the victim should be informed by the SARC or SAPR VA that the investigation may continue regardless of whether the victim participates.

DoDI 6495.02, Encl 4, 1(c)



Access to Assistance

402022

- Member of the armed forces, or a dependent, who is an alleged victim of sexual assault is entitled to meet with a specially trained legal assistance attorney. This section does not expand eligibility for legal assistance, but clarifies that services will be provided to victims. *Section 581, FY12 NDAA; 10 U.S.C. 1044*
- Commanders are required to give opportunity to service member victim to consult with LA attorney, and if collateral misconduct, defense counsel. *DoDI 6495.02, Encl 5, 3(l)*



Expedited Transfer

402023

- **MILPERSMAN 1300-1200; NAVADMIN 132/12**
 - Alleged victims of sexual assault who have made an **unrestricted report** may request a change of station or unit transfer
 - CO has 72 hours to respond to a request for transfer
 - Presumption in favor of transferring alleged victim if the CO, with advice of a judge advocate, believes the report to be credible.
 - Appeal – If request is disapproved, it is an automatic review by the first flag or general officer in the chain of command (complete in 72 hours of submission)



Documentation

402024

- **Document Retention** – *DoDI 6495.02, para. 4p*
- For all Unrestricted reports, DoD shall retain Victim Reporting Preference DD Form 2910 in DSAID for 50 years
- For all Restricted reports, the SAFE Kit, which includes the DD Form 2911 or civilian forensic examination report, if available, will be retained for 5 years after victim signs DD Form 2910.

- **Record of Trial** – *DoDI 6495.02, Encl 5, 3(o)*
- Upon request, victims of sexual assault offenses shall have opportunity to receive authenticated record of trial in all SPCM and GCM cases free of charge. Victim shall be informed of this right.



NEW ARTICLE 120

402025



New Article 120

402026

- Article 120 was reorganized for clarity and divided into three UCMJ offenses:
 - **Article 120** – Rape and sexual assault generally (adults)
 - Article 120a – Stalking
 - **Article 120b** – Rape and sexual assault of a child
 - **Article 120c** – Other sexual misconduct



New Article 120

402027

Changes to Article 120

- Clarified the statute by separating offenses based on victim and physical from non-physical offenses.
- Removed the unconstitutional burden-shift to the accused that occurred when an accused asserted certain defenses under the former statute.
- Modified Definitions:
 - Definition of sexual act was made gender neutral to include oral and anal penetration
 - Definition of consent was further defined
- Effective 28 June 2012.
- New Executive Order Signed 15 May 2013 sets out maximum punishments



Sexual Act and Sexual Contact

402028

Sexual Act →

Penetration of vulva, anus or mouth by Penis;

OR

Penetration of the vulva, anus or mouth by any part of the body or object

- With the intent to abuse, humiliate, harass, or degrade/gratify the sexual desire of any person**

Sexual Contact →

- Touching or Causing another person to touch directly or through clothing of :

- Genitalia, anus, groin, breast, inner thigh or buttocks of any person**
- With intent to humiliate, abuse, or degrade any person**

OR

-Touching (or causing another to touch) any body part of any person directly or through clothing

- With intent to arouse/gratify sexual desire of any person**



New Article 120

402029

SEXUAL ACT	SEXUAL CONTACT	SEXUAL ACT	SEXUAL CONTACT
<p>Commits SA/SC By:</p> <ol style="list-style-type: none"> 1. Unlawful force 2. Force likely to/causing GBH to any person 3. Threatening/placing in fear that <i>any</i> person subjected to death/GBH/kidnapping 4. Rendering unconscious 5. Administering drug/intoxicant by force/without consent to impair 		<ol style="list-style-type: none"> 1. Commits SA/SC By: <ol style="list-style-type: none"> a. Threatening b. Causing bodily harm c. Fraudulent representation for professional purposes d. Inducing a belief that person is another person 2. When person knows that other person is asleep, unconscious, unaware of sex 3. Other person is <u>incapable of consenting</u> due to: <ol style="list-style-type: none"> a. Impairment by drug/intoxicant b. Mental disease/disability 	
Rape	Agg. Sex Contact	Sex Assault	Abus. Sex Contact
LWOP	20 yrs	30 yrs	7 yrs



Definition of Consent

402030

- Freely given agreement to the conduct at issue by a competent person.
- The following circumstances **DO NOT** constitute consent:
 - Expression of lack of consent - words or conduct.
 - Lack of verbal or physical resistance resulting from the use of force, threat of force, or placing in fear.
 - Dating or social or sexual relationship or manner of dress, by itself.
 - Sleeping, unconscious, or incompetent person.
 - Force causing or likely to cause death or grievous bodily harm or to being rendered unconscious.
 - Fraudulent representation.
- Lack of consent also may be inferred based on the circumstances.



SEXUAL ASSAULT INITIAL DISPOSITION AUTHORITY

402031



Sexual Assault Initial Disposition Authority

402032

- **Policy Announcement:** Secretary of Defense Memorandum, “Withholding Initial Disposition Authority Under the Uniform Code of Military Justice in Certain Sexual Assault Cases,” April 20, 2012

-Now found in DoDI 6495.02, Encl 5, 7(b)

- **Service Implementation:** NAVADMIN 195/12

- **Policy Guidance for Judge Advocates:** 28 June 2012, Code 20 Sidebar



Sexual Assault Initial Disposition Authority

402033

- Withholding Policy

- If report of: rape, sexual assault (Art. 120) or forcible sodomy (Art. 125) or attempt of these crimes (Art. 80) then the Initial Disposition Authority (SA-IDA) must be:

- [SPCMCA or GCMCA] + [O-6 or higher in rank] = initial disposition authority (SA-IDA)

- Also IDA for all collateral misconduct arising from the report of above SA crimes, i.e. larceny, UA, burglary etc., committed by victim or alleged offender. Commanders have discretion to defer taking action on collateral misconduct.



Sexual Assault Initial Disposition Authority

402034

Navy v. Marine Policy

SecDef and Navy Withhold

ADULT CRIMES (Article 120)

- Rape
- Sexual Assault
- Aggravated Sexual Contact
- Abusive Sexual Contact

CHILD CRIMES (Article 120b)

- Rape of a Child
- Sexual Assault of a Child
- Sexual Abuse of a Child

USMC Withhold

OTHER SEXUAL CRIMES (Art 120c)

- Indecent Viewing, Visual Recording, or Broadcasting
- Forcible Pandering
- Indecent Exposure

Neither USN/USMC Withhold

STALKING (Art 120a)



Sexual Assault Initial Disposition Authority

402035

•If SA-IDA determines →

- No action → Case dismissed. SA-IDA must coordinate with SARC to update DSAID and IDA for OPREP/Reporting Requirements.
- Court-Martial warranted → SA-IDA takes action or forwards to superior (GCMCA)
- Only Administrative/ NJP action → SA-IDA may take action or send back to subordinate

If sends back to subordinate, subordinate may then take any available disposition, informed by the SA-IDA decision that court-martial not warranted.

•In all cases SA-IDA must consult with an SJA and document disposition decision.



Scenario #1

402036

- You are a command services attorney for the base. At 0900, on Monday morning, the CMC informed the CO (O-6 installation commander) that one of their Sailors, FN S, was raped while at a house party on Saturday by the Sailor she just recently awarded Sailor of the Quarter to in your command. The CMC only knows this, because one of FN S' friends, who is her LPO, reported it to him.
- The CO calls you into her office. She has a lot of stuff on her plate, and wants you to walk her through what she should be doing at this point.
- What do you tell her?
- You find out later: FN S does not want to cooperate, because she had been under age drinking and was extremely drunk when it happened and is afraid she will get in trouble.



Scenario #2

402037

- You're the deputy SJA. You receive a phone call from an O-5 CO. NCIS called her to say that they have been working on a sting against one of her Sailors. He is suspected, and they have evidence of him, chatting online with a 14-year old girl, sending pictures of his genitalia to her, and saying obscene and lascivious things to her about what they will do when they meet. She was very disturbed and told her dad, who notified NCIS and the local police.
- What do you tell the CO is his responsibility?



Scenario #3

402038

- You're the CDO for the RLSO in Hawaii. You get a phone call asking for assistance from the XO off the USS MUSTIN (DDG-89) making a port call. A group of his Sailors ended up a hotel party last night with Sailors from other ships. This morning, one of his Sailors told her chief that throughout the night she was groped and touched on her breasts and her buttocks by two of the Sailors off another DDG, despite her protests. She can identify them.
- You find out later from base security that she got into a loud verbal and physical altercation outside an enlisted club with a female Sailor stationed at Pearl Harbor that same night, and base security was called.
- How do you advise the CO/XO of the USS MUSTIN (O-5)?
- What if the accuseds' CO calls for advice? How would you advise them?
- What if she alleges that they tried to rape her? Does this change your advice?



MILITARY RULES OF EVIDENCE

412, 413, 513, 514, 615



MRE Refresher

402040

- MRE 412, Sex Offense Cases: The Victim's Sexual Behavior or Predisposition
- MRE 413, Similar Crimes in Sexual Offense Cases
- MRE 513, Psychotherapist—Patient Privilege
- MRE 514, Victim Advocate—Victim Privilege
- MRE 615, Excluding Witnesses



MRE 412

402041

- Is intended to shield victims of sexual assaults from the often embarrassing and degrading cross-examination and evidence in sexual assault trials.
- Evidence generally inadmissible
 - Proof that an alleged victim engaged in other sexual behavior
 - Proof of an alleged victim's sexual predisposition
- Applies at C-M and Article 32 investigations



MRE 412

402042

Exceptions:

- (A) Specific instances of sexual behavior by the victim to prove source of semen, injury, or physical evidence;
- (B) Specific instances of sexual behavior by the victim with accused to prove consent or by the prosecution;
- (C) Evidence the exclusion of which would violate the constitutional rights of the accused.



MRE 412

402043

- “Constitutional Rights” Exception 412(b)(1)(c)
- “The burden is on the Defense to clearly demonstrate that the proffered evidence is relevant, material, and favorable to its case.” (by a preponderance)
- Must be of consequence to determining guilt, vital to the defense
- See U.S. v. Ellerbrock, 70 MJ 314 (C.A.A.F. 2011) for an example of the type of evidence admissible under this exception.



MRE 412

402044

- Moving party seeking to admit 412 evidence needs to file written motion 5 days prior to entry of pleas unless good cause shown.
- The military judge shall conduct a closed hearing outside the presence of the members and the public.
- Victim has a reasonable opportunity to attend and be heard
- The motion, papers, and the record of the hearing must be sealed and remain under seal unless the court orders otherwise.



MRE 413

402045

- Accused charged with “sexual assault offense”:
Evidence that *the accused* committed prior “sexual assault offense” is admissible to prove “any relevant matter”
- Allows Government to admit specific instances of prior sexual assault conduct— no conviction needed
- Must be disclosed to accused 5 days before pleas unless good cause



MRE 513

402046

- **Patient Psychotherapist Privilege**
- Protects confidential communications between patients and psychotherapists or assistants when the communication was made to facilitate diagnosis or treatment of the patient's mental or emotional condition.



MRE 513

402047

- **Who may claim?**
 - **Patient**
 - Any person who consults or is examined by a psychotherapist for purposes of advice, diagnosis, or treatment of a mental or emotional condition.
 - **Guardian or Conservator of Patient**
 - **Trial Counsel** (if authorized by patient)
 - **Defense Counsel** (if authorized by patient)
 - **Psychotherapist or Assistant** who received communication
 - Authority is presumed to assert on behalf of patient absent evidence to the contrary



MRE 513

402048

- **There is no privilege when**
 - The victim is dead
 - When communication is evidence of child abuse or neglect or when one spouse is charged with crime against the other
 - Federal/State law or Service regulation impose duty to report information contained in the communication
 - When psychotherapist believes that a patient's mental or emotional condition makes the patient a danger to any person, including the patient
 - Communication clearly contemplated the future commission of a fraud or crime or if services of psychotherapist are sought to enable or aid anyone to commit or plan to commit crime or fraud
 - When necessary to ensure safety and security of military personnel, dependents, military property, classified information or the accomplishment of the mission
 - When accused offers statements concerning mental condition as extenuation and mitigation evidence and when subject to motion to disclose
 - Admission or disclosure is constitutionally required



MJRE 513

402049

Privilege is not absolute

- **Hearing**
 - If admissibility of records or other privileged communication (including *testimony* of psychotherapist) in dispute is sought, party must file motion to disclose 5 days prior to entry of pleas
 - MJ must conduct a hearing prior to release
 - May be closed (no spectators)
 - MJ examines the evidence or a proffer *in camera*
 - MJ may issue a protective order or admit only portions
 - Patient has a right to attend and be heard at their own expense unless otherwise subpoenaed to testify
 - Motion, papers, and record of hearing generally remain under seal



MRE 514

402050

- **Victim Advocate-Victim Privilege**
- Protects confidential communication between the victim and a victim advocate if communication was made for the purpose of facilitating advice or supportive assistance to the victim.



MRE 514

402051

- **Who may claim?**
 - **Victim**
 - Any person who suffered direct physical or emotional harm as the result of a **sexual or violent offense**
 - Sexual offense
 - Violent offense
 - **Guardian or Conservator of Victim**
 - **Trial Counsel** (if authorized by victim)
 - **Defense Counsel** (if representing & authorized by victim)
 - **Victim Advocate** who received communication
 - Designated in writing as a VA **OR**
 - Authorized to perform VA duties IAW service regulations, and is acting in the performance of those duties **OR**
 - Certified as a VA pursuant to Federal or State requirements



MRE 514

402052

- There is no privilege when
 - The victim is dead
 - Federal/State law or Service regulation impose duty to report information contained in the communication
 - A victim advocate believes that a victim's mental or emotional condition makes the victim a danger to any person, including the victim
 - The communication clearly contemplated the future commission of a fraud or crime, or if the services of the victim advocate are sought or obtained to enable or aid anyone to commit or plan to commit what the victim knew or reasonably should have known to be a crime or fraud
 - Necessary to ensure the safety and security of military personnel, military dependents, military property, classified information, or the accomplishment of a military mission
 - Admission or disclosure is constitutionally required



MRE 514

402053

Privilege is not absolute

- **Hearing**
 - If admissibility of records or communication (including *testimony* of VA) in dispute
 - Portions of records/testimony may be released (i.e., if Military Judge determines it fits into an exception)
 - MJ must conduct a hearing prior to release
 - May be closed (no spectators)
 - MJ examines the evidence or a proffer *in camera*
 - Victim has a right to attend and be heard at their own expense unless otherwise subpoenaed to testify
 - MJ may issue a protective order or admit only portions



MRE 615

402054

- At a party's request, a military judge must exclude witnesses so that they will not hear other witnesses' testimony. A military judge also may do so *sua sponte*. The rule **does not** authorize exclusion of:
 - (e) a **victim** of an offense when **the sole basis** for exclusion would be that the victim may testify or present information during the presentencing phase of the trial.



PROFESSIONAL RESPONSIBILITY

Consideration of PR Rules in Sexual Assault Cases

402055



Professional Responsibility & SAPR

- Know the PR Rules
 - All Hands Effort
 - Staff Judge Advocate – The Department of the Navy, primarily through advice to the Commander
 - Trial Counsel – The United States
 - Defense Counsel – The Accused
 - Legal Assistance Counsel – Assist the Victim
 - You are not alone! Seek help from Supervisory Attorney
-



Professional Responsibility & SAPR

- Rule 1.1 Competence:
 - Provide “competent, diligent, and prompt representation to a client.” Requires “the legal knowledge, skill, access to evidence, thoroughness, and expeditious preparation reasonably necessary for representation.”
 - Duty to stay informed on emerging practice developments.

402057



Professional Responsibility & SAPR

- Rule 1.3 Diligence:

- Requires “reasonable diligence and promptness in representing a client, and consulting with the client as soon as practicable and as often as necessary...”
- “Perhaps no professional shortcoming is more widely resented than procrastination.”



Staff Judge Advocates

- **Rule 1.13: Dept of Navy as Client**
 - A/C Relationship with Convening Authority on Matters Relating to Official Duties.
- **Rule 2.1: Advisor:**
 - SJAs must “exercise independent professional judgment and render candid advice.”



Trial & Defense Counsel

- Rule 4.3: Dealing with an Unrepresented Person (Victims, Witnesses, Family members)
 - Duty to ensure unrepresented persons understand your role and refrain from providing legal advice other than to refer them to counsel.



Trial & Defense Counsel

- Rule 4.2: Communication with Person Represented by Counsel:
 - A covered attorney shall not communicate about the subject of the representation with a party the covered attorney knows is represented by counsel unless the other attorney consents, or the covered attorney is authorized do to so by law or court order.
 - Some victims retain civilian counsel
 - USAF victims may have a SVC detailed to them
 - Will Congress pass legislation requiring SVCs?



Trial & Defense Counsel

- Rule 3.6 Extra-Tribunal Statements:
 - May not provide a statement “that will have a substantial likelihood of materially prejudicing an adjudicative proceeding or an official review thereof.”
 - Rule 3.8 Special Rule for TCs:
 - Exercise reasonable care to prevent investigators from making statements that Rule 3.6 would prohibit you from making.
 - Refrain from comments that have substantial likelihood of heightening public condemnation of the accused.
-



Trial & Defense Counsel

- 4 Rules Important to Remember in Emotional Cases
 - Rule 3.1 – Meritorious Claims and Contentions
 - Rule 3.3 – Candor towards the Tribunal
 - Rule 3.4 – Fairness to Opposing Party and Counsel
 - Rule 4.4 - Respect for Rights of Third Persons
 - No “win” comes from a rigged fight
 - Dishonesty in the system can NEVER be justified.
-



Legal Assistance Attorneys

- Rule 1.2: Establishment and Scope of Representation (Closely follow NLSC Policy)
 - In case of conflict follow procedures carefully
 - NO VICTIM IS TO BE TURNED AWAY, WITHOUT A PROPER REFERRAL
 - If no conflict, provide assistance but avoid confusion as to your role:
 - “Extreme caution shall be exercised to avoid any expectation on the victim’s part that a legal assistance attorney may in any way impact the outcome of any criminal or administrative proceeding.”



Wrap-Up

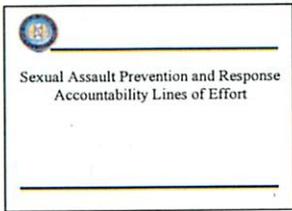
- Remember each party has their role in this system
 - TC – Seek justice and represent The United States
 - DC – Zealously advocate for your client
 - LA – Assist the victim
 - SJA – Advise the Commander
- No case should be personal when we respect each others' duties as professionals.

Sexual Assault Prevention and Response Training JAGC – June 2013

NAVY 6.75

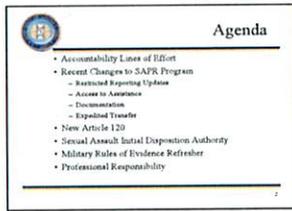
DISCUSSION POINT	RELATED FACILITATOR ACTIVITY
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SLIDE 1 Sexual Assault Prevention and Response



Accountability Lines of Effort

SLIDE 2 Introduction



This training is designed to inform Navy judge advocates, attorneys, legalmen and paralegals about the Sexual Assault Prevention and Response (SAPR) Accountability Lines of Effort and to ensure a JAG Corps community baseline of knowledge on: recent updates to the SAPR program; Article 120, UCMJ; the Military Rules of Evidence relevant to sexual assault cases, and Professional Responsibility issues in sexual assault cases. A second presentation will be provided on victims' rights and services for SJAs, trial counsel, and legal assistance attorneys.

DISCUSSION POINT	RELATED FACILITATOR ACTIVITY
<p>values, and team commitment to promote an environment where sexual assault is not tolerated.</p> <p>SLIDE 6</p> <div data-bbox="236 509 517 721" style="border: 1px solid black; padding: 5px;">  <p style="text-align: right;">Lines of Effort</p> <ul style="list-style-type: none"> • Training • Prevention • Response • Accountability </div> <p>SLIDE 7</p> <div data-bbox="236 805 517 1016" style="border: 1px solid black; padding: 5px;">  <p style="text-align: right;">Training & Prevention</p> <ul style="list-style-type: none"> • FY12 SAPR-Leadership (SAPR-L) Leader's ownership of problem of SA in their commands • FY13 SAPR-Fleet (SAPR-F) Sailor responsibility for positive changes in command/Navy with emphasis on bystander intervention (BI) • Piloted Bystander Intervention program at Navy A Schools • Aggressive SA Awareness Month (SAAM) campaign in April: all commands conducted minimum of two hours of dedicated SA awareness </div> <p>Lines of Effort</p> <p>We are going to talk about the Navy's initiatives to combat sexual assault within our ranks and how the JAGC assisted these efforts.</p> <p>Training and Prevention</p> <p>JAGC officers teamed up with the Master Mobile Training Teams for the SAPR-L training, hosted by N135 and the Center for Personal and Professional Development (CPPD), to train command triad members worldwide.</p> <ul style="list-style-type: none"> - JAGs on the MTTs trained individuals on a commander's role with respect to sexual assault investigations, responsibilities to the alleged offender and victim, ways to support the alleged offender and victim, and the SA-IDA withholding policy. - This training effort served to educate commanders and first level responders on the SA-IDA withholding policy. 	

DISCUSSION POINT	RELATED FACILITATOR ACTIVITY
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- The JAGC also provided JAGs to train and educate junior leadership in SAPR-F; stressing Bystander Intervention.
- Overall, the Navy is focused on ensuring Bystander Intervention and other types of training like Sexual Assault Awareness Month (SAAM) occurs where our sailors first enter the service at boot camps, accessions programs, training commands and academies, while also ensuring our current sailors are being trained.

SLIDE 8



Response & Accountability

- NDAA 12: Additional SARCs and VAs in targeted locations based upon SA trends to optimize intervention/prevention and victim support
- Implemented SA victim expedited transfer policy. As of January 2018, all expedited transfer requests were approved
- DoD Safe Helpline published as Navy SA crisis response resource
- Tiered communications from COs to Flgs on reported cases and from Flgs to VCSG/CNSO on effectiveness
- Executing SA-Initial Disposition Authority withholding

Response and Accountability

Accountability

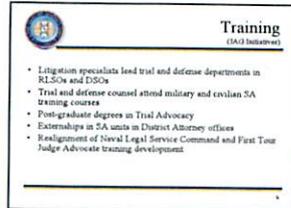
Accountability is an enduring aspect of command. The Accountability line of effort (LOE) encompasses those actions specific to adjudicating an alleged sexual assault crime from the initial unrestricted report through its appropriate disposition. Commanders must take action to protect the health and safety of the victim while safeguarding due process rights of the alleged offender; support the ongoing investigation; and take appropriate action based on the facts and evidence in consultation with legal counsel.

DISCUSSION POINT	RELATED FACILITATOR ACTIVITY
<p>Response</p> <p>Overall, the Navy has increased the number of SARCs and Victim Advocates. As of January 2013, approval was granted to all 62 expedited transfer requests that were received. With tiered communications, there is now a Navy-wide effort to look at the problem of sexual assault. Commanding Officers are now required to provide a personal assessment of the impact of a reported sexual assault to the first Flag Officer in the chain within 30 days of the initial report. This report is designed to allow Flag Officers to assess the command climate at subordinate commands relative to sexual assault as well as the factors surrounding the reported sexual assault, such as location and environment surrounding the incident, demographics, and the role of alcohol. The Flag Officers then communicate via TYCOM/Fleet Forces with CNO/VCNO to help assess the effectiveness of the sexual assault program. Further, the initial disposition authority for sexual assaults has risen to a higher rank. We will discuss this policy change later.</p>	

DISCUSSION POINT

RELATED FACILITATOR ACTIVITY

SLIDE 9



Training
(OASD Initiatives)

- Litigation specialists lead trial and defense departments in RLSOs and DSOs
- Trial and defense counsel attend military and civilian SA training courses
- Postgraduate degrees in Trial Advocacy
- Externships in SA units in District Attorney offices
- Reassignment of Naval Legal Service Command and First Tour Judge Advocate training development

JAG Initiatives on Training

In the JAGC, we are focusing on Trial Advocacy and ensuring the right people are going to the right jobs and getting the appropriate training in order to best prosecute and defend cases involving sexual offenses.

- Military Justice Litigation Qualified (MJLQ) officers lead trial and defense departments at Region Legal Service Offices (RLSOs) and Defense Service Offices (DSOs), which provide prosecutors and defense counsel.
- The Navy sends career litigators to civilian post-graduate schools such as George Washington University, Georgetown, Temple University, and California Western School of Law to receive Master of Laws degrees in litigation or trial advocacy.
- In 2012, the JAG Corps further refined its litigation capabilities by establishing an externship program and assigned two officers to work in the sex crimes units in the Office of the State Attorney in Jacksonville, FL, and San Diego District Attorney's Office in San Diego, CA.

DISCUSSION POINT	RELATED FACILITATOR ACTIVITY
<ul style="list-style-type: none"> - In October 2012, the JAGC reorganized Naval Legal Service Command and established four Defense Service Offices (DSOs) headquartered in Washington, D.C.; Norfolk, Virginia; San Diego, California; and Yokosuka, Japan. The DSO's mission is to defend service members in military justice proceedings, represent them at administrative boards, and provide other representational services, including advice on non-judicial punishment and adverse personnel actions. - As part of realignment, the first two years of all new judge advocates' careers will focus on comprehensive training in prosecuting and defending cases, providing legal assistance, and advising Navy commands. New judge advocates are required to complete Professional Development Standards at their first duty station, following completion of the Basic Lawyer Course at Naval Justice School. These standards ensure that judge advocates are fully equipped to operate effectively in their first-tour assignments, including supporting criminal litigation, providing command services, and providing legal assistance to Sailors and their families. 	

DISCUSSION POINT

RELATED FACILITATOR ACTIVITY

SLIDE 10

JAG Initiatives on Capability

Capability
(JAG Initiatives)

- Military Justice Litigation Career Track
- Trial and Defense Counsel Assistance Programs (TCAP and DCAP) provide reach-back, training and oversight
- Trial Counsel Engagement in NCIS Sexual Assault Task Forces
- Highly Qualified Experts (HQEs) provide reach-back and training
 - HQEs Headquarters recently hired as HQE with nearly 20 years experience prosecuting and trying
 - TCAP and DCAP each have HQEs to assist and train trial teams
 - TCAP Support Specialist (SSS) in an expert in sexual assault prosecution and victims rights

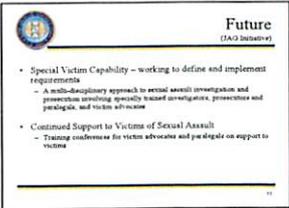
We are supporting our trial advocacy and litigation capability through the Military Justice Litigation Career track to grow well-trained and experienced litigators who can handle these complex cases.

- In June 2007 the JAG Corps created the Military Justice Litigation Career Track. Recognizing that litigation skills are perishable, those individuals accepted into the track fill litigation-intensive billets and improve the effectiveness and efficiency of the court-martial process. This robust community of military justice litigators formed the nucleus for reach-back capability for trial practitioners and staff judge advocates worldwide.
- Also, in 2010, the Navy JAG Corps created the Trial Counsel and Defense Counsel Assistance Programs (TCAP and DCAP). Through the support of military and civilian experts and TCAP and DCAP, we are providing reach back, training and assistance to our litigators. The programs are led by military justice experts who provide high-quality advice, assistance, training, and resources for trial and defense counsel worldwide.

DISCUSSION POINT	RELATED FACILITATOR ACTIVITY
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- The JAG Corps is conducting a pilot program with the NCIS Sexual Assault Task Force. The Task Force consists of a small group of special agents assigned to sexual assault investigations. The Task Force meets weekly at East Coast and West Coast locations to review case progress and monthly with the senior regional prosecutor and installation SARCs. This multi-disciplinary approach allows investigators, prosecutors, and sexual assault prevention and response personnel to troubleshoot sexual assault investigations, prosecution, and victim care issues as they arise. It also promotes early cooperation between stakeholders to improve quality of practice and provides the model for our special victim capability. The teams have already identified several means of improving coordination between investigators, prosecutors, and victim advocates. As the pilot program develops, leadership will continue to assess best practices for use in other regions.

SLIDE 11



Future JAG Initiatives

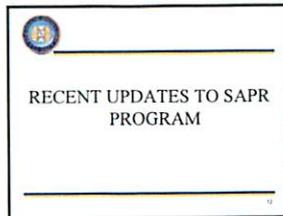
- There are other future initiatives, and one of them is Special Victim Capabilities. The JAGC is looking into the requirements and ensuring that any program is implemented properly.
- The DoD SAPRO working group consists of members from all services' Judge Advocate branches,

DISCUSSION POINT	RELATED FACILITATOR ACTIVITY
<p>investigative units, DoD IG, OSD Legal Policy and DoD SAPRO on Special Victim Capabilities (SVC). The objective of the SVC is to have specially trained personnel investigate and prosecute the “special victim offenses” of child abuse, rape, sexual assault, forcible sodomy, and domestic violence involving aggravated assault. It is envisioned that the SVC will be comprised of specially trained investigators, prosecutors, victim-witness personnel and paralegal support personnel, but the services will not be required to establish a free standing or new “unit”.</p> <p>We are currently executing training to provide proper legal assistance to victims, as well as educating victim advocates and paralegals to better address the needs of victims.</p> <ul style="list-style-type: none"> - The Navy instituted the Legal Assistance for Crime Victims conference and has trained more than 150 Navy and Marine Corps attorneys and paralegals ensuring victims' rights are understood and protected. 	

DISCUSSION POINT

RELATED FACILITATOR ACTIVITY

SLIDE 12

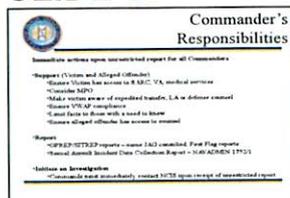


Updates to the SAPR Program

DoD updated the SAPR program in several ways through legislative and policy changes. We will focus on some of those changes and clarifications by looking at the proposals in the 2012 NDAA and the new comprehensive DoDI 6494.02 on SAPR Programs and Procedures that are now in effect.

- Note - Navy instructions have not been updated yet to incorporate the changes in the DoD Instruction.

SLIDE 13



Commander's Responsibilities

SAPR-L taught us that the phrase "Support, Report and Initiate an Investigation," is something that we need our commanders to remember.

- The Commander's Checklist provided in the SAPR Toolkit at www.sapr.mil provides general information, but all judge advocates should also become familiar with DoDI 6495.02 for additional information.
- **Support** – commands must support both the victim and alleged offender in sexual assault cases in a fair and non-judgmental manner.

DISCUSSION POINT	RELATED FACILITATOR ACTIVITY
<ul style="list-style-type: none"> - A few items on this slide warrant additional discussion. First, an important clarification in DoDI 6495.02 (Encl 5) concerns Military Protective Orders (MPOs): in sexual assault cases, MPOs may be issued verbally, but must be followed up in writing with the DD Form 2873. Also, civilian authorities must be informed of the MPO if the alleged offender resides off base in accordance with the "Duncan Hunter National Defense Authorization Act for Fiscal Year 2009". Practitioners need to be aware of these and other requirements in the instruction if advising commands on MPOs in sexual assault cases. - Second, the victim's command is required to ensure the victim is informed about an expedited transfer. We will talk more about expedited transfers on a future slide. - Report – Sexual offenses have additional unique requirements. - OPREP requirements in F3100.6J require commands to list name of judge advocate consulted in a sexual assault case. Beyond that, the CO should ensure the unit's sexual assault data collection coordinator is 	

DISCUSSION POINT	RELATED FACILITATOR ACTIVITY
<p>working with the SARC to comply with additional reporting requirements to include the Sexual Assault Incident Data Collection Report – NAVPERS 1752/1. Further, per NAVADMIN 272/12, within 30 days, the CO must have a conversation with the first flag in the chain of command regarding command climate, circumstances surrounding the incident, and actions taken to prevent future sexual assaults. This should be face to face, but phone or VTC is acceptable.</p> <ul style="list-style-type: none"> - Initiate an Investigation - a clarification in the DoDI 6495.02 is the requirement for commanders to notify the Military Criminal Investigative Organization (MCIO) (NCIS) immediately upon receiving a report of sexual assault. The command should not initiate a preliminary inquiry or command investigation, even to assess credibility, but instead should notify NCIS right away. The command must also notify NCIS upon final disposition of the case so they can enter the data into the Defense Sexual Assault Information Database (DSAID). 	

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- Per DoDI 5505.18 on Investigation of Adult Sexual Assault in the Department of Defense, NCIS must investigate all SA crimes regardless of severity.

SLIDE 14



Restricted Reporting

There are several differences between unrestricted and restricted reporting. This slide provides a refresher before getting into some of the recent updates and clarifications to the policy.

ASK: First whom does the victim have to report to in order to make a restricted report?

CLICK: If reported to anyone other than VA, SAPR, or Health care provider, then it will likely be an unrestricted report. There have been some updates that will be discussed in a moment.

ASK: Is the command notified of a restricted report?

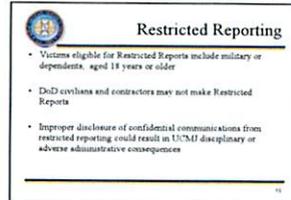
CLICK: Yes, but they are only given only enough information to know that a sexual

DISCUSSION POINT	RELATED FACILITATOR ACTIVITY
	<p>assault has occurred without information identifying the victim or suspect.</p> <p>ASK: We just heard that NCIS must investigate all sexual offenses. Will NCIS investigate a restricted report?</p> <p>CLICK: No. They too will not be given identifying information in order to initiate an investigation.</p> <p>ASK: What is the benefit to restricted reporting vice unrestricted reporting?</p> <p>CLICK TWICE: Whether restricted or unrestricted reporting, the Victim can expect support from the SARC</p>

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SLIDE 15



Restricted Reporting

- Victims eligible for Restricted Reports include military or dependents, aged 18 years or older
- DoD civilians and contractors may not make Restricted Reports
- Improper disclosure of confidential communications from restricted reporting could result in UCMJ disciplinary or adverse administrative consequences

Restricted Reporting

Not everyone is eligible to make a restricted report, especially overseas.

- DoD civilians and their dependent family members and U.S. citizen contractors may only make unrestricted reports and receive emergency medical care and limited SAPR services OCONUS unless otherwise eligible.

and SAPR VA, as well as well as medical, counseling and advocacy support.

ASK: Who is eligible to make a restricted report?

CLICK: Victims who are over the age of 18, who are active duty members or dependents. But DoD Civilians and Contractors and their dependants have to make unrestricted reports.

ASK: Are there any consequences for improperly

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RELATED FACILITATOR ACTIVITY

disclosing a confidential communication in a restricted report?

CLICK: Yes. There could be a UCMJ violation and disciplinary or adverse administrative actions can be taken.

SLIDE 16

Restricted Reporting

- **Important Clarifications**
- Victim Confiding in Another Person
 - DoD 6495.02, End 4, 1(f)
- Effects of Independent Investigation
 - DoD 6495.02, End 4, 1(f)
- Disclosure in Mandatory Reporting Jurisdiction or to Civilian Faculty or Authorities
 - DoD 6495.02, End 4, 1(f)(2)
- Disclosure to Legal Assistance Attorney
 - DoD 6495.02, End 4, 1(h)(3)

Clarifications to Restricted Reporting

There are several points that the DoD Instruction has updated or provided clarification. For example:

Victim Confiding in another Person

- In establishing Restricted Reporting, DoD recognizes that a victim may tell someone (e.g., roommate, friend, family member) a sexual assault has occurred before considering whether to file a Restricted Report. This does not, by itself, void the Restricted Reporting option

DISCUSSION POINT**RELATED FACILITATOR ACTIVITY**

unless the third party later discloses that information to another source. This is not an option if the confidant is law enforcement or in the victim's chain of command.

- Article 1137 of the U.S. Navy Regulations requires persons in the naval service to report all offenses under the UCMJ that come under their observation. Therefore, this article does not require a confidant in these circumstances to report a sexual assault unless the service member observes the offense. DoDI 6495.02, Encl 4, 1(e); Article 1137, U.S. Navy Regulations 1990.

Independent Investigations

- An independent investigation in a sexual assault case is one that is initiated based on information obtained independently of the victim.
- If there is an ongoing independent investigation based on information derived from a source other than the victim, the victim will no longer have the option of Restricted Reporting when: (a) the SARC is informed of

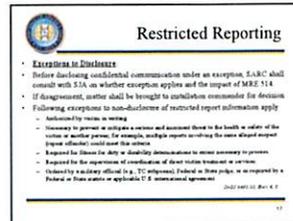
DISCUSSION POINT	RELATED FACILITATOR ACTIVITY
<p>this investigation, and (b) the victim has not already elected Restricted Reporting.</p> <ul style="list-style-type: none"> - Therefore, timing of a Restricted Report is crucial. The victim MUST take advantage of the Restricted Reporting option before the SARC is informed of the investigation in order to retain the restricted reporting option. This also applies to independent state investigations. <p>Disclosure in Mandatory Reporting Jurisdiction or to Civilian Facility or Authorities</p> <ul style="list-style-type: none"> - DoDI 6495.02 also clarifies potential consequences of disclosing a sexual assault allegation in a jurisdiction that requires mandatory reporting, a scenario often encountered when a sexual assault victim discloses at a civilian facility or to civilian authorities or to a civilian health care provider (HCP) on a military installation. - HCPs in many jurisdictions are required by mandatory reporting laws and state credential requirements to inform law enforcement any time they receive a sexual assault allegation. Therefore, disclosure of a sexual assault to health care providers in these jurisdictions 	

DISCUSSION POINT	RELATED FACILITATOR ACTIVITY
<p>might automatically initiate an investigation by civilian law enforcement. This may apply whether the HCP works in a military or civilian facility in that state jurisdiction. This may then preclude the ability of the victim to later make a restricted report, even though the initial disclosure was made to an HCP that normally would be able to take a restricted report under DoD policy. DoD's policy is to honor restricted reporting as much as possible, and may be able to do so if a victim informs a SARC first, but victims need to understand the restricted reporting option is not always guaranteed.</p> <p>Disclosure to Legal Assistance Attorney or Chaplain</p> <ul style="list-style-type: none"> - In the course of otherwise privileged communications with a chaplain or legal assistance attorney, a victim may indicate that he or she wishes to file a Restricted Report. If this occurs, a chaplain and legal assistance attorney shall facilitate contact with a SARC or SAPR VA to ensure that a victim is offered SAPR services and so that a DD Form 2910 can be completed. A chaplain or Legal Assistance (LA) attorney cannot accept a Restricted Report. DoDI 6495.02, Encl 4, 1(b)(3). 	

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Restricted Reporting

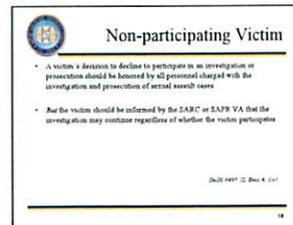
- **Exceptions to Disclosure**
- Before disclosing confidential communication under an exception, SARC shall consult with SIA on whether exception applies and the impact of MBE 514.
- If disagreement, matter shall be brought to inhibition commander for decision.
- Following exceptions to non-disclosure of restricted report information apply:
 - Authorized by victim in writing.
 - Necessary to prevent or mitigate serious and imminent threat to the health or safety of the victim or another person. For example, multiple reports involving the same alleged suspect against children could harm the victim.
 - Required for closure for duty or disability determination to return necessary to proceed.
 - Required for the suspension of continuation of direct victim treatment or services.
 - Directed by military official (e.g., TC adjutant). Follow in their policy, or as required by a Federal or State statute or applicable D-I memorandum agreement.

DAI 2407 01, Rev 4.1

Exception to Disclosure Rule in Restricted Reports

There are some circumstances where a SARC may disclose confidential information from a restricted report. These exceptions are very limited and JAG consultation is required before any information is disclosed.

SLIDE 18



Non-participating Victim

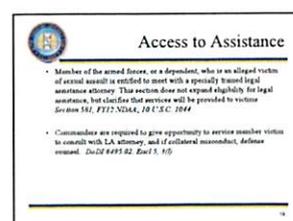
- A victim's decision to decline to participate in an investigation or prosecution should be honored by all personnel charged with the investigation and prosecution of sexual assault cases.
- But the victim should be informed by the SARC or SAPP VA that the investigation may continue regardless of whether the victim participates.

DAI 2407 02, Rev 4.101

Non Participating Victim

A victim has the right to decline to participate in a sexual assault investigation and prosecution. However, this does not necessarily mean the investigation will stop. The victim must be informed that the investigation may continue without their assistance. Although it is not stated explicitly in policy, in practice, a victim will not be forced to testify against his or her will.

SLIDE 19



Access to Assistance

- Member of the armed forces, or a dependent, who is an alleged victim of sexual assault is entitled to meet with a specially trained legal assistance attorney. This section does not expand eligibility for legal assistance, but clarifies that services will be provided to victims.
See also 5A, 10 USC 1044
- Commanders are required to give opportunity to service member victims to consult with LA attorney, and if collateral misconduct, defense counsel. *DAI 2407 02, Rev 4.101*

Victim's Access to Assistance

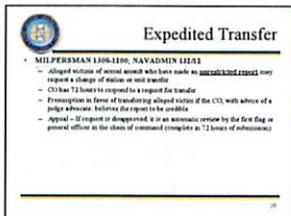
Victims who are on active duty or dependent victims are entitled to meet with a Legal Assistance attorney to receive information on the military justice process, victim's rights, and assistance with a wide variety of legal issues related to being the victim of a crime. If there is a question of collateral misconduct by the victim, efforts will be made for him or her to

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Speak with a defense counsel. Commanders are required to ensure victims have the opportunity to meet with LA or defense counsel.

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Expedited Transfers

Expedited Transfers are not new in the Navy. MILPERSMAN 1300-1200 lays out the process for requesting and handling an expedited transfer. The key items to remember are that only a victim who has made an unrestricted report can request a transfer; he or she must be counseled on the effect of the transfer on their career; the CO has 72 hours in which to make a decision, and if the CO denies the request, there is an automatic appeal to the GCMCA, who then has 72 hours to make a decision on the transfer.

- A credibility determination is made at the time of the request- considering the advice of the supporting judge advocate, and the available evidence.
- Factors for CO to consider: the potential transfer of the alleged offender instead of the servicemember; the nature and circumstances of the offense; whether a temporary transfer would be appropriate; the training

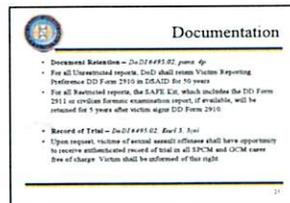
DISCUSSION POINT

RELATED FACILITATOR ACTIVITY

status of the servicemember requesting transfer; status of the investigation, and impact on the mission.

- Victims must be made aware of their right to request an expedited transfer. There is no time limit for the victim to make the request.

SLIDE 21



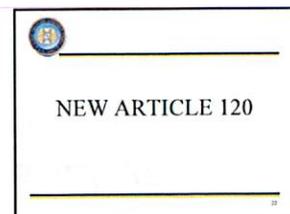
Documentation

- **Document Retention** – DoD 4955.02, para. 4p
- For all Unrestricted reports, DoD shall retain Victim Reporting Preference DD Form 2910 in OASD, for 5 years.
- For all Restricted reports, the SAFE Kit, which includes the DD Form 2911 or civilian forensic examination report, if available, will be retained for 5 years after victim signs DD Form 2910.
- **Record of Trial** – DoD 4955.02, para. 3, 3a1
- Upon request, victims of sexual assault offenses shall have opportunity to receive authenticated record of trial in all SPCM and OCM case files of charge. Victims shall be informed of this right.

Documentation

Depending on the type of report, the DD Form 2910 and SAFE Kit will be maintained for a length of time. DD Form 2910 is the Victim's Reporting Preference Statement and DD Form 2911 is the Sexual Assault Forensic Examination Report. TCs and SJAs should inform the victim that he or she is entitled to a free copy of the SPCM and GCM record of trial.

SLIDE 22



NEW ARTICLE 120

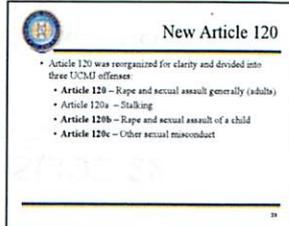
Article 120

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New Article 120



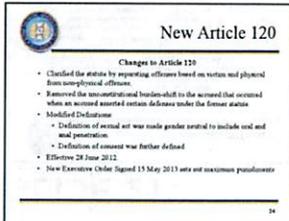
New Article 120

- Article 120 was reorganized for clarity and divided into three UCMJ offenses
- Article 120 – Rape and sexual assault generally (adults)
- Article 120a – Stalking
- Article 120b – Rape and sexual assault of a child
- Article 120c – Other sexual misconduct

The new Article 120 is easier to read and makes it easier to charge offenses because it is now separated by victim status; Article 120 is for adult victims; Article 120b is for child victims, and all other sexual offenses like videotaping without permission fall under Article 120c.

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Changes to Article 120



New Article 120

Changes to Article 120

- Clarified the statute by separating offenses based on victim and physical harm requirements of offenses
- Removed the unconstitutional burden shift to the accused that occurred when an accused asserted a certain defense under the former statute
- Modified Definition
 - Definition of sexual act was made gender neutral to include oral and anal penetration
 - Definition of consent was further defined
- Effective 28 June 2012
- New Executive Order Signed 15 May 2013 sets out maximum punishments

Most importantly, the new Article 120 disposed of the unconstitutional burden shift that was in the previous Article 120 regarding consent. It also became gender neutral. Now a male on male sexual offense in which a sexual act is alleged can be charged under Article 120.

We are still waiting on a forthcoming Executive Order to give sample specifications, commentary and LIOs, but we now know what maximum punishments are for the crimes listed.

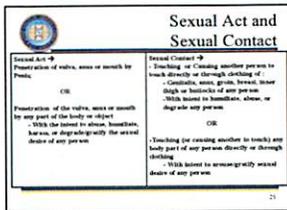
- All sexual crimes committed after 28 June 2012 will be charged under the current Article 120.

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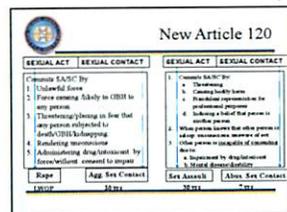
Definitions for Sexual Act and Sexual Contact



This slide provides the definitions for a sexual act and sexual contact under the new Article 120.

SLIDE 26

New Article 120



When looking at Article 120, the easiest way to think about it is to determine what is the act alleged and how did it occur.

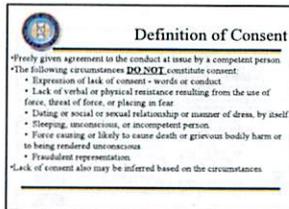
- If there is a sexual act, i.e. penetration of some part of the body by some object, and it was committed using something from the box on the left, i.e. unlawful force, force likely to cause grievous bodily harm, rendering the victim unconscious, etc., then rape can be charged. If a sexual act occurs that was caused by threats, bodily harm, fraud or done while the other person was incapable of consenting, etc., then sexual assault would be charged, but not rape.
- The same is true for aggravated sexual contact and abusive sexual contact, except that the definition of

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sexual contact is generally wrongful touching under or over the clothing of the victim certain areas of the victim with intent to abuse, humiliate or degrade or touching or causing someone else to touch the victim to arouse or gratify sexual desire of any person.

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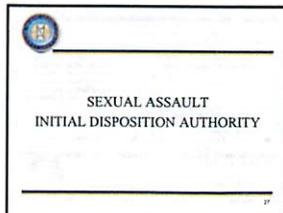
Definition of Consent

- Freely given agreement to the conduct at issue by a competent person.
- The following circumstances **DO NOT** constitute consent:
 - Expression of lack of consent - words or conduct
 - Lack of verbal or physical resistance resulting from the use of force, threat of force, or placing in fear
 - Dating or social or sexual relationship or manner of dress, by itself
 - Sleeping, unconscious, or incompetent person.
 - Force causing or likely to cause death or grievous bodily harm or to being rendered unconscious
 - Fraudulent representation.
- Lack of consent also may be inferred based on the circumstances.

Definition of Consent

Article 120 now contains a comprehensive definition of what is, and most importantly, what is not consent.

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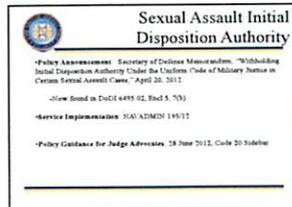
**SEXUAL ASSAULT
INITIAL DISPOSITION AUTHORITY**

Sexual Assault Initial Disposition Authority

DISCUSSION POINT

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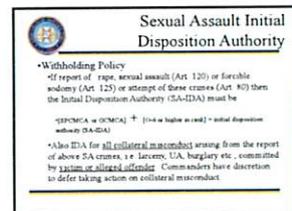
SLIDE 29



Sexual Assault Initial Disposition Authority (SA-IDA)

There are several references that explain the Sexual Assault Initial Disposition Authority policy. The Navy policy follows the policy set out by SECDEF.

SLIDE 30



SA-IDA Policy

The Navy policy is straightforward.

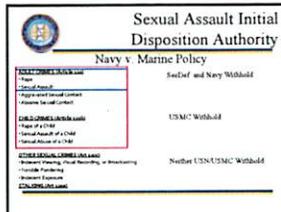
- If there is an alleged penetration offense; rape, sexual assault, forcible sodomy or any attempt of these offenses, then the convening authority who will make the initial disposition decision in the case must be an O-6 or higher with SPCM or GCM authority. This will affect the decision-making process only in those units who with an O-5 or below CO. O-5 or below COs who receive a sexual assault allegation should forward the case to the SA-IDA within 30 days. A sample transmittal letter can be found on Code 20's NKO page.

DISCUSSION POINT	RELATED FACILITATOR ACTIVITY
<ul style="list-style-type: none"> - These O-6s are referred to as SA-IDAs (Sexual Assault initial Disposition Authorities). The SA-IDA is found in the ADCON chain of command vice OPCON. - The SA-IDA policy not only covers the alleged sexual offense, but also any crime that arises from or surrounds the sexual offense committed by the victim or alleged offender. Often, this could be drinking underage or adultery, on the part of the victim or the alleged offender. This collateral misconduct will also be elevated to the SA-IDA. DoDI 6495.02 now clearly states that commanders may defer action on collateral misconduct. 	

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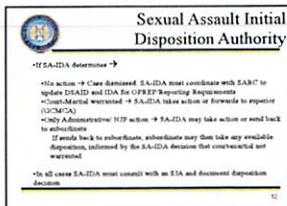


SA-IDA policy with USMC addition to the policy

While the Navy follows the SECDEF policy, the Marine Corps has expanded the withholding policy to also include all Article 120 offenses and Article 120b child sexual offenses.

For the Navy, if an O-5 CO receives a report of a rape of a child by a member of his or her crew, this CO will be the initial disposition authority for the case. In the Marine Corps, it will go to the O-6 SPCMA or higher.

SLIDE 32



What Options does the SA-IDA Have?

- As the slide indicates, the O-6 SA-IDA has the usual range of options available to them ranging from no action to forwarding the case through an Article 32 hearing to a GCMCA.

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- Potential UCI concern: Although the Senior SA-IDA can decide to return the case to a subordinate commander for any action the subordinate commander deems appropriate, the Senior SA-IDA should not direct the subordinate commander on which action to take.

SLIDE 33

 Scenario #1

- You see a command services attorney (in the base. At 0900, on Monday morning, the CMC informed the CO (O-4 installation commander) that one of base sailors, FN 5, was raped while at a house party on Saturday by the sailor she just recently granted status of the Quarter to in your command. The CMC only knows this, because one of FN 5' friends who reported it to him.
- The CO calls you into her office. She has a lot of stuff on her plate, and wants you to walk her through what she should be doing at this point.
- "What do you tell her?"
- You find out later, FN 5 does not want to cooperate, because she had been under age drinking and was extremely drunk when it happened and is afraid she will get in trouble.

Scenario 1

Remember: "Support, Report, and Initiate an investigation."
The CO can use the checklist (www.sapr.mil) as a guide.

a. Supporting the victim:

- Ensure the victim has access to medical, counseling, advocacy through the victim advocate and the SARC and legal assistance as needed.
- Should an MPO be given? It will depend. Prior to your CO issuing a MPO, he may want to speak with NCIS and a judge advocate.
- Expedited Transfer? Make sure the victim is aware that she can request one. Use MILPERSMAN 1300-1200 as a guide for the process.
- VWAP – It should be confirmed that the victim understands her rights under VWAP as well.

ASK: What do you tell the CO?

ASK: Who is the initial disposition authority?

CLICK for the second Part of the scenario: Does the fact that the victim was underage drinking change your analysis?

DISCUSSION POINT**RELATED FACILITATOR ACTIVITY****b. Don't forget reporting requirements.**

- Each command should be working with the SARC to report.
- Don't forget the new requirement for the CO to give a personal command assessment with the first flag via phone, VTC or in person.

c. Initiate an investigation:

- The command should not conduct its own investigation. They must immediately contact NCIS to investigate.

Is this an unrestricted report?

Yes. Even though the victim confided in a friend, it was the friend who is her LPO and in her chain of command, which means it is unrestricted.

Who is the SA-IDA?

The O-6 installation commander can be the SA-IDA per the SA-IDA policy.

What about her collateral misconduct?

The O-6 will still make the decision on the collateral misconduct, but there is no requirement that the CA address the collateral misconduct immediately and in fact can defer a decision until the conclusion of the sexual assault court-martial

DISCUSSION POINT

RELATED FACILITATOR ACTIVITY

without penalty. DoDI 6495.02 recognizes that it may be advisable to defer action on collateral misconduct, keeping in mind statute of limitations and speedy trial concerns. The victim should be encouraged to be involved in the investigation and the case, despite the collateral misconduct, as it is typically a barrier to reporting an offense.

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Scenario #2

 Scenario #2

- You're the deputy SIA. You receive a phone call from an O-5 CO. NCIS called him to say that they have been working on a sting against one of her Sailors. He is suspected, and they have evidence of him, chatting online with a 14-year-old girl, sending pictures of his genitalia to her, and saying obscene and lascivious things to her about what they will do when they meet. She was very disturbed and told her dad, who notified NCIS and the local police.
- What do you tell the CO as his responsibility?

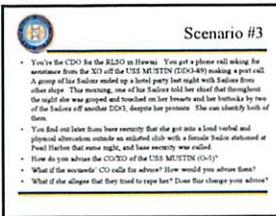
The victim in this case is a child. Therefore, the SA-IDA does not require withholding to an O-6 SPCMCA. The O-5 may retain authority. The CO should still support by providing whatever support the victim is eligible for, assuming she is a DoD dependent, and refer the case to NCIS for investigation.

ASK: What is the CO's responsibility?

DISCUSSION POINT

RELATED FACILITATOR ACTIVITY

SLIDE 35



Scenario #3

- You're the CDO for the RLDO in Hawaii. You get a phone call asking for assistance from the XO of the USS MUSTIN (DD-980) making a port call. A group of five sailors ended up a night party had night with sailors from other ships. This morning, one of the sailors told her chief that throughout the night she was groped and touched on her breasts and her buttocks by two of the sailors and another DD1, despite her protests. She can identify both of them.
- You find out later from her secretary that she got into a local hotel and phoned someone outside an isolated club with a female sailor stationed at Pearl Harbor that same night, and later secretly was raped.
- How do you advise the CO/2D of the USS MUSTIN (D-1)?
- What if the accused CO calls for advice? How would you advise them?
- What if the alphas that they tried to rape her? Does that change your advice?

SCENARIO #3

Remember: "Support, Report, Initiate an investigation"

Responsibilities for the Victim's CO: See Slide 33

Responsibilities of the Accused's CO?

- Support the accused
 - Ensure has access to legal representation
 - Limit information to those with a need to know
 - Work with COC to ensure accused is getting proper medical assistance if needed.
- Reporting requirements
- Initiate investigation with NCIS

Is the Accused's CO the SA-IDA?

Yes, this is not a "penetration" offense, rather it is a sexual contact offense. Therefore, IDA remains with the O-5 CO.

What about collateral misconduct?

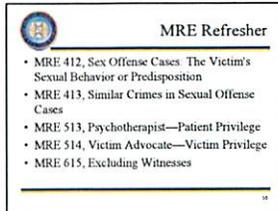
This is not a penetration offense, so the authority to make the initial decision on the sexual assault offense and collateral misconduct remains with the O-5 CO to make a decision.

DISCUSSION POINT	RELATED FACILITATOR ACTIVITY
<p>What if the victim alleges they tried to rape her? Now, the case involves a penetration offense so the SA-IDA policy applies. You must advise the command to forward the case to the O-6 SA-IDA. Generally ADCON, not OPCON.</p> <p>For the Victim's CO, was there collateral misconduct? The CO could make a determination about whether the scenario involved collateral misconduct, i.e. is it relating to or arising from the sexual offense? There is a good argument that these circumstances here would not be collateral misconduct, but in an abundance of caution, and in consultation with a judge advocate, perhaps treat it that way.</p> <p>SLIDE 36</p> <div data-bbox="229 1019 506 1226" style="border: 1px solid black; padding: 5px;">  <p>MILITARY RULES OF EVIDENCE 412, 413, 513, 514, 615 Sexual Assault in the Courtroom</p> </div> <p>Military Rules of Evidence This section is a refresher on the Military Rules of Evidence most pertinent to sexual assault cases. Not only should the audience have a working knowledge of these rules, but the rules are particularly relevant to victims' rights and it is important that victims are informed of their rights under the MREs, most notably those rights in MRE 412 and MRE 514.</p>	

DISCUSSION POINT

RELATED FACILITATOR ACTIVITY

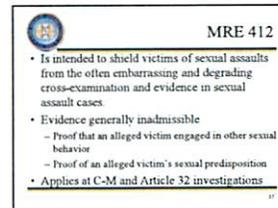
SLIDE 37



MRE Refresher

- MRE 412, Sex Offense Cases—The Victim's Sexual Behavior or Predisposition
- MRE 413, Similar Crimes in Sexual Offense Cases
- MRE 513, Psychotherapist—Patient Privilege
- MRE 514, Victim Advocate—Victim Privilege
- MRE 615, Excluding Witnesses

SLIDE 38



MRE 412

- Is intended to shield victims of sexual assaults from the often embarrassing and degrading cross-examination and evidence in sexual assault cases
- Evidence generally inadmissible
 - Proof that an alleged victim engaged in other sexual behavior
 - Proof of an alleged victim's sexual predisposition
- Applies at C-M and Article 32 investigations

MRE 412

MRE 412 is one of the most important rules of evidence in sexual assault cases. It was designed to safeguard victims against the invasion of privacy and potential embarrassment that is often associated with public disclosure of their intimate sexual details in court.

- MRE 412 states that evidence that an alleged victim engaged in other sexual behavior or proof of an alleged victim's sexual predisposition is generally **inadmissible**.
- MRE 412 applies at courts-martial and Article 32 investigations. See RCM 405(i). Although language was proposed to clarify the application of MRE 412 in Article 32 investigations, it has not yet been adopted.

DISCUSSION POINT

RELATED FACILITATOR ACTIVITY

SLIDE 39

 MRE 412

Exceptions:

- (A) Specific instances of sexual behavior by the victim to prove absence of semen, injury, or physical evidence;
- (B) Specific instances of sexual behavior by the victim with accused to prove consent or by the prosecution;
- (C) Evidence the exclusion of which would violate the constitutional rights of the accused.

MRE 412 Exceptions

MRE 412 has three exceptions that allow disclosure of prior sexual history or sexual predisposition of the victim in sexual assault cases. The first two exceptions are self-explanatory and do not often result in litigation. The third exception, when the evidence is constitutionally required, is where most litigation arises.

SLIDE 40

 MRE 412

- "Constitutional Rights" Exception 412(b)(3c)
- "The burden is on the Defense to clearly demonstrate that the proffered evidence is relevant, material, and favorable to its case" (by a preponderance)
- Must be of consequence to determining guilt, vital to the defense
- See *U.S. v. Ellerbeck*, 70 MJ 914 (C.A.A.F. 2011) for an example of the type of evidence admissible under this exception

MRE 412 Exceptions

In order to admit evidence under the third exception to MRE 412, when the exclusion of evidence would violate the accused's constitutional rights, the burden is on the defense by a preponderance to show why the proffered evidence is material, relevant, and favorable; in other words, vital to the defense. MRE 412 is a rule of exclusion designed to keep evidence out, therefore the burden is difficult for the defense to meet in many cases.

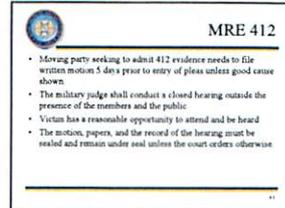
- See *U.S. v. Gaddis*, 70 MJ 208 (C.A.A.F. 2011) for a discussion of the balancing test under this exception.

DISCUSSION POINT	RELATED FACILITATOR ACTIVITY
<ul style="list-style-type: none"> - U.S. v. <u>Ellerbrock</u>, 70 MJ 314 (C.A.A.F. 2011) provides an example of the type of evidence admissible under this exception. In this case, C.A.A.F opined that the alleged victim's prior extramarital affair over two years before the current sexual assault allegation was relevant to the victim's motive to lie about the consensual nature of sex with accused, and that it was error for the military judge to exclude the evidence. This evidence was relevant because the defense presented evidence that the victim knew, after having her first affair, and that her husband would likely react angrily and possibly violently if the victim had another extramarital affair. The court also noted that the victim's testimony about consent was crucial to accused's conviction, there were significant contradictions in other witnesses' testimony about level of victim's intoxication at time of encounter, and prosecution's case was not overwhelming. 	

DISCUSSION POINT

RELATED FACILITATOR ACTIVITY

SLIDE 41



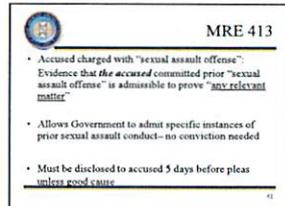
MRE 412

- Moving party seeking to admit 412 evidence needs to file written motion 5 days prior to entry of pleas unless good cause shown.
- The military judge shall conduct a closed hearing outside the presence of the members and the public.
- Victim has a reasonable opportunity to attend and be heard.
- The motion, papers, and the record of the hearing must be sealed and remain under seal unless the court orders otherwise.

MRE 412 Procedures

This slide briefly describes the procedures used to admit evidence under MRE 412. Of note, the victim has a right to attend the MRE 412 hearing and be heard. The hearing will be closed and will take place outside the presence of the members. A closed hearing means that the hearing will be closed to the public. It does not necessarily mean that support staff and supervising attorneys must be excluded.

SLIDE 42



MRE 413

- Accused charged with "sexual assault offense". Evidence that *the accused* committed prior "sexual assault offense" is admissible to prove "any relevant matter".
- Allows Government to admit specific instances of prior sexual assault conduct—no conviction needed.
- Must be disclosed to accused 5 days before pleas unless good cause.

MRE 413

In contrast to MRE 412 that excludes a victim's prior sexual history or predisposition evidence, MRE 413 specifically allows prior sexual assault offense evidence against an accused.

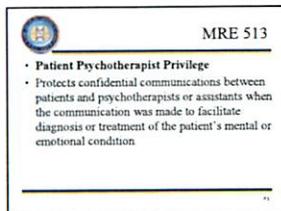
- MRE 413 is designed to allow evidence of prior sexual offenses committed by the accused to be admitted against the accused.
- Unlike the other rules of character evidence that prohibit prior bad acts from being used to show propensity of an accused, MRE 413 specifically allows evidence of prior sexual offenses to be used for any relevant matter to include propensity.

DISCUSSION POINT

RELATED FACILITATOR ACTIVITY

- MRE 413 applies whether or not the prior incident resulted in a conviction.
- Sexual assault offenses are generally defined as misconduct falling under Article 120, wrongful sexual abuse offenses, or conspiracies or attempts to engage in the same.

SLIDE 43



MRE 513

- Patient Psychotherapist Privilege
- Protects confidential communications between patients and psychotherapists or assistants when the communication was made to facilitate diagnosis or treatment of the patient's mental or emotional condition

MRE 513 – Psychotherapist-Patient Privilege

MRE 513 and MRE 514 are rules of testimonial privilege and they are designed to protect communications made by a victim or patient from improper disclosure to a third party.

- These rules balance society's interests in keeping communications between a patient and a psychotherapist and a victim and victim advocate confidential and the need to disclose all available evidence at trial.
- Neither privilege is absolute; both have similar exceptions that allow disclosure in certain cases. Both privileges apply to oral or written communications, and both have procedures that provide for disclosure discussed in the following slides.

DISCUSSION POINT

RELATED FACILITATOR ACTIVITY

SLIDE 44

 MRE 513

- Who may claim?
 - Patient
 - Any person who consents or is examined by a psychotherapist for purposes of advice, diagnosis, or treatment of a mental or emotional condition.
 - Guardian or Conservator of Patient
 - Trial Counsel (if authorized by patient)
 - Defense Counsel (if authorized by patient)
 - Psychotherapist or Assistant who received communication
 - Auditory is presumed to assert on behalf of patient absent evidence to the contrary.

MRE 513 – Psychotherapist-Patient Privilege

While the patient and victim may assert the privilege on their own behalf, as the slide indicates, other parties; including the psychotherapist, victim advocate, and others may assert the privileges on the victim's behalf as well.

SLIDE 45

 MRE 513

- There is no privilege when:
 - The victim is dead.
 - The communication is evidence of child abuse or neglect or when the victim is charged with abuse against the child.
 - The patient has a better legal claim against the psychotherapist than the communication.
 - When psychotherapist indicates that patient consented or authorized disclosure of the patient's change in sex status, including for patient.
 - Communications directly investigated for the commission of a federal crime or if service of psychotherapist on sought in matter is not necessary to ensure or give to death upon a trial.
 - When necessary to ensure safety and security of military personnel, dependents, military property, official information or the accomplishment of the mission.
 - When record of the defendant's activities is sought in an investigation and disclosure would be of substantial value to the defense.
 - A hearing or disclosure is constitutionally required.

SLIDE 46

 MRE 513

Privilege is not absolute

- Hearing
 - If admissibility of records or other privileged communication (including documents of psychotherapist) is sought, party must file motion to disclose & file prior to start of trial.
 - MJ must conduct a hearing prior to release.
 - MJ may issue a protective order or other order.
 - MJ may issue a protective order or other order.
 - Parties have a right to attend and be heard at their own expense unless otherwise authorized by court.
 - Motion, papers, and record of hearing generally remain under seal.

MRE 513 Procedures

This slide focuses on the procedures involved when the moving party seeks disclosure of information privileged under this rule. Similar to MRE 412, a patient has a right to attend the hearing and be heard when the contents of their confidential psychotherapist communications are sought.

DISCUSSION POINT

RELATED FACILITATOR ACTIVITY

SLIDE 47

 MRE 514

- **Victim Advocate-Victim Privilege**
- Protects confidential communication between the victim and a victim advocate if communication was made for the purpose of facilitating advice or supportive assistance to the victim

MRE 514 – Victim Advocate-Victim Privilege

The victim advocate-victim privilege is the newest testimonial privilege created by Executive Order in December 2011. It is very similar to MRE 513 and is likely to be interpreted like MRE 513 by the courts.

SLIDE 48

 MRE 514

- **Who may claim?**
 - Victim
 - Any person who suffered direct physical or emotional harm as the result of a crime or military offense
 - Sexual offense
 - Victim witness
 - Court-Martial or Court-Martial of 10/10e
 - Trial counsel if authorized by victim
 - Defense Counsel if representing A authorized by victim
 - Victim Advocate who received communication
 - Designated as such in 10A USC
 - Authorized to perform VA duties 10A USC in regulations, and in writing in the performance of those duties 10A USC
 - Certified as VVA pursuant to Public Law 110-288

SLIDE 49

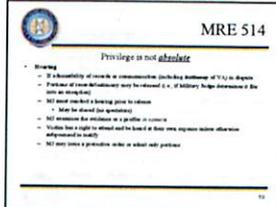
 MRE 514

- **There is no privilege when**
 - The victim is dead
 - Federal/state law or Justice regulation requires that to report information contained in the communication
 - A victim advocate believes that a victim's mental or emotional condition makes the victim a danger to any person, including the victim
 - The communication clearly contemplated the direct commission of a crime or other act of the nature of the victim advocate are sought or obtained in violation and appears to contain or plan to contain information the victim knew or reasonably should have known to be a crime or fraud
 - Necessary to ensure the safety and security of military personnel, military dependents, military property, classified information, or the accomplishment of a military mission
 - Adherence to disclosure is constitutionally required

DISCUSSION POINT

RELATED FACILITATOR ACTIVITY

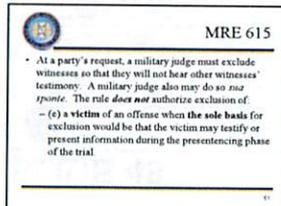
SLIDE 50



MRE 514 Procedures

This slide focuses on the procedures involved when the moving party seeks disclosure of information privileged under this rule. Similar to MRE 412, a victim has a right to attend a hearing and be heard when the content of their confidential communications with a victim advocate is sought. It is important that victims are informed of these rights.

SLIDE 51



MRE 615 – Excluding Witnesses

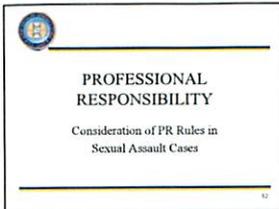
This rule is included because the right to attend the trial is often very important to victims. If a victim is going to testify as a witness on the merits, they may be properly excluded if the military judge finds that their testimony will be materially affected by hearing other testimony. However, if the sole basis of the exclusion is that they will testify in presentencing, they may not be excluded.

DISCUSSION POINT

RELATED FACILITATOR ACTIVITY

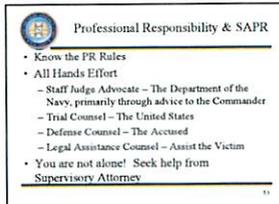
SLIDE 52

Professional Responsibility in Sexual Assault Cases



SLIDE 53

Professional Responsibility & SAPR



Know the PR Rules:

Properly handling sexual assault cases requires Judge Advocates to track multiple requirements and resolve complex issues. Understanding your obligations under the PR rules will assist you in navigating through these very challenging cases.

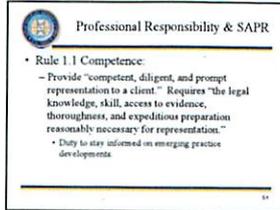
Seek Help From Your Supervisor Attorney:

Refer to your supervisory attorney if you have any question concerning your PR duties. (See Rules 5.1 and 5.2).

DISCUSSION POINT

RELATED FACILITATOR ACTIVITY

SLIDE 54



Rule 1.1 Competence

Competence requires legal knowledge, skill, thoroughness and expeditious preparation and continuing study and education to maintain it. Competence applies to every case but can be especially challenging in sexual assault cases due to rapidly changing procedures, programs and authorities. As an example, think of all the issues a SJA must track in sex assault cases: OPREP, Restricted or Unrestricted, MPO/PTC, Expedited Transfer, SA-IDA, VWAP, SAPR, SAPR VA etc.

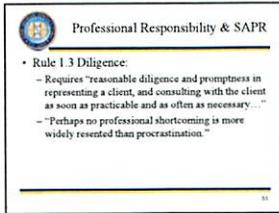
In short, SJAs need to know latest reporting, disposition requirements, and programs available to victim, while maintaining sufficient knowledge of changes in statutory and case law authorities. TC/DCs need to know latest changes in statutory and case law authorities while maintaining sufficient knowledge in latest reporting, disposition requirements and programs available to the victim.

LA Counsel need to stay informed about Federal/State/Local laws, systems and processes designed to support the victim.

DISCUSSION POINT

RELATED FACILITATOR ACTIVITY

SLIDE 55



Professional Responsibility & SAPR

- Rule 1.3 Diligence
 - Requires "reasonable diligence and promptness in representing a client, and consulting with the client as soon as practicable and as often as necessary..."
 - "Perhaps no professional shortcoming is more widely resented than procrastination."

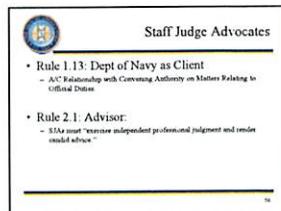
Rule 1.3 Diligence

SJAs: have multiple programs, reporting requirements and other issues to track. Ensure your commands know and are meeting the deadlines for reporting and properly processing these cases. Regardless of any deadlines, do not let these cases sit! It is particularly important for SJAs to ensure their commands are in compliance with VWAP requirements.

TC/DC: More than just usual case prep. These cases involve complex fact patterns, confusing and evolving legal issues to be navigated while keeping victim/witnesses sufficiently informed.

LA Office: Ensure every LA Team member is familiar with NLSC policies regarding service to crime victims and what resources are available, military and civilian, to assist them.

SLIDE 56



Staff Judge Advocates

- Rule 1.13: Dept of Navy as Client
 - A/C Relationship with Convening Authority on Matters Relating to Official Duties
- Rule 2.1: Advisor
 - SJA and "exercise independent professional judgment and render candid advice."

Staff Judge Advocate

Rule 1.13: A/C relationship exists between the SJA and the Department of the Navy (DoN) as represented by the Convening Authority on matters within the scope of CA's duties and in best interest of DoN.

DISCUSSION POINT

RELATED FACILITATOR ACTIVITY

Rule 2.1: In Sexual Assault cases, your Boss will rely heavily on you to help navigate through numerous complex issues. **STAY INFORMED!** Your advice may not always be what your Boss wants to hear but you owe him or her your informed and unvarnished opinion.

SLIDE 57

Trial & Defense Counsel

- Rule 4.3: Dealing with an Unrepresented Person (Victims, Witnesses, Family members)
 - Duty to ensure unrepresented persons understand your role and refrain from providing legal advice other than to refer them to counsel.

Trial and Defense Counsel

TCs have certain responsibilities towards victims (VWAP/Trial Prep) and will often work very closely with them. Victims sometimes mistakenly refer to TC as their attorney. DCs often work closely with the accused's family or defense witnesses who may also make the same mistake. Need to ensure victims, witnesses and family members know your role.

SLIDE 58

Trial & Defense Counsel

- Rule 4.2: Communication with Person Represented by Counsel
 - A covered attorney shall not communicate about the subject of the representation with a party the covered attorney knows is represented by counsel unless the other attorney consents, or the covered attorney is authorized to do so by law or court order.
 - Some victims reject civilian counsel
 - USAF includes may have a SVC detailed to them
 - WB Congress pass legislation regarding SVCs*

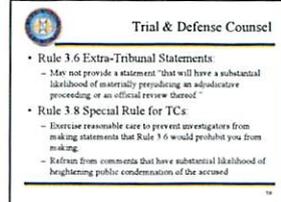
Trial and Defense Counsel

Per Rule 4.2, TCs and DCs need to coordinate with victim's or witness' counsel before communicating with them. The other counsel may agree to permit TC or DC to discuss trial matters with their client without the counsel's presence. But is this likely to happen?

DISCUSSION POINT

RELATED FACILITATOR ACTIVITY

SLIDE 59



Trial & Defense Counsel

- **Rule 3.6 Extra-Tribunal Statements**
 - May not provide a statement "that will have a substantial likelihood of materially prejudicing an adjudicative proceeding or an official review thereof"
- **Rule 3.8 Special Rule for TCs**
 - Enforce reasonable care to prevent investigators from making statements that Rule 3.6 would prohibit you from making.
 - Refrain from comments that have a substantial likelihood of heightening public condemnation of the accused.

Trial and Defense Counsel

Rule 3.6 Extra-Tribunal Statements – applies to all covered attorneys.

- Judge Advocates need to be very careful in any statement they give to the media while a case is either pending or in trial. Sexual assault cases may be covered by the media. Prior to submitting to an interview, consult Rule 3.6 and your supervisory attorney.

Rule 3.8 Special Responsibilities of a Trial Counsel and Other Government Counsel:

- Preventing Investigators from making statements that would violate Rule 3.6, applies to anyone assisting or associated with the TC.
- Refraining from heightening public condemnation of the accused: Exception – when a statement is necessary to inform the public of the nature and extent of the TC's actions and that serve a law enforcement purpose.

DISCUSSION POINT	RELATED FACILITATOR ACTIVITY
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SLIDE 60



Trial & Defense Council

- 4 Rules Important to Remember in Emotional Cases
 - Rule 3.1 - Meritorious Claims and Contentions
 - Rule 3.3 - Candor towards the Tribunal
 - Rule 3.4 - Fairness to Opposing Party and Counsel
 - Rule 4.4 - Respect for Rights of Third Persons
- No "win" comes from a rigged fight
- Dishonesty in the system can NEVER be justified

Trial and Defense Counsel

These rules of course apply to every court-martial regardless of the charges, but the emotionally-charged atmosphere that often surround sexual assault cases occasionally lead Judge Advocates to forget about these rules.

Rule 3.1: Meritorious Claims and Contentions

No frivolous motions or arguments without good faith argument for an extension, modification, or reversal of existing law. Does not affect a DC's duty to defend the client and require the government to prove every element of the case.

Rule 3.3: Candor and Obligations Toward the Tribunal

No false evidence, or false or misleading representations or legal authority, and full disclosure to the tribunal - especially in an ex parte proceeding.

Rule 3.4: Fairness to Opposing Party and Counsel

May not obstruct access to evidence, falsify evidence or assist witness to testify falsely, disobey order from tribunal, make frivolous discovery requests or fail to diligently respond to a legitimate discovery request, render unsupported or improper

DISCUSSION POINT	RELATED FACILITATOR ACTIVITY
<p>assertions at trial, ask someone other than the client not to speak to opposing party.</p> <p>Rule 4.4 – Respect for Rights of Third Persons</p> <p>May not “use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal right of such a person.”</p> <p>SLIDE 61</p> <div data-bbox="223 790 510 997" style="border: 1px solid black; padding: 5px;"> <p> Legal Assistance Attorneys</p> <ul style="list-style-type: none"> • Rule 1.2 Establishment and Scope of Representation (Closely follow NISC Policy) <ul style="list-style-type: none"> - In case of conflict follow procedures carefully - NO VICTIMS TO BE TURNED AWAY, WITHOUT A PROPER REFERRAL - If no conflict, provide assistance but avoid confusion as to your role <ul style="list-style-type: none"> o “Extreme caution shall be exercised to avoid any expectation on the victim’s part that a legal assistance attorney may in any way impact the outcome of any criminal or administrative proceeding.” </div> <p>Legal Assistance Attorneys</p> <p>Section 5-12 of JAGINST 5801.2b (Legal Assistance Manual) provides detailed guidance on providing assistance for prospective or current clients identified as victims. The procedures for a Proper Conflict Referral are detailed in section 5-12(e).</p>	
<p>Defining the Scope</p> <p>While there are many potential PR issues that accompany providing legal assistance to sexual assault victims, clearly defining the scope of your representation to the client is among the most important. This quote is from 5-12 g(1).</p>	

DISCUSSION POINT

SLIDE 62



Wrap-Up

- Remember each party has their role in this system
 - TC - Seek justice and represent The United States
 - DC - Zealously advocate for your client
 - LA - Assist the victim
 - SJA - Advise the Commander
- No case should be personal when we respect each others' duties as professionals

RELATED FACILITATOR ACTIVITY



Victim and Witness Assistance Program (VWAP)



References

- JAG/COMNAVLEGSVCCOM 5800.4A
- COMDTINST M5810.1E (MJM, 2011, Ch 3.M.)
- COMDTINST M1754.10D (SAPRP, 2012)
- COMDTINST 1754.16A (2012)
- CG Work Life- VWAP
http://www.uscg.mil/worklife/victim_witness_assistance.asp
- DoD Directive 1030.1 (2004)
- DoD Instruction 1030.2
- SECNAVINST 5800.11B
- OPNAVINST 5800.7A
- LEGADMINMAN Chapter 6



VWAP Purpose

- Ensure that victims & witnesses receive appropriate response and assistance.
- Protect victims from further harm or hardship.
- Ensure victims are aware of their rights and of available services.



When does VWAP Apply?

- Whenever there is an offense in which there is a victim or a witness.
- Dispositions:
 - NJP
 - Administrative separation board
 - Court-martial



Who is a Victim?

Victim:

- A person who suffers *actual* or *threatened* physical, emotional, or financial harm as a direct result of a criminal offense.
- The term “victim” includes the immediate family of a minor who is a victim, or the surviving family of a homicide victim.
- Includes civilians



Victim's Rights

- To be treated with fairness and respect for victim's dignity and privacy.
- To be reasonably protected from the accused.
- To be notified of court proceedings.
- To receive restitution as available.
- To attend public court sessions.
 - Unless court determines testimony would be materially affected if victim hears other testimony at trial.
- To confer with the attorney for the Government.
- To be informed about case disposition (conviction, sentencing, imprisonment, and release).



Victim's Rights

- **Advisory role in decisions involving prosecutorial discretion, such as plea-bargaining.**
- **Trial Counsel shall ensure the victim's views concerning prosecution and plea negotiations are obtained and forwarded to the CA.**



Who is a Witness?

- Person who has information or evidence concerning a crime and provides that knowledge to a DON representative about an offense in the investigative jurisdiction of DON.
- When the witness is a minor, the term includes a parent or legal guardian.
- Does not include defense witnesses or individual involved in the perpetration of the crime as a perpetrator or accomplice.



Witness's Rights

- To be treated with fairness and respect for witness's dignity and privacy.
- To be reasonably protected from the accused.
- To be notified of any scheduling changes that will affect the witness's appearance at court-martial.
- To be notified of the apprehension of an accused, the initial appearance of an accused before a military judge, the release of the accused pending court-martial, and trial proceeding (including guilty pleas).
- To be informed about case disposition (conviction, sentencing, imprisonment, and release).



THE PLAYERS

- The Commanding Officer
 - Installation/Regional Commander
 - Unit CO
- The Victim Witness Liaison Officer (VWLO)
- The Victim Witness Assistance Coordinator (VWAC)
- NCIS / Law Enforcement
- Hospital
- Staff Judge Advocate
- Chaplain / FFSC / FAP
- Trial Counsel (RLSO / LSSS)
- NLSO / Legal Assistance Office
- Brig



DD Form 2701: Initial Information

- Initial information and services available.
- Provide at time of initial contact (usually law enforcement).
- Provide names of investigator(s), the VWAC / VWLO and legal POC.
- Provides info regarding medical care, counseling resources, possible restitution, and transitional compensation.



DD 2702: Court-Martial Information

- Status update and court-martial procedures:
 - Investigation
 - Arrest/apprehension of accused
 - Preferral of charges
 - Scheduling of court proceedings
 - Release or detention of accused
 - Case disposition
- TC responsible.



TRIAL COUNSEL REQUIREMENTS

- Notify victim of all procedures leading up to and during the court-martial.
 - Consultation prior to PTA being signed.
- Notify of scheduling changes.
- Separate waiting rooms.
- Sentencing
- Miscellaneous items to help make things easier for the victim/witness:
 - Parking
 - Child care
 - Lodging
 - Employers
 - Creditors
 - Victim's property



DD 2703: Post Trial Information

- Informs victim / witness of post-trial process, including:
 - ✓ Location of confinement facility
 - ✓ Clemency/parole considerations
 - ✓ Convening Authority action
 - ✓ Change in inmate status
- TC and brig responsible.



DD 2704: Confinement Status

- Victims and witnesses may elect to be notified of changes in offender's status in confinement.
 - Must be completed for every case involving confinement.
 - If no eligible victims or witnesses entitled to notification, TC signs/certifies as such.



TC - Data

- Maintain data on number of victims/witnesses who received:
 - DD 2702
 - DD 2703
 - Number of victims who elected to be notified of change in confinee status under DD 2704
- Forward data to NLSC using DD 2706



Deployed Units

- VWAP applies to all units in all locations.
- Availability of victim services is reduced.



Challenges in a Deployed Environment

- Victim and assailant on same ship or in same unit?
- Assailant to be punished while victim deployed?
- Victim wants out of the Navy?
 - May not be possible
 - More cumbersome from a deployed position
 - How to respect victim's wishes while still maintaining viability of a trial



TC - Compensation

- Ensure victims receive information regarding compensation programs:
 - State
 - Other financial sources of relief
 - Transitional Compensation for Abused Dependents



Military Victim Assistance Programs

- SAPP
- FAP/Work-Life
- Benefits for dependents who are victims of abuse by Sailors losing right to retired pay
 - Title 10 USC, Section 1408(h)
 - May get retirement benefits from divorce court - can elect transitional compensation meanwhile, but it's subject to recoupment



Compensation for Abused Dependents

- Transitional Compensation for Abused Dependents
 - DoDI 1342.24
 - DD Form 2698 – Application for Transitional Compensation
 - COMDTINST 1754.16A (2012)
 - CG-1754 – Application for Transitional Compensation
- 12-36 months



Other Compensation Programs

- DOJ Office for Victims of Crime (OVC)
 - <http://www.ojp.usdoj.gov/ovc/vwac>
- National Association of Crime Victim Compensation Boards
 - <http://www.nacvcb.org>
- State victim compensation programs



Potential Challenges

- What if the victim doesn't want to work with you?
- What if the victim doesn't think they can testify?
- What if the victim is having a problem with the trial counsel? The defense counsel?
- What if the victim is being harassed? Afraid of the accused? Afraid of the accused's family or friends?



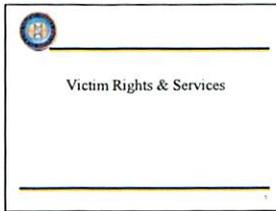
Questions?

NAVY 0.75

Sexual Assault Prevention and Response Training (Victim Rights) JAGC – June 2013

DISCUSSION POINT

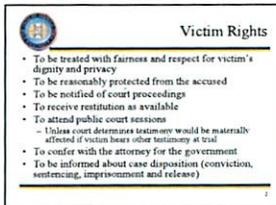
SLIDE 1



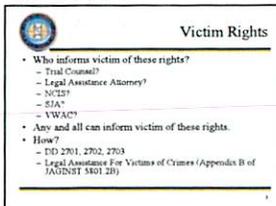
Victim Rights & Services

These rights can be found in our VWAP instruction (COMNAVLEGSVCCOM 5800.4A). They are also detailed in the DD 2700 series forms and the Legal Assistance For Victims of Crimes form (Appendix B of JAGINST 5801.2B). TCs, LA Attorneys, SJAs, NCIS, and Victim Witness Assistance Coordinators can all inform victims of these rights. The forms above are tools to help inform victims of their rights.

SLIDE 2

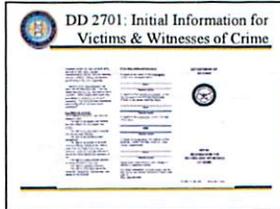


SLIDE 3



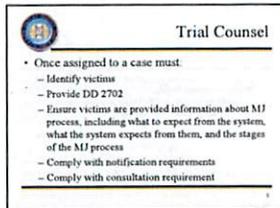
DISCUSSION POINT

SLIDE 4



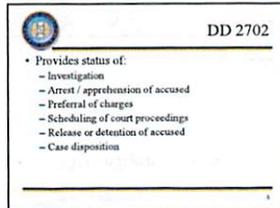
SLIDE 5

Trial Counsel Duties



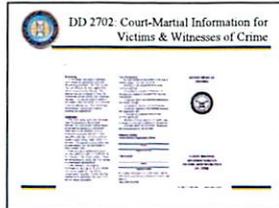
TCs will likely have the most interaction with victims. TCs also have significant responsibility in making sure victims receive appropriate information. The duties identified in these slides focus on what trial counsel should do at the beginning stages of a court-martial or investigation.

SLIDE 6

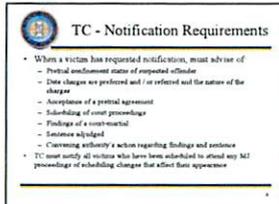


DISCUSSION POINT

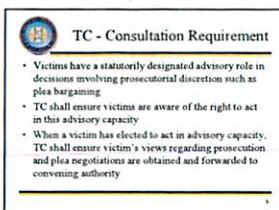
SLIDE 7



SLIDE 8



SLIDE 9



Trial Counsel Duties (At Trial)

TCs must ensure that victims understand their right to communicate their views to the convening authority during pleas negotiations. Most of the other duties in these slides apply during the trial phase of a court-martial.

DISCUSSION POINT

SLIDE 10



TC - Documentation Requirement

- TC required by JAG to document compliance with VWAP
- It is wise to track conversations with the victim and not just when forms are provided

SLIDE 11



TC - Separate Waiting Room

- TC shall ensure, to the extent possible, that victims and prosecution witnesses are provided with a waiting area during court-martial proceedings that is removed from and out of sight of accused and defense witnesses

SLIDE 12



TC - Sentencing

- Inform victims of the opportunity to present evidence to the court at sentencing, including statement concerning impact of the crime, such as financial, psychological, and physical harm

DISCUSSION POINT

SLIDE 13

 TC - Other Assistance

- Provide victims/witnesses with information concerning services such as transportation, parking, child care, lodging, translators, and interpreters
- Take reasonable steps to inform employers that victim is involved in court-martial (upon request)
- Contact creditor if victim/witness subject to serious financial strain caused by crime or cooperation in investigation / prosecution
- Safeguard victim's property held as evidence and return it as soon as possible

SLIDE 14

Trial Counsel Duties (After Trial)

 TC - Post Trial

- Provide DD 2703 to victims
 - Inform victim of post-trial process, including
 - Location of confinement facility
 - Clemency / parole consideration
 - CA, Arson
 - Notification rights
 - Check to ensure status (via Form 2700)
- Information may be limited if necessary to avoid endangering safety of victims, jeopardizing an ongoing investigation, or unduly delaying disposition of offense

Trial is a busy time for TCs. It can be very emotional for victims. TC's should plan ahead and get help from staff to make sure the victim receives the appropriate information at the conclusion of the trial.

SLIDE 15

 DD 2703: Post-Trial Information for Victims & Witnesses of Crime



DISCUSSION POINT

SLIDE 16

TC - Post Trial

- Before a DD 2704 Subsequent Statement is drafted to be modified if changes in offender's status in confinement:
 - DD 2704 should not be drafted for any time period in which offender has active or imminent entitlement to parole.
 - TC filing / certificate as such.
- Copies should be provided to:
 - Correctional Institute, Superintendent of the Boston Circle
 - Correctional Institute, Superintendent of the State House
 - Sentenced by TC

SLIDE 17

DD 2704: Victim/Witness Certification & Election Concerning Immune Status



The image shows a form titled "DD 2704: Victim/Witness Certification & Election Concerning Immune Status". The form contains several sections for a victim or witness to provide information and make an election regarding their immune status. The sections include: "I, the undersigned, am a victim/witness of the crime described in the attached case file number", "I am a victim/witness of the crime described in the attached case file number", "I am a victim/witness of the crime described in the attached case file number", and "I am a victim/witness of the crime described in the attached case file number". There are also checkboxes for "I am a victim/witness of the crime described in the attached case file number" and "I am a victim/witness of the crime described in the attached case file number".

SLIDE 18

TC - Compensation

- Ensure victims receive information regarding compensation programs:
 - Other financial services of relief
 - Transitional Compensation for Abused Dependents

DISCUSSION POINT

SLIDE 19

 **Military Victim Assistance Programs**

- Sexual Assault Prevention and Response (SAPR)
 - Access to Victim Advocate
- Family Advocacy Program (FAP)

SAPR, FAP, & Compensation Programs

Victims may also have access to SAPR or FAP resources. These resources (SARCs, Victim Advocates, Counselors) can help victims during the process. They can also help victims apply for compensation programs, like Transitional Compensation if eligible.

SLIDE 20

 **DOD Compensation Programs**

- Transitional Compensation for Aboard Dependents
 - Dependents may be eligible for transitional compensation (limited benefit)
 - 10 U.S.C. 1619
 - DODI 1342.21
 - OPNAVINST 1750.3
 - DD Form 2086 Application for Transitional Compensation
- Travel and Transportation of Dependents - JFTR US240
- Benefits for Dependents Who are Victims of Abuse by Sailors
- Living Right to Retired Pay
 - 38 U.S.C. Sec. 1440(b)
 - Must get retroactive benefits from abuse claim - can affect transitional compensation
 - 38 U.S.C. Sec. 1440(a)

SLIDE 21

 **Other Compensation Programs**

- DOJ Office for Victims of Crime (OVC)
 - <http://www.ovc.gov/>
- National Assoc. of Crime Victim Compensation Boards
 - <http://www.nacvcb.org/>
- State victim compensation programs
 - <http://ovc.ncjrs.gov/find/victimservices/>

DISCUSSION POINT

SLIDE 22



Legal Assistance

- Victims who are on active duty or dependent victims are entitled to meet with a Legal Assistance attorney to receive information on the military justice process, victim's rights, and assistance with a wide variety of legal issues related to being the victim of a crime, but only if they are independently entitled to the service (i.e. active duty or dependent).
- 2012 NDAA states that victims shall be informed of the availability of legal assistance.
- Section 581 of National Defense Authorization Act. See also Enclosure 5 of DoDI 6495.02.

Legal Assistance

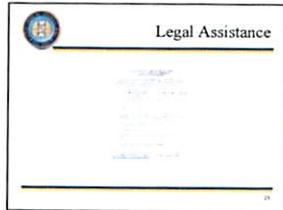
Section 581 of the 2012 NDAA and Enclosure 5 of DoDI 6495.02 states that victims shall be informed of the availability of legal assistance. Victims who are on active duty or dependent victims are entitled to meet with a Legal Assistance attorney to receive information on the military justice process, victim's rights, and assistance with a wide variety of legal issues related to being the victim of a crime. The form "Legal Assistance for Victims of Crimes" shall be used by LA attorneys to inform victims of their rights. Legal Assistance offices shall make sure that the appropriate conflict checks are performed.

On their initial visit to the LA office, crime victims will be provided a list of rights and benefits to which they may be entitled as a result of their status as a victim. LA attorneys will discuss these rights without forming an attorney-client relationship. If it is determined that the victim will not present a conflict of interests to the LA office, the LA attorney can then substantively discuss rights and benefits with the client in the context of an attorney-client relationship, subject to one important limitation. LA attorneys will assist in enforcing/facilitating client rights and benefits only to the extent this can be done outside the context of a court-martial

DISCUSSION POINT

(e.g., transitional compensation and MPOs). All rights and benefits to be enforced through the CM must be referred to trial counsel.

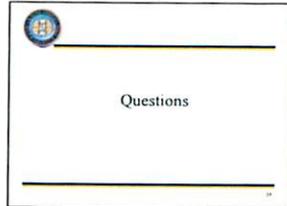
SLIDE 23



Legal Assistance for Victims of Crimes

Appendix B of JAGINST 5801.2B. This form is handed to each and every person who is a crime victim whether he or she is a victim of domestic violence, car theft; sexual assault; identity theft. It does not matter as long as the victim is identified or self identifies as a victim.

SLIDE 24





Working with Investigators

- Relationships
- Early engagement
- Interviews
- Communication
- Professionalism
- Teamwork
- Continuity
- Testimony
- Preparation
- MRE 615

Testifying in Mock Article 32 hearing.

Followed by 2 hours report writing to write ROI (CLOSED).

501284

for S/, for desertion and being wanted by NCIS for questioning in rape investigation. (4 hours).

2nd part would be permissive S&S of Martin's residence (2 hours).

Students will be provided DD-553 and Mock SRB for review.

Followed by 6 hour report writing 2 statements & ROI (CHANGE) adding co-subject. Also will initiate 7F case with an ROI (OPEN) with lead to check with State Dept (passport) & interview family members & add S/ to NCIC.

Students will be provided ROI (ACTION) with lead responses negative results from family & passport application from DOS. Will provide date of anticipated passport delivery (date of phase 5) and location being mailed to, an on-base residence (a friend of S/).

Phase V (4 hours)

CW will come in and report being approached by a civilian (friend of S/) looking to get him & his friend (S/) out of the country. The students should conduct surveillance at residence and execute command authorization (verbal) looking for S/. Resident will be quickly interrogated (civilian waiver) at the residence and then will take students to location where S/ is waiting. Students will apprehend S/ at second site and transport both back to interview lab. S/ will be interrogated (military waiver) and will state that he had consensual sex with V/ and did not use rohypnol, he will then ask for a lawyer.

Followed by 4+2 hours of report writing to write the ROI (INTERIM) and IA's.

Phase VI (2 hours prep + 4 hours lab)

her and removing her clothes. She also has a vague recollection of S/ being on top of her having sexual intercourse with her, she was not conscious enough to tell him no. She woke up at 0430 and noticed a white discharge from her vagina when she went to the bathroom and she had discomfort in her groin area as well.

Followed by 4 hours report writing (complete ROI (OPEN) and V/ statement). Lead to have friend interviewed @ another base.

Phase III (2 hours)

Interview lab-Recorded pretext call between V/ & S/. S/ will make tacit admissions—I thought you wanted it too/You never said no/I'm sorry/etc.

Followed by report writing V/ statement of pretext call.

Students receive lab test results from hospital showing presence of rohypnol.

Phase IV (4 + 2 hours)

Brief S/'s CO and request to interrogate. CO advises S/ is UA. Two friends (Martin & Edwards) are available to be interviewed. Martin denies any knowledge of rohypnol. Edwards denies any direct knowledge of rohypnol, but heard S/ and Martin talking about Martin having some pills. Edwards also states the day after the incident he talked to S/ and he was bragging about "banging a squid" and how she just kinda just laid there. S/ did not talk about rohypnol. Interrogation of Martin leads to him admitting that he had 10 pills of rohypnol and gave 1 to S/ that night before going to the club. He does not know if S/ used it or not. He also had a conversation the next day with S/, but S/ told him he "banged the squid" and didn't even need the rohypnol. A DD553 will be issued

New CCI Scenario

Phase I (6 hours)

Sex Assault Crime Scene instructed by FCU personnel. To be treated as a duty call with students being called out at 0445 by Command Duty Officer. Victim (USN AD) is at hospital (not available for immediate interview). The location of the crime is her on-base residence. Her dependent husband is on travel out of the area. Students will be told the victim states she was at the on-base bar the night prior with a few friends. They met some guys and were dancing and playing pool with them. One of the guys drove her to her residence and she doesn't recall anything after that until she woke up at 0400 in her bed (alone), she was naked and believes she was raped. She believes she was raped because her groin area is sore and when she went to the bathroom, she had a white discharge from her vagina.

Students receive housing/Pass & ID records for v/ residence.

Followed by 4 hours of report writing (begin the ROI (OPEN) and IA's for crime scene).

Phase II (4 hours)

Interview Lab-Interviews of victim and one of her friends. The victim will provide details of the evening of the assault. She and her friends went to the bar, met the three guys, danced and played pool with them. She only had three drinks, but began to feel intoxicated after the third drink. She accepted a ride to her house from the S/. She recalls the two of them walking to her front door but has lapses of vague memories after that. She has vague recollections of being in her bedroom, in her bed with S/ kissing

	to State Dept for passport inquiry.	
30NOV11 Wednesday	During Report Writing, provide results from interview of family & State Dept check.	ROI (DCWA) & IA's of family interview & State Dept. check. Check with housing show Passport being delivered at Gary Pope's on-base house.
30NOV11 Wednesday Phase V	CW-Willie Wilson reports contacting S/MACEY & Gary POPE at the Red Carpet Lounge. They said MACEY was in serious trouble & needed to leave the country. PASS at Pope's off base residence. Apprehend Macey and interrogate. See Phase V handout for details.	
07DEC11	Prep & Article 32	

Hazzard Residence- Team A- Bldg 76, Apt 69
Team B- Bldg 76, Apt 69
Team C- Bldg 76, Apt 69

Misc. Details

Tommy A Macey	SSN-234-56-7890 DOB-14Feb80
Tommy B Macey	SSN-234-56-7890 DOB-14Feb80
Tommy C Macey	SSN-234-56-7890 DOB-14Feb80
V/HAZZARD's Husband	Jonathan Hazzard
V/Hazzard BIC	SSN-123-45-6789 DOB-17Mar80
Gary Pope's wife	HM2 Terri Pope NAVHOSP NAS Glynco, GA

NCIS SACCI Timeline SABTP # 103

V/HAZZARD, PATTY (NMN)/YN2 USN
22NOV11-SEGO-0004-8FNA

Date	Action(s)	Inst. (Handouts, etc.)
22NOV11 Tuesday Phase I	Crime reported early AM. Occurred late night 21NOV11/early AM 22NOV11.	Provide base PASS & ID. Housing & DMV records after crime scene
22NOV11 Tuesday	RW-Students write crime scene IA and write ROI (OPEN) V/Title	N/A
23NOV11 Wednesday Phase II	V/HAZZARD & friend (Sara Francis Harper) interviewed. 2 nd Friend (Annie Jones) has returned to Norfolk. Need to obtain medical waiver from V/. RW-Write ROI (ACTION) w/request for oral/wire auth & lead to have JONES interviewed (NFNF). Also, prepare statement/IA for V/HAZZARD & HARPER.	End of Phase II, provide lab results showing V/Hazzard had rohypnol in her blood system.
28NOV11 Monday Phase III	Students conduct recorded pre-text telephone call between V/ & S/. Need Consensual Intercept Waiver. RW-Document results of consensual intercept.	Consider having the team practice the pre-text call with V/Hazzard before actually making the phone call. Provide Alpha Roster for Macey, Edwards, and Martin. Results of interview of Jones (NFNF).
28NOV11 Monday	Team Meeting-if needed	
29NOV11 Tuesday Phase IV	Students brief CO Raymond LONG (CO of VFA-127). They find out AO2 Tommy MACEY is UA. They will interview AO2 Eric MARTIN & AO3 Daniel Edwards. MARTIN denies any knowledge of "ruffies". Edwards tells students he overheard MACEY & MARTIN talking about ruffies and MARTIN said he would give one ruffie to MACEY. Interrogate MARTIN he confesses & agrees to PASS, which will be conducted after lunch. During Search students should find nine (9) more ruffies.	Students will receive a DD553 for MACEY (Desertion) at end of lab. DD553 will note he is wanted by NCIS for questioning in a rape investigation. Also results of a SRB review. Students should ask for a photo of S/Macey.
29NOV11 Tuesday	RW-ROI (CHANGE) & ROI (ACTION), lead to have family interviewed (DC) & lead	N/A