

**COMPARATIVE SYSTEMS SUBCOMMITTEE  
ISSUE ASSESSMENT- DEFENSE OF SEXUAL ASSAULT CASES**

**SUBCOMMITTEE MISSION STATEMENT:**

Assess and compare military and civilian systems used to investigate, prosecute, and adjudicate crimes involving adult sexual assault and related offenses, under 10 U.S.C. 920 (Article 120, Uniform Code of Military Justice (UCMJ)).

**SUBCOMMITTEE OBJECTIVES AND SCOPE:**

Compare military and civilian systems used to defend those accused of adult sexual assault crimes.

Identify best practices from civilian jurisdictions that may be incorporated into any phase of the military system.

**ISSUES:**

*In sexual assault cases, how do the military defense counsel and their practices compared to public defenders in civilian jurisdictions? Are there any civilian best practices that DoD should adopt?*

**REPORT OUTLINE:**

**I. Methodology and Overview of Subcommittee Analysis**

- A. Meetings/discussions held
- B. Presenters heard
- C. Installations visited
- D. Materials reviewed
- E. Relevant RFIs:

**II. Organizational Structure of Defender's Offices**

- A. Civilian Jurisdictions— Specialized career track or general practice for attorneys, funding, resources
  - 1. Large jurisdictions
  - 2. Small jurisdictions
- B. Military – Who defends sexual assault cases and what is the organizational structure of the office and command (local, regional)
  - 1. Army
  - 2. Air Force
  - 3. Navy
  - 4. Marines
  - 5. Coast Guard
- C. Civilian v. Military – relationship with others involved in the process
  - 1. Police / SVU Investigators / MCIOs
  - 2. Defense Attorney Investigators
    - a. What is the background of civilian investigators for public defenders?

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- b. What training have they received?
  - c. How are the public defender's investigators funded?
  - d. Can military defense counsel request an investigator? If so, how often has that been done in sexual assault cases?
  - 3. Victim Attorneys
  - 4. Prosecutor
  - 5. Prosecutor & VWL
- D. Measures of effectiveness

**III. Defense Attorneys**

- A. Experience required
- B. Training required for lead defense counsel
  - 1. Funding for training
  - 2. Agreements/programs for training in civilian jurisdictions
- C. Career progression
  - 1. Promotion issues (military career defense attorneys)
  - 2. Retention of attorneys
  - 3. Pay disparity between prosecutors and public defenders
- D. Case load

**IV. Defense Counsel's Role & Authority**

- A. Point of involvement in the case
- B. Initial and on-going interaction with:
  - 1. first responders
  - 2. investigators
  - 3. VA's and victim agencies
  - 4. victim attorneys
  - 5. prosecutors
- C. Supervision of defense counsel
- D. Public defender/ military defense counsel ability to take or decline a client
- E. How do defense counsel perceive the government's charging decisions
  - 1. Is the proper authority being exercised – drafting and/or charging
  - 2. Does there seem to be a tendency to overcharge or do charges seem to be appropriate to encourage pleas?
  - 3. Does there seem to be a protocol to review charging decisions or are there inconsistencies that would be resolved with better review of charges
  - 4. Does there appear to be a clear criteria used
- F. Military defense attorney's role and relationship with Commanders – is rank an issue?

**V. Issues Relating to the Trial**

- A. Type of Evidence used when defending in acquaintance rape type of cases
  - 1. Rape Kit
  - 2. Suspect Kit
  - 3. Technology/ specialization

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- a. Cell phones
  - b. Computers
  - c. Video evidence
  - d. Pretext phone calls
  - e. DNA/forensics
  - f. Psychology/psychiatry
  - g. Cross-racial issues
- B. Witnesses
- 1. Requests
  - 2. Subpoenas
- C. Experts used in sexual assault cases
- 1. Obtaining experts
  - 2. Funding experts
    - a. who pays for the time to prep & testify and what are the limits
    - b. travel expenses
  - 3. Forensic psychiatrists
  - 4. Other types of experts and frequency of the use of those experts
  - 5. Use of consultants v. experts
- D. Victim (as witness) Issues
- 1. Relationship with the victim, victim counsel, and victim advocates
  - 2. Collateral Misconduct
  - 3. Counterintuitive behavior
  - 4. Alcohol/drug use
  - 5. Delayed/inconsistent reports or statements
  - 6. Credibility
  - 7. Mental Health Issues
  - 8. Availability
  - 9. Consent
  - 10. Recantation (true/false) and how to handle non-cooperation
  - 11. Rank disparity – theories of constructive coercion
  - 12. Expedited Transfer – how to prosecute case when victim is in another location
- E. Defendant issues
- 1. Character Evidence
    - a. Good Soldier Defense in military compared to defendant's ability to provide evidence of his good character and/or truthfulness in civilian sexual assault cases (specifically review its application in the military at the time of charging decisions and RCM 306, RCM 404, RCM 405(a))
    - b. Defendant's character evidence – merits & sentencing
  - 2. Evidence of other acts by accused
    - a. Civilian
    - b. Military Rule of Evidence (MRE) 404(b) uncharged misconduct
    - c. MRE 413, evidence of accused's committing previous sexual assault
    - d. MRE 414, admissibility of similar crimes in child molestation cases
- F. Privileges and protecting information during trial - analyze the historical basis and policy reasons for each of the above issues and the applicable MRE's/RCMs and civilian privileges

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1. MRE 501, construing privileges narrowly
2. MRE 502, Attorney-client privilege (prosecutors & defenders views on new victim counsel/*Brady* issues) and how this is handled in civilian jurisdictions with victim attorneys
3. MRE 503, Clergy privilege compared to civilian jurisdiction rules
4. MRE 504, Spousal privilege compared to civilian jurisdictions and the role it plays in domestic violence cases that contain a sexual assault offense
5. MRE 513, Psychotherapist-patient privilege compared to civilian jurisdictions' privileges for mental health professionals and records
6. MRE 514, Victim-advocate privilege compared to civilian jurisdiction privileges

**VI. Discovery & Pre-trial Proceedings**

- A. Scope of discovery & related issues in sexual assault cases
  1. Timing
  2. Disclosure requirements
  3. Witness availability
  4. Use of expert consultants
- B. Defense counsel's role and opinions regarding Grand jury, preliminary hearing or Art. 32 proceedings
- C. Extent of Motion Practice – civilian v. military

**VII. Pre-trial Negotiations and Guilty Pleas**

- A. Who handles plea negotiations
- B. Who is the plea agreement between (Defendant & Convening Authority)
- C. Opportunity for Defendant to be heard by the Convening Authority or Government prior to plea deal
- D. What do the parties agree to
  1. Civilian Jurisdictions
  2. Military – sentence / beat the deal possibility
- E. Supervision or approval authority required for pleas in sexual assault cases

**VIII. Trial**

- A. Panel selection – are there any problems with the civilian or military process according to defendants or defense counsel?
- B. Impact of Rape Shield Law on the defendant's case and related MRE's
- C. Interaction with Victim's Attorneys during trial

**IX. Post-Trial**

- A. Administrative Separations for service members convicted, but retained
- B. Defense counsel's role during the appellate process

**X. Defense Counsel & Victim Rights**

- A. Concern with victim's rights versus defendant's rights
- B. What resources are available to defendants compared to victims?

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**XI. Best Practices & Metrics of success**

**XII. Findings Based on Above Evidence**

**XIII. Recommendation(s)**

**DRAFT**