

**COMPARATIVE SYSTEMS SUBCOMMITTEE
ISSUE ASSESSMENT- PROSECUTING 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 for the prosecution, and adjudication of adult sexual assault crimes.

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

ISSUES:

How do the military prosecution systems for sexual assault cases compare with those 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 Prosecutor's Offices & Location

- A. Civilian Jurisdictions— Special Victim Units within Prosecutor's office or general practice; Specialized career track or general practice for attorneys; separate or co-located with investigators, victim advocates, victim witness liaisons;
 - 1. Federal
 - 2. States
 - 3. Large jurisdictions
 - 4. Small jurisdictions
- B. Military – Special victim capability (SVC) & non-specialized Trial Counsel; Large & small bases prosecutors' "capability" to handle penetrative & non-penetrative sexual assault cases
 - 1. Army
 - 2. Air Force
 - 3. Navy
 - 4. Marines
 - 5. Coast Guard
- C. Civilian v. Military – relationship with others involved in the process

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1. Prosecutor & Victim Advocate
2. Prosecutor & Investigator
3. Prosecutor & VWL

D. Measures of effectiveness

III. Prosecutors

- A. Experience required for lead prosecutors
- B. Training required for lead prosecutors
 1. Funding for training
 2. Agreements/programs for training in civilian jurisdictions
- C. Career progression
- D. Case load

IV. Prosecutor'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. defense counsel
- C. Supervision of prosecutors
- D. Prosecutor discretion to take or decline taking a case from investigative phase
- E. Charging
 1. Authority – drafting and/or charging
 2. Protocol to review charging decisions
 3. Criteria used
- F. Prosecutor's role and relationship with Commanders

V. Issues Relating to the Trial

- A. Type of Evidence used in acquaintance rape type of cases
 1. Rape Kit
 2. Suspect Kit
 3. Technology/ specialization
 - a. Cell phones
 - b. Computers
 - c. Video evidence
 - d. Pretext phone calls
 - e. DNA/forensics
 - f. Psychology/psychiatry
 - g. Cross-racial issues
- B. Experts used in sexual assault cases
 1. Obtaining experts
 2. Funding experts

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3. Forensic psychiatrists
4. Other types of experts and frequency of the use of those experts
- C. Victim (as witness) Issues
 1. Relationship with the victim, victim's counsel, and victim advocate
 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
 12. Expedited Transfer – how to prosecute case when victim is in another location
 13. Best methods to retain victim cooperation throughout the process
 14. Any special procedures or considerations for prosecutors when dealing with male victims?
- D. 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. Accused'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
- E. 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
 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

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- A. Scope of discovery & related issues in sexual assault cases
 - 1. Timing
 - 2. Disclosure requirements
 - 3. Witness availability
 - 4. Use of expert consultants
 - 5. Interpretation of what constitutes Jenks Act and *Brady* material
- B. Prosecutor'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 (Prosecutor v. Convening Authority)
- C. What do the parties agree to
 - 1. Civilian Jurisdictions
 - 2. Military – sentence / beat the deal possibility
- D. Supervision or approval authority required for pleas in sexual assault cases

VIII. Trial

- A. Panel selection
 - 1. Who is eligible to sit on a jury/panel – civilian v. military systems
 - 2. Selection of pool of members – questionnaires used by military
 - 3. Panel selection process by judge, prosecutor, defense counsel
 - 4. Jury education
 - 5. Voir Dire
- B. Impact of Rape Shield Laws (Federal, State, MRE 412) on the government'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. Prosecutor's role during the appellate process

X. Declination of Cases & Alternative Dispositions

- A. When received from investigators
- B. After charged / preferred / referred
- C. After preliminary hearing/GJ/Art. 32 hearing
- D. Use of Alternative Dispositions (Art. 15, administrative proceedings)

XI. Prosecutor & Victim Rights

- A. How do prosecutors ensure they meet their requirement to notify victim of Victim rights

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- B. What does a prosecutor do when a victim rights' issue arises or realizes a right may have been violated?
- C. What extent do prosecutors take victim's opinion into account throughout the judicial process
 - 1. Pre-trial (charging decision, preferral & referral)
 - 2. Declination or closing of case
 - 3. Plea negotiations
 - 4. At trial
 - 5. Sentencing
 - 6. Post-trial
- D. What improvements can be made for prosecutors to protect victims' rights

XII. Comparable Populations & Jurisdictions

- A. College students – intoxication cases involving acquaintances
- B. Prosecutors interaction with concurrent jurisdiction
 - 1. DA's offices & military installations
 - 2. DA's offices & college campuses
- C. Urban Areas
- D. Native American territories

XIII. Best Practices & Metrics of success

XIV. Findings Based on Above Evidence

XV. Recommendation(s)