Judicial Proceedings Panel on Sexual Assault in the Military
U.S. Army Special Victims' Counsel Training Course
August 18-22, 2014, TJAGLS, Charlottesville, VA

The Judicial Proceedings Panel was established by the Secretary of Defense in June 2014 in accordance with section 576(a)(2) of the National Defense Authorization Act for Fiscal Year 2013. The Judicial Proceedings Panel is an independent federal advisory committee tasked with conducting an independent review and assessment of military judicial proceedings for sexual assault offenses since Fiscal Year 2012, for the purpose of developing recommendations to Congress and the Secretary of Defense for improvements to such proceedings. Judicial Proceedings Panel member Mr. Victor Stone attended the Special Victims' Counsel Training Course held by the U.S. Army at the Judge Advocate General's Law School, U.S. Army, Charlottesville, Virginia 22903 from August 18-22, 2014.

JPP Participants

Mr. Victor Stone, JPP member
Ms. Julie Carson, JPP staff attorney

TJAGLCS Participants/Instructors:
COL Tania Martin, Director of The Judge Advocate General Law School (TJAGLS)
COL McKee, U.S. Army Special Victims' Counsel Program Manager
MAJ Marcus Misinec, SVC Course Manager
Mr. John Meixell, U.S. Army, Chief, Legal Assistance, Policy Division
MAJ Aimee Bateman, Professor, Criminal Law Department, TJAGLS
MAJ Shaun Lister, U.S. Army, Professor, Criminal Law Department, TJAGLS
LTC Ben Grimes, Professor and Vice Chair, Criminal Law Department, TJAGLS
Dr. Kimberly Lonsway, Ph.D. Director of Research, EVAWI
Ms. Kelly Taylor, RN, SANE-A, SAMFE, Forensic Program Manager, Womack Army Medical Center, Fort Bragg, NC
Mr. Ray Arp, U.S. Army, Supervisory Special Agent, Fort Lee, VA
LTC Alex Pickands, U.S. Army, Chief, Trial Counsel Assistance Program
MAJ Thomas, U.S. Army, Chief, Defense Counsel Assistance Program
Maj Iain Pedden, U.S. Marine Corps, Professor Criminal Law Department, TJAGLS
MAJ Jeremy Steward, U.S. Army, Professor, Criminal Law Department, TJAGLS
MAJ Jeremy Stephens, U.S. Army, Professor, Criminal Law Department, TJAGLS
Mr. Steven Adraschko, Chairman/Director Support Staff, U.S. Army Clemency and Parole Board
Guest SVCs and Clients
MAJ Bret Batdorff, U.S. Army, Deputy, Trial Counsel Assistance Program

DAY 1 – Monday, August 18, 2014

Course Welcome and Introduction (0800-0830)
The SVC course began at 0800 on Monday, August 18, 2014 with a welcome to the Army JAG School from the Director, COL Tania Martin, who noted that there is no more important mission than the SVC program and that over 200 SVCs have gone through the Army SVC training course to date.

The purpose of the course is to prepare judge advocates to effectively serve as Special Victims' Counsel when appointed, focusing on the roles, relationships, and professional responsibilities of SVCs throughout sexual assault cases to include post-trial matters. Special emphasis is placed upon substantive military

law directly related to Special Victim crimes as well as instruction on victim behavior, services, and medical issues. The course requirement is 35 hours.

COL James McKee, the Army SVC Program Manager, also welcomed the group, noting that there were 84 JAGS attending this course, mostly from the Army, but also from the Coast Guard, Navy, Marine Corps and an Air Force observer. He reported that this was the 3rd face-to-face Army SVC training course and that there has also been one online course and one continuing legal education (CLE) course. COL McKee emphasized the independence of the organization and the importance of SVCs meeting and educating the other stakeholders involved in sexual assault about the role of the SVC in the process, since it is so new to many in the field. He showed the class a public service announcement video made by an SVC from Fort Irwin, California, and encouraged the SVCs to use radio, news, and video to help educate Service members in their areas of responsibility about the program.

COL McKee reported that the major role the Army is seeing for its SVCs is managing expectations for the client and helping them understand the process and particularly in explaining sentences. He reported that so far the Army has had SVCs in court over 300 times. COL McKee gave his personal cell phone number and e-mail to the class and encouraged them to call or e-mail any time.

SVC Roles, Responsibilities, Scope of Representation, & Resiliency (0840-1000)

Mr. Meixell, Chief, Legal Assistance, Policy Division for the U.S. Army, provided an overview of the job responsibilities of the SVC. He reported that in the 10 months of the Army program, there have been 1200 active clients with 70 active duty SVCs, 65 Army Reserve SVCs and 45 Army National Guard SVCs (a number of whom are part time) and that the feedback has been very positive. He discussed the relevant FY14 NDAA provisions and the *Kastenberg* case and said that in practice military judges are allowing SVCs to submit written motions and argue clients' interests before them. He also noted that SVCs are finding that mental health records are being turned over relatively frequently in sexual assault cases.

Describing the structure of the Army SVC program, Mr. Meixell stated that the legal assistance chiefs, both civilian and military, are providing oversight and guidance to the SVCs and that the SVC Program Manager is available to help resolve any conflicts. One complaint that he said is coming up from stakeholders is that they are very satisfied with the SVCs from their own units, but when SVCs come in from outside, there are problems. They are also hearing the reverse – SVCs are reporting that they work fine with their SJA, but have problems with outside SJAs. Another issue is that there are a number of cases where a client wants to continue being represented by the SVC after that SVC has moved to another position. In some cases the SVC has been allowed to keep the client if there is no conflict with the new position and some have been able to wait for the case to finish to PCS.

Mr. Meixell advised SVCs to request an RCM 802 conference with judges to establish their role in the court proceeding such as where to sit, how to object, etc. COL McKee added that an SVC should object from behind the bar if the judge will not recognize or work with the SVC. The SVCs were instructed to allow the relationship between the trial counsel and the victim to continue as much as possible and to let TC prep the victim before any proceeding. The SVC is to explain the process, but TC builds the prepping relationship.

For monthly reporting, Mr. Meixell stated that the following data is tracked: manpower statistics, CIS statistics, number of new SVC clients, number of SVCs in office, number who seek legal counseling, number of interviews/pre-trial preps, and number of trials.

Sexual Offenses Under the UCMJ and NDAA Changes to the UCMJ & New Developments (1010-1200)

MAJ Bateman, a criminal law professor at TJAGLS, began by highlighting as the most pressing issue, the fact that there are currently no procedural rules in place for implementation of the 2012 changes to Article 120 of the UCMJ. These rules are created by Executive Order of the President and it remains unsigned – 2 years after the law has taken effect. As the Army awaits the President's signature on the Executive Order, the Military Judges' Bench Book is filling the gap to the extent possible. The unofficial revised Bench Book includes changes as of June 12, 2014.

As a consequence, procedural rules that would address the (1) elements, (2) explanation, (3) lesser included offenses, (4) maximum punishments, and (5) sample specifications of sexual assault crimes in the Military are undefined at this time. There is no timeframe for the EO to be signed – she reported that it is in indefinite limbo. Mr. Stone commented to the class that in the absence of an EO, the DoD or Services should themselves establish a set of rules to uniformly follow in lieu of or until the EO is signed (i.e. follow the proposed EO until one is formally signed.)

MAJ Bateman then discussed the various sexual assault crimes and issues under the new Article 120. She pointed out several gaps in the new Art. 120, including the fact that under the current 120 sexual contact crimes don't include objects touching a body part, only body parts touching. Therefore contact with a sex toy or to spit or urinate on someone may not qualify. A second issue noted by MAJ Bateman is that the new statute does not cover the distribution of photos or videos that were originally made consensually, known as "revenge porn." Viewing these images is not a crime so long as the victim consented to make the video or image, it doesn't matter that the victim did not consent to its distribution to others. She noted that most civilian statutes have this gap as well, with the exception of California and New Jersey.

MAJ Bateman discussed that a frequent question arises about what constitutes "substantial impairment," which is a required element for rape by administration of drugs or alcohol. She also discussed the issue of consent not being included as an element in the current Article 120. She explained that though consent is not an element it is still, in effect, written into the law through the element of "bodily harm," which can be established as nonconsensual sexual contact.

Sexual Assault Response/Victim Rights (1330-1420)

MAJ Lister, a criminal law professor at TJAGLS, discussed the role of Army SHARP program, the Family Advocacy Program, the Victim Witness Liaison Program, medical personnel, SANE nurses, CID, chaplains as well as local and state agencies, all of whom may be involved in a sexual assault case.

He discussed restricted and unrestricted reports and collateral misconduct. MAJ Lister reported that Army Regulation 600-20, which deals with sexual assault response in the Army has been revised and should be coming soon.

SVC Professional Responsibility & Potential Conflicts (1430-1520)

LTC Grimes a criminal law professor and Vice Chair of the TJAGLS Criminal Law Department, stated that one rule offers the majority of the applicable guidance for SVCs: ABA Model Rule 1.14 concerning Clients with Diminished Capacity. It prescribes first that "a lawyer shall, so far as reasonably possible, maintain a normal client-lawyer relationship." LTC Grimes also discussed the applicability of other key rules of professional responsibility and how they impact an SVC in executing their responsibilities to their client. The rules he discussed in depth were: Confidentiality (Rule 1.6), Conflict of Interest (Rule 1.7),

Competence (Rule 1.1), Declining/Terminating Representation (Rule 1.16), Tribunal Publicity (Rule 3.6), Professional Independence (Rule 5.4), and Candor (3.3).

Small Group Breakouts (1530-1700)

The course participants split up into small groups facilitated by TJAGLS faculty to discuss the material covered in the previous sessions and to ask any questions they may have.

The session ended at 1700.

DAY 2: Tuesday, August 19, 2014

Sexual Assault Offender Behavior and Sexual Assault Victim Behavior (0800-1200)

The morning session began at 0800 at TJAGLS. Dr. Lonsway, Director of Research at Ending Violence Against Women International, provided the class with information on the psychology of sexual assault offenders and victims. She cited a 2009 study by McWhorter et al of enlisted Navy personnel that indicated that 95% of sex offenses were part of a series. She recommended EVAWI Training Institute Dynamics Module and Impact Modules for SVCs to learn more on the issue.

Dr. Lonsway played an audio recording made by Dr. David Lisak of a sex offender describing his behavior in seeking a victim to sexually assault that aired as part of a segment on NPR.com. She indicated that individuals who have committed rapes prior to entering the military are ten times more likely to commit a rape during their first year in the military.

Victim Medical Issues in Sexual Crime Cases (1330-1420)

Ms. Taylor, a registered nurse and Forensic Program Manager, Womack Army Medical Center in Fort Bragg, NC, explained that Sexual Assault Medical Forensic Examiners (SAMFE) are health care providers, primarily registered nurses, though also physicians, advanced practice nurses, and physician assistants, who have been specially trained to provide comprehensive care for the sexual assault patient and who demonstrate competency in conducting a medical legal forensic exam. She stated that SAMFEs have the ability to testify as experts or fact witnesses in court.

Ms. Taylor stated that it takes 4-8 hours to conduct a forensic exam and that there are five purposes for collecting forensic evidence: 1) to identify the assailant; 2) to identify any threat the assailant made; 3) to establish presence of injury; 4) to confirm recent sexual contact; and 5) to compare or match evidence to the history of the person reporting the assault and or of the suspect.

Ms. Taylor explained that a cervical swab can be taken up to 160 hours after an assault and toxicology can be done up to 95 hours after an assault. The form filled out for a forensic exam is DD2911 and a copy can be obtained by the patient. She added that a drug that is becoming popular for drug facilitated sexual assault (DFSA) is Visine and that it is not detectable in tests.

Small Group Breakouts (1430-1520)
Students engaged in small group discussions facilitated by TJAGLS faculty about the role of SVCs in ensuring their clients receive the full extent of services available to them and to ask and answer questions.

Criminal Investigation Division Interview Techniques (1530-1630)

Mr. Arp, an Army Supervisory Special Agent from Fort Lee, VA, stated that the sexual assault investigation is unlike any other type of criminal investigation due to the uniquely intimate and invasive nature of the crime. He stated that unlike many other types of cases, the victim interview is the most essential piece of evidence in the case. Mr. Arp described the issues involved in working with trauma victims and the specific way they process a traumatic event. He discussed some typical investigator tactics that can be obstacles to effective interviewing of victims and described appropriate trauma-informed procedures for such an interview that help the victim feel comfortable and in control. He emphasized the importance of open-ended questions and allowing the victim to control the pace.

Mr. Arp explained that he has found it extremely helpful during the initial interview to provide the victim a journal and explain to the victim that it is normal for anyone in a stressful situation such as a police interview or testifying in court to forget important details. He asks the victim to take the journal with them and keep it with them over the next few days and write down everything they can remember – feelings, thoughts, sights, sounds, smells, and other details – no matter how unimportant the detail may seem. He then asks the victim to bring the journal back to him to copy and review (or obtain it as evidence if necessary). This journal and the details provided will not only save time in developing the comprehensive statement of the victim, but also provide much more detail than an investigator may have obtained using other techniques.

The session ended at 1630.

DAY 3: Wednesday, August 20, 2014

Victim Programs/Services (0800-0850)

The morning session begat at 0800 at the TJAGLS. MAJ Lister revisited the topic of victim services provided by the military and their distinction from the role of the SVC. He noted that victim advocates and SARCs have privileged communications with a victim as does an SVC, but that it is important to know that a victim witness liaison does not have privilege. He discussed victim rights issues that an SVC can help with, particularly with protection of a victim's privacy with respect to mental health records.

MAJ Lister noted that SVCs should not be making appointments for clients and that VAs should be doing that, but the SVC does need to know when and where client is receiving services. He discussed HIPPA and recommended that SVCs go to the medical facility to find out what the facility's process is for releasing records. He stated that under HIPPA, hospitals must review records they will disclose; they should then go directly to the military judge via court order. He noted that a problem arises when CID requests the records of a victim. He said if this is happening the SVC should reach out to Medcom or the command to alert them that this is a violation of HIPPA.

SVC Program from the "Parties" Perspective (0900-0950)

LTC Pickands, Chief of the Army Trial Counsel Assistance Program, focused on the importance of keeping the SVC role distinct from that of the trial counsel. He stated that the fear that trial counsel have is fear of the unknown and they may not understand where the SVC fits in the process. He cautioned that if the SVC preps clients for trial and looks for witnesses they begin to look like trial counsel, which is not the SVC role. He stated that typically trial counsel may meet with the client around fifteen to twenty times. Usually the meetings are short and they don't always talk about the elements of a case, because it is important for trial counsel to build a relationship with the client.

Regarding information SVCs should be able to receive, LTC Pickands stated that the government should provide any statements of the client, the language of the charges that apply to the client, and any motion that affects the client's right to participate, privileges, records, or property.

MAJ Thomas, Chief of the Army Defense Counsel Assistance Program, affirmed the comments of LTC Pickands and added that the more it looks like the SVC is helping the trial counsel, the more friction there will be with the defense.

Military Rules of Evidence 412, 513, 514 (1000-1050)

Maj Pedden, a criminal law professor at TJAGLS, walked through the case law that has developed so far relating to MRE 412. He discussed *U.S. v. Gaddis*, which held that MRE 412 cannot limit introduction of evidence required by the Constitution – although he noted that the text of the rule seems to permit such a limitation. According to *Gaddis*, if the probative value of the proffered evidence outweighs the danger of unfair prejudice, it is admissible, no matter how embarrassing it might be to the alleged victim.

He also discussed *U.S. v. Ellerbrock*, which held that the exclusion of relevant and material evidence whose probative value outweighed the danger of unfair prejudice, and which tended to show motive to fabricate in order to protect marriage, was unconstitutional. Maj Pedden then reviewed the most recent case on point, *LRM v. Kastenberg*, which affirms that a victim has standing and a right to be heard with respect to MRE 412 and 513, although the judge is able to restrict victims and patients to written submissions, exercise reasonable control over the proceedings and *Kastenberg* does not provide a right to appeal an adverse evidentiary ruling.

The New Article 32 (1100-1150)

MAJ Steward, a criminal law professor at TJAGLS, explained that the 2014 NDAA comprehensively reforms Article 32 hearings, transforming them from investigatory to preliminary hearings. He explained that the current Article 32 hearing serves as a discovery tool for the defense, a way to preserve testimony to impeach witnesses at trial or to use where a witness is unavailable at trial, and to investigate uncharged offenses. The current burden of proof is "reasonable grounds to believe the accused committed the offense." The new Article 32, however, will be a determination of whether there is "probable cause" to believe an offense has been committed and the accused committed the offense. Military victims will no longer be required to testify and judge advocates must serve as investigating officers in all cases. MAJ Steward explained Military Rules of Evidence do not apply to an Article 32 hearing, with limited exceptions, including MRE 412 and 513. He also discussed subpoenas *duces tecum* as a new procedural tool for obtaining documentary evidence at Article 32 hearings that may be issued by investigating officers or trial counsel.

Post-Trial Actions and Appeals (1330-1450)

MAJ Stephens, a criminal law professor at TJAGLS, explained the principles of sentencing established by RCM 1001(g). He described the eight available punishments for an offender, which are: 1) No punishment; 2) Reprimand; 3) Forfeiture of Pay; 4) Fine; 5) Reduction of Grade; 6) Restriction; 7) Hard labor without confinement; and 8) Confinement and implications of each, including the sentencing proceedings, sex offender registration, and issues related to forfeitures He discussed the "Report of Result of Trial" as the first post-trial document and that its release starts the bell tolling on post-trial action. The convening authority receives an "SJA Recommendation" (SJAR) that includes: 1) report of trial; 2) a copy or summary of any pre-trial agreement; 3) recommendations for clemency by the sentencing authority; 4) the SJA's concise recommendation; and 5) a copy of any victim submission. MAJ Stephens stated that the victim's role in clemency under the new Article 60 is that they may provide a written submission to the convening authority for consideration before clemency action. The convening

authority must consider: 1) the result of trial; 2) the SJA recommendation; 3) matters submitted by the accused; and 4) matters submitted by the victim, and if a new matter is raised in the victim's submission, the accused must be served with the new matter and given 10 days to rebut. He described the appeals process for the accused and timelines for decisions as well as the All Writs Act.

Corrections, Clemency, and Parole (1500-1550)

Mr. Andraschko, Chairman/Director Support Staff, U.S. Army Clemency and Parole Board, provided an overview of the DoD corrections system, the Army Clemency and Parole Board and victim/witness involvement. He explained the corrections system consists of three levels of confinement: Level I facilities are for short term and pre and post-trial confinements; Level II facilities are medium security for sentences up to 10 years; and Level III facilities which are maximum security prisons. Mr. Andraschko explained that victim participation is important and desired by the Board and that victims can provide written statements for consideration by the board or can appear in person and Clemency and Parole Board hearings (at their own expense). He also discussed the role of the Facility Disposition Board and that this board needs to hear from the victim before the case goes to the Clemency and Parole Board.

The session ended at 1550.

DAY 4: Thursday, August 21, 2014

SVC/Client Relationship and Representation & Interacting with CID, TC/DC, SARCs (0800-0850)

The morning session began at 0800 at the TJAGLS. During these sessions, the class heard from six seasoned SVCs who each described their experiences as an SVC and offered their advice and best practice tips to the students, and answered specific practice questions. The first SVC presenter was CAPT Cassie Fowler. CAPT Fowler stated that she had had four months experience as a lawyer when she was selected to become an SVC and no military justice experience, but noted that she had a good list of people to call for help. She reported that she attended the SVC course ten months ago. CAPT Fowler advised that initial client contact is the most important thing and should be in-person. She stated that the victim doesn't want a therapist, they want someone with an action plan; give them a discrete task that you will do for them – and do it – it will build trust. She also advised students to ask their clients, "In 5 years, what would you like to get from this experience?" This will help them focus their expectations.

CAPT Callin Kerr, spoke next. She is stationed in Alaska and started as an SVC and legal assistance attorney, but is now a full-time SVC because the position is so busy. She cautioned that every client is different and that their behavior may not reflect the kind of sexual assault that has happened to them. She advised the class to worry first about the health and safety of the client and wait to get into the details of the assault after the first meeting. She stated that typically, clients want to move because of harassment from others in the unit, not to get away from the accused, so SVCs need to be sure to listen to what the clients concerns are. She recommended that SVCs get to know what community resources are available and assess whether SHARP or FAP would better serve the client.

CAPT Kalin Schlueter recommended that SVCs have a chart they can show the client about the military justice process. She also advised that military justice experience is not essential for the position, but that SVCs need to talk with others who do have experience. Capt Dustin Kouba, an Air Force SVC at Andrews AFB, reported that he currently has 40 clients and that 20 are active now and about 10 are currently finishing up. He believes the ideal caseload is about 12-15 clients that are headed towards courts-martial. He recommended that the SVCs set up a tracking system for their cases. He uses an Excel spreadsheet and uses it to provide weekly reports to leadership. Capt Kouba advised that SVCs have an

"official use" need for reports of investigation (ROI) and Article 32 reports under the Privacy Act b(1) exception. He reported that he usually argues from behind the bar and that some judges will not allow him to speak in court. He also added that one judge adds a 3rd table at the Article 32.

CAPT Sean Mahoney, an SVC based in Hawaii, reported that he has over six years of military justice experience and became an SVC after serving as trial counsel. In 7 months as an SVC he has represented 70 clients with about 30 to 35 clients at any given time. He, as did the other SVCs, emphasized that this is a relationship-driven job and that it is important to talk to the other stakeholders in the proces. He stated that an investigator interview can last from one to six hours and that the SVC should talk to the client about the length of the investigation. In Hawaii, he reported, investigations usually take from three to six months to complete.

Guidance from the Bench (0900-0950)
MAJ Bret Batdorff discussed his two year term as military judge at Leavenworth where he presided over 95 courts-martial. He reported that his involvement with SVCs ran the spectrum from only having their name listed to others who were involved in 412 hearings. He emphasized that all of the judges understand the importance of the SVC mission.

SVC/Client Round Table (1330-1630)
During this session the class heard from four victims, accompanied by their SVCs to discuss the victims' experiences with the process and the impact the SVC had on their experience. Victims and SVCs then answered questions from the students. The victims were all extremely satisfied with their SVCs and reported that having an attorney made a huge difference to them in understanding the process. One of the victims' assailants was acquitted and she was still satisfied with the process. One of the victims reported that she is planning to move forward with her career in the military, and another one stated that she was definitely getting out of the military when her enlistment was up. The others were uncertain about what they would do.

One of the SVCs reported that the biggest discrepancy among judges is how they handle SVCs. Another one reported that the SJA and deputy SJA had been extremely supportive as were COL McKee and Mr. Meixell. The class also heard from the SVCs that there are quarterly joint SVC meetings and that SVCs post materials to share on JAGCNET and that a motions bank is being developed. They also reported that the most common collateral misconduct that they see from victims is underage drinking.

The session ended at 1630.

DAY 5: Friday, August 22, 2014

Role-Play sessions (0800-1430)
Not attended

Attending Panel Member Comment

See attachment.

I hereby certify, to the best of my knowledge, the above trip report, as augmented by my attached comments, is accurate and complete.

Mr. Victor Stone
Member
Judicial Proceedings Panel

Attachments:

1. SVC Course Notes (prepared by Julie Carson)
2. Attending Panel Member Comments

U.S. Army SVC Training Course, TJAGLCS, Charlottesville, VA
August 18-22, 2014

Trip Report of Mr. Victor Stone, Judicial Proceedings Panel Member

The technical training was comprehensive and my notes agree with those of the staff attorney, as modified by the following observations I made relative to the legal and practical hurdles which SVC face in the military court martial system. Although it was stated at the outset of the training conference that the Special Victim Counsel (SVC) will not "be hindered" by the trial counsel or defense counsel, SVC may well be hindered in their ability to represent sexual assault victims due to circumstances beyond the control of the SVC. I have outlined below some of the practices discussed at the training conference which raises this concern that the military justice system needs modification, particularly with respect to the in-court representation of sexual assault victims by SVC.

a) I heard that military CID investigators do not always inform sexual assault victims from the very outset of their attempt to interview a victim that victims have a right to an SVC who is available to advise the victim, including about whether it is in the victim's strategic and emotional interest to continue talking to the that investigator before that very interview proceeds. Similarly, defense counsel often seek to interview the victim before preferral occurs in order to speak to the victim before the victim obtains the services and counseling of an SVC.

Experts at the training explained that sexual assault victims are uniquely traumatized and as a coping mechanism their mind often blocks out parts of the trauma from their short term memory. The immediate structured interviews that CID policy requires within 24 hours and which defense counsel also seek, we were told, is the "worst thing" to do to obtain crucial trial information from victims or to assist the victim to heal, but continues as the norm. The victim has no duty to make an immediate report and sensitive, delayed, unstructured discussions with open-ended questions are less intimidating and help such victims slowly recall and explain fragments of the offense, data they may not have originally recalled or thought significant, and do not indicate recent fabrication, even if CID investigators and defense counsel argue otherwise.

b) I heard that investigating officers and military judges do not routinely accept an entry of appearance from an SVC and enter it into the military court's electronic docket system or provide SVC with unrestricted access, which trial counsel and defense counsel get, to all entries and documents lodged with that system, including even basic documents like the charge sheet. Moreover, since the electronic docket system and the trial counsel do not serve all pleadings on the SVC, the defense counsel also do not serve the SVC with their pleadings, thereby causing such pleadings to arrive at the SVC, if a response is required, late or sometimes only after the issue has been decided. I also heard trial counsel defend their right to prescreen what pleadings or motions they forward to SVC and defend their right not to simply serve SVC with all filed pleadings which would allow the SVC to decide if and to what extent their client's interests may be at stake. This appalling lack of both respect for the victim and lack of professional courtesy for the SVC has not been addressed and remedied by the military courts or their bench book.

c) I heard that SVC do not routinely get notice of, an invitation to attend, and copies of all the pleadings filed beforehand for RCM 802 pretrial conferences held to discuss all the various pretrial procedures that may occur. SVC may only find out afterwards what has occurred. I heard that the military takes the position that victims are only entitled to records that they could get under the Freedom of Information Act (thereby refusing victim counsel's "official use" justification) and Privacy Act (despite victim counsel's (b)1 exception), even though the trial counsel, defense counsel, and the court to whom various issues are argued, are not similarly limited

d) I heard that unlike trial counsel and defense counsel, SVC do not routinely get a place in the well of the court to sit and a separate desk on which to organize their materials, or even a specific place to stand, and are expected to communicate with the court by raising their hand and then shouting from the gallery, or by passing notes to the trial counsel who then "represents" and speaks for the SVC, violating the victim's 2013 statutory right to be treated with "fairness" and "dignity." SVC were told that in each case, they will need to argue for a ruling in order to receive the respect which the other counsel routinely receive. It appears that strict adherence to prior decades old military court martial practice is occurring, except where Congress has specifically conformed rules of practice, thereby not accommodating victim's needs that flow from their new statutory rights. Currently, defense counsel are allowed to cross examine and try to "break" the emotional composure of the sexual assault victim at a public Article 32 proceeding. Congress, in the 2013 NDAA, sought to ameliorate unnecessary public humiliation of the victim at Article 32 hearings, who will by the time of that hearing already have provided a sworn statement to investigators and will be subject to adverse cross examination at trial. Effective for crimes occurring December 26, 2014, a victim's testimony at the Article 32 hearing is optional rather than mandatory. The anticipated court martial procedure described at this training course, undercutting the purpose of the new law, is that after the new law takes effect, defense counsel will seek to depose victims under RCM 702, which civilian defense counsel in similar non-military cases may not do, thereby continuing to subject victims to virtually the same pretrial emotional trauma which this change in law was explicitly designed to avoid.

e) I heard that SVC are routinely challenged by defense counsel as not being permitted to speak to the court on behalf of and in place of their lay client, other than at MRE 412 and 513 hearings. Per *LRM v. Kastenberg*, many military judges agree and only allow SVC to make written, not oral, presentations, and do not accommodate a victim's attempt to appeal an adverse ruling, even if it authorizes release of the victim's privileged mental health or sexual history records.

f) I heard that mental health records of sexual assault victims are routinely handed over to military investigators by military hospitals, which the training indicated "probably" violated HIPPA regulations (because they are not ordinary "inter-agency" medical record transfers). Then, "relatively frequently," the records are turned over to the trial and defense counsel by military judges, based upon what are simply termed "constitutional" reasons. The experienced training instructor stated that "he has never seen a case where none of the records were deemed germane to the defense" by a military judge. There were very few references to or discussion of victims' case law as pronounced by Article III non-military federal courts, or those courts' interpretation of the federal statutory language, 18 U.S.C. 3771, which is similar to the language now applicable to the military. My overall impression was that federal precedents decided by

non-military Article III courts have no binding effect and only minimal persuasive effect or use in military Article I courts. For example, there were comments from several instructors that statutory military court requirements which employ terms routinely applied for many years in Article III courts (e.g., "substantial impairment"; "reasonable grounds to believe," "reasonably should have known"; provided "substantial assistance") were unclear to these Article I professionals because those terms have not yet been defined by Congress specifically for these Article I military courts, or definitively by the military appeals courts in published opinions. They are also, as with the other concerns noted, not addressed in the military Judge's Bench Book or military court rules. By contrast, I believe that standard practice under HIPPA and Federal Rule of Procedure 17(c) is that advance notice must be provided to victims and their counsel before such records may be released to allow timely objection to the release of privileged materials.

g) I heard that military judges are not routinely allowing victims to submit written victim impact statements at the time of sentencing or to have their counsel read their statement or speak for them when the emotional trauma may well be too great for the victim. Instead, victims who wish to provide an impact statement about the emotional toll they suffered from the crime must agree to again take the witness stand, and again submit to the trauma of cross-examination by an adverse defense counsel in public. Non-military courts do not require this kind of repeated traumatic examination of sexual assault victims who wish to make a statement before sentencing.

h) I do not recall hearing about any standardized step by step military court restitution procedure, despite the new 2013 statutory emphasis on full restitution for the victim, that is included in the prosecution of military sexual offenses that is similar, for example, to what is provided in federal law.

i) If victims wish to participate in the standard post-trial/pre-appeal commutation process, they cannot do so orally if that is their wish, but must write a statement. If victims wish to participate in any subsequent parole and commutation proceedings, they can do it orally, but at present there is no central victim registry maintained where they can sign up and be assured that they will be contacted in a timely manner, i.e., before a decision is rendered.

j) The attendees anticipate only a two year assignment as Special Victim Counsel which suggests that their SVC training and real time experience as an SVC will not be maximized.

k) I heard that the procedural implementation rules for the 2012 Article 120 offenses, including specification of the elements of the offenses, lesser included offenses, maximum punishments, sample charging language, and explanatory commentary are still in limbo because the necessary Presidential Executive Order resolving these matters remains unsigned. Nonetheless, no interim uniform guidelines have issued to make the revised Article 120 effective, and I learned at the training that there is a big discrepancy with respect to how individual military judges treat SVCs.

l) Most Investigating Officers at Article 32 hearings after August 14, 2013, will be administrative law JAG officers. That means that their normal portfolio encompasses civil, not criminal law, matters. Whether such an IO appointed from the Administrative Law branch will have had prior meaningful and recent military criminal sexual assault law training or experience

since the statute was revised in 2012 is neither guaranteed nor likely. This becomes an even more important concern now that E.O. 13669 was signed on June 12, 2014, since IO's are now tasked with making pretrial legal rulings on rape-shield issues that arise under MRE 412.