

The Army Judge Advocate General Legal Center and School (TJAGLCS)
SVC Training Course.
January 19-22, Charlottesville, VA

Day 1: Tuesday, January 19, 2016

1) Course Welcome and Intro (30 minutes)

The course manager for the SVC Training course was Army Major Marcus Misinec from TJAGLCS faculty. He noted that this is the sixth SVC course that has been offered by the Army since October 2013, welcomed SVCs from the Army, Army Reserve, National Guard, Marine Corps, Navy and Coast Guard to the course. There were also a number of program paralegals in attendance as well as the Army and Marine Corps SVC Program Managers and the Navy Deputy SVC Program Manager.

2) SVC Program Overview and Way Ahead (50 minutes)

The Army SVC Program Manager, Colonel Elizabeth Marotta, welcomed the attendees and noted that she is very proud to be leading the SVC program for the Army and noted that she specifically requested the position. She stated that attendance for this week's course is completely full with 80 participants, and that interest from the field was overwhelming to offer a "mid-year" course (in addition to the regular August Army course). She emphasized that staff judge advocates are seeing the overwhelming value SVCs are providing to the command and the direct impact the program is having on readiness. She stated that the SVC program is "about getting all of our servicemembers back into the fold to be ready for the fight."

For this course, experienced SVCs from each of the Services were brought in from the field to share their experiences and insights with the new SVCs. COL Marotta noted the importance of building relationships with other SVCs. She explained that this has been crucial at the program leadership level and that she meets monthly with Program managers from the other Services and that they work very closely together. She noted that SVCs are often located on joint bases that that sexual assaults incidents cross services which increases the importance of the SVCs knowing each other and how each of the Services operates.

COL Marotta explained the structure of the Army SVC Program, noting that it is a division of the office of the Army TJAG within the legal assistance organization. She introduced Mr. John Meixell, who currently runs the Army Legal Assistance Program, and who also attended the entirety of the course. She further noted that she and Mr. Meixell report through a civilian in the Senior Executive Service at the Office of the Judge Advocate General (OTJAG).

On the regulatory front, COL Marotta stated that OTJAG criminal law division just finished its revision of Army Regulation 27-10 on military justice, but that it is still going through the internal review process. She did not address a timeline for publication. She noted that the SVC Program is very happy with the changes that were made.

Describing her role, COL Marotta explained that as SVC Program Manager she is in charge of policy, force structure, certification, budget, training, tech chain supervision, lessons learned and oversight

for Reserve and NGB Program Managers and that all travel requests and expenses for SVCs go through the SVC Program. She added that the SVC Program now has its own positions and has grown authorizations in an environment that is typically seeing cuts.

After explaining the program structure, COL Marotta described the SVC Program mission in detail. She noted that all SVC counsel are uniformed. The Army TJAG certifies all SVCs and to be selected for the position, a judge advocate must have military justice experience, familiarity with supporting resources, an understanding of victim behavior and the impact of crime on victims, maturity, sensitivity, judgment, ability to listen.

She discussed that the training course is required and also that there will be an Army continuing legal education (CLE) seminar in April that will focus in depth on SVC motions practice. She noted that the next Army SVC course will be in August followed by a child course in September. She added that Unlike the Army, the Air Force holds the child and adult courses together, and lasts for almost two weeks. She said the Air Force is having its next SVC certification course in May 2016.

Role of SVC

COL Marotta explained the role of the SVC noting that SVCs are available for both restricted and unrestricted reports and that they represent clients during investigation, preferral, referral, negotiations, alternate dispositions, article 32 hearings, motions practice, trial and post-trial. She emphasized that the role of the SVC is not to poke holes in the case but that they are there to support victims by helping them make informed decisions, educating them about the military justice system, the roles of sexual assault personnel and the variety of medical and non-legal assistance available to them.

She added that a victim has to go through a cycle of healing and that what they want at the beginning may not be what they want at the end. She said that SVCs have to let victims work through that as they go through the healing process and to explain the second and third order effects of their decisions.

Authority

COL Marotta discussed the authority establishing the SVC program, noting that the FY14 NDAA created the SVC program with 8 areas of service to be provided. She emphasized that the NDAA established the authority of "representation" for victims as opposed to just assistance. She also emphasized that SVCs are not parties in the case and that they have limited standing. She explained that the trial counsel handles all of the discovery and the case and the SVC comes in when there is an M.R.E. 412 or 513 issue.

Eligibility

COL Marotta stated that the SVC Program is currently available to Soldier victims, other victims eligible for legal assistance, former Soldiers and dependents, but she highlighted that the FY16 NDAA has a directive to open up SVC services to Department of the Army civilians. She said details on how this will work are still being developed. She advised the SVCs that they must be child-certified before on child clients and that each case with a child client goes up through the SVC Program manager and is tracked closely by her. Lastly, she discussed the eligibility requirements for the Reserve Component and National Guard Soldiers when on active duty or full-time National Guard duty. She referenced Army Directive 2014-09 which extends eligibility to inactive duty for

training, inactive duty, traveling to and from duty. The National Guard Program manager noted that the nexus is very easy to qualify for SVC service, but noted that it does not go to whether there is legal jurisdiction for the case under the UCMJ.

Notification to clients

COL Marotta noted that notification to victims of the availability of SVC services was a problem initially and that she received a lot of calls about it, but that this has smoothed out a lot over time. She highlighted the FY16 NDAA requirement that notification is now required before law enforcement or trial counsel may interview a victim. Another issue she warned SVCs about is checking for conflicts before representing a client. She emphasized SVCs must check in the CIS (not sure of acronym meaning) system to see if they have represented any party in legal assistance or defense.

Victims as clients

COL Marotta discussed the importance of building rapport and trust with victims and of meeting face to face with the staff judge advocates when the SVC is remotely located. She emphasized that SVCs need to manage expectations with their clients and also noted the FY16 NDAA requirement to improve responses when a victim is male. She mentioned an upcoming conference in Washington, D.C. that will focus on dealing with male victims. She noted that many of the problems that arise are communication problems when the SVC is not a member of the office of the staff judge advocate prosecuting the case.

Relationships

COL Marotta began this session by advising the SVCs that while everyone wants a lawyer, not every function requires a lawyer. However, she said, as legal assistance attorneys, Army SVCs have a lot of resources available to them to assist clients. She explained that they are part of the SJA office, even when interests conflict and that most conflicts involve communication issues. She advised the SVCs to share their workload data with the chief of legal assistance (CLA) within the office of the staff judge advocate and that they should bring issues to the CLA first. She also informed the SVCs that defense counsel may come to them asking whether they support a deal and that this is OK. It is OK for an SVC to talk with defense counsel and SJAs are now recognizing that this can be helpful in the process.

COL Marotta also discussed the importance of building relationships with Sexual Harassment and Assault Response personnel, the Family Advocacy Program personnel, the Victim Witness Liaison, Special Victim Prosecutors, trial counsel, defense counsel, investigators, military judges and medical providers at their installations.

Interaction with CID Investigators

With respect to investigations, COL Marotta advised the SVCs that they should not let their role interfere with the investigation, that a victim requesting an SVC should not delay the investigation or collection of evidence. She also told them to get an understanding of the victim's mental state to determine whether they need help first. She noted the need to involve a defense counsel if the SVC becomes aware of any collateral misconduct as Army SVCs do not advise on these issues.

Relationship with Trial Counsel and Defense Counsel

COL Marotta stressed that the SVC are not trial counsel, their role is to protect victim rights, not prosecute cases. She noted that a challenge brought by the SVC program is for trial counsel to build relationships with victims and that it is important for the SVC to facilitate this by allowing the trial counsel to prep the victim for Article 32 hearing and court-martial testimony. As for defense counsel interviews, COL Marotta told SVCs to insist that a defense paralegal also be present, to obviate the possibility that the SVC could be called to testify if the victim changes their story. She also noted that the interests of the victim can sometimes be aligned with the defense counsel, such as to support a deal if the victim refuses to cooperate and the Government won't dismiss the case.

Pre-trial

COL Marotta advised the SVCs that victims may now petition the Army Court of Criminal Appeals if an Article 32 ruling violates the rights of a victim and that the Government must now consult with the victim regarding their preference in prosecution venue. She told SVCs they should request to participate in 802 meetings between the military judge and counsel if they think there will be an issue relevant to the victim. She announced that the Army has developed rules on this that are being circulated internally and noted that the Navy and Marine Corps already have the SVC role included in their rules. She advised the SVCs to provide notice of their representation to the military judge through electronic docket request.

Trial

COL Marotta discussed defense motions and that the Government files a response but that the victim may also respond and argue with limited standing. She discussed the information SVCs should share with victims during the trial. COL Marotta also discussed the requirement that military judges designate a representative to assume the rights on behalf of a minor or incompetent person and that SVCs are being asked to take on this role. She noted that guidance will be coming out on this issue soon. She discussed the victim's right to submit an unsworn statement during sentencing without being considered a witness subject to cross examination and advised SVCs to think through whether they are opening a door with new information post-trial.

Other SVC support.

COL Marotta reported that in the Army, about 30% of an SVC's work is on legal assistance issues and that the FY16 NDAA has broadened the scope to include equal employment and Freedom of Information Act issues.

Retaliation

COL Marotta reported that the Army TJAG was meeting with a group of SVCs to hear about what they are seeing with retaliation and what SVCs are currently doing. She noted that the TJAG does not want SVCs to be responsible for retaliation, and that responsibility should rest with the command. She referenced Army Directive 2014-20 which sets forth the Army retaliation policy.

COL Marotta went on to discuss what constitutes social retaliation, from isolation by peers to harassment on social media. She advised SVCs to limit the frequency of their e-mails to the command because the e-mails can become discoverable and that they should always be cognizant of and minimize the risk of becoming a part of the case.

Duration/Termination of representation

COL Marotta emphasized the importance of the scope letter. She advised SVCs to set up expectations for the termination of representation from the very beginning. She noted that SVCs get very engaged and are a victim's lifeline, so it is harder than they think when they have to terminate representation. She reported that the TJAG is getting ready to put out additional guidance on the issue of termination of representation and that the scope letters are being re-drafted to better address the issue.

Resiliency

COL Marotta made a point to discuss the importance of SVC's taking care of themselves and knowing who they can talk to about issues that arise.

Additional Training

COL Marotta told the SVCs that the Army will help them to attend non-DoD training, but that there are a lot of bureaucratic steps required to do so, so she asked that they let her know well in advance.

Reporting Data

COL Marotta stated in order to keep up with requests for information that come in from Congress and other organizations that SVCs are required to submit monthly reports to the Program Manager. She advised that the monthly reports are due by the 4th day of each month and should be sent to usarmy.pentagon.hqda-otjag.mbx.svc-program@mail.mil. She added that Army attendees will receive the Reporting Policy memo via email.

COL Marotta also discussed Quarterly DCS Meetings (not sure of acronym) hosted by Program staff that give SVCs a chance to communicate directly with the SVC Program Manager.

3) Sexual Offenses Under the UCMJ (50 minutes)

LtCol Hatch, USMC, a member of the criminal law faculty at TJAGLCS, was the instructor for this technical session covering Article 120, UCMJ and key developments in case law relevant to victims' rights and SVCs.

He noted that since the Manual for Courts Martial (M.C.M.) still does not contain the elements for Article 120 offenses, he advised that SVCs should consult the Military Judges' Benchbook for guidance on information missing from the M.C.M for Article 120.

LtCol Hatch discussed maximum punishments as codified by Executive Order 13543 (May 15, 2013) and discussed the differences between the 2007 and 2012 versions of Article 120, UCMJ.

He discussed lesser included offenses and the issue of force, and referenced the following related cases: *U.S. v. Alston* (2010), *U.S. v. Bonner* (CAAF 2011), *U.S. v. Riggins* (CAAF 2016) (fear as force) *U.S. v. Schloff* (CAAF 2015) (Stethoscope case) (seeking cert from USSC), *U.S. v Thomas* (N-MCCA 2014), *U.S. v. Soto* (AFCCA Sept 16, 2014)

4) Military Rules of Evidence (M.R.E.) 412/513/514 (1 hour 50 minutes)

Maj Ian Pedden, USMC, member of the criminal law faculty at the TJAGLCS, was the instructor for this technical session.

Maj Pedden first discussed M.R.E. 412, particularly focusing on its exceptions which are 1) instances of behavior to show someone else was the source of semen, injury or other physical evidence; 2) prior sexual behavior between the accused and victim to prove consent or by the prosecution; or 3) Constitutionally required.

Maj Pedden discussed the current military case law relating to M.R.E. 412 including:

U.S. v. Banker (CAAF 2004) 60 MJ 216 (MRE 412 is not limited to nonconsensual sexual offenses, but applies to proceedings involving alleged sexual misconduct.)

U.S. v. Gaddis – (CAAF 2011) 70 MJ 248 (Balancing tests with MRE 403. MRE 412 cannot limit introduction of evidence required by the Constitution although the text of the rule seems to permit such a limitation. *Banker* is wrong. Balance against unfair prejudice not against alleged victim’s privacy.)

U.S. v. Ellerbrock (CAAF 2011) 70 MJ 314 (412(b)(1)(C)) –(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.) 608(c) - bias is always admissible (because it is constitutionally required) clearly demonstrated motive to fabricate

U.S. v Key (NMCCA 2012) 71 MJ 566 (no motive to fabricate)

U.S. v. Collier (CAAF 2009) 67 MJ 347 (same sex case)

Maj Pedden also discussed M.R.E. 413 and 414. These rules of super-inclusion provide that similar crimes in sex offense cases may be admissible even if there was no conviction. He noted that this can be a source of consolation to victims after an acquittal.

Maj Pedden discussed *U.S. v Kastenberg*, and its influence on the FY15 NDAA which provided victims with standing and an opportunity to be heard in M.R.E. 412 and 513 cases subject to reasonable limitations determined by the military judge. He noted that the case allows the military judge to restrict victims and patients to written submissions.

A participating Navy VLC relayed to the class that he has noticed that VLC scheduling is being considered more than it was, but that there still is not a lot of deference. An Army SVC reported that he has set up a “co-counsel” relationship with another SVC that has helped with scheduling conflicts.

Maj Pedden discussed FY15 NDAA §535 dealing with victims’ rights enforcement, noting that it is a subjective test for appeals. A Navy VLC added that a limiting factor of this provision is that it only applies to the specified M.R.E. issues. He noted that, for instance, if a victim wishes to attend at another time, they may not have the enforcement right under this provision.

Next, Maj Pedden discussed FY15 NDAA §536 which provides that the general military character of an accused is not admissible for the purpose of showing the probability of innocence. He noted the unusual circumstance of Congress modifying a M.R.E. Maj Pedden advised the SVCs that although this provision limits the use of military character of the accused it does not mean it is not a defense anymore, particularly with respect to military crimes. Further, he stated that it is important to note that the statute covers “General” military character, because specific character – such as propensity to tell the truth - is still allowable. He also said that the use of general military character for reasons other than showing probability of innocence would also still be permissible.

Maj Pedden noted that assault consummated by a battery is a lesser included offense (LIO) of sexual assault, but was not included in the limiting of admissibility of good military character. He wasn’t sure whether Article 128 was intentionally left out of the mix or whether it was an unintended oversight, but stated that a defense counsel would want to be sure that they have the option to get this LIO in.

Maj Pedden next discussed FY15 NDAA §537 which modified M.R.E. 513 psychotherapist-patient privilege by removing the “constitutionally required” exception. He noted, ironically, that this NDAA provision was passed very shortly after JPP member, Mr. Victor Stone attended the August 2014 SVC training where he discussed this issue at length. Maj Pedden further discussed the Joint Services Committee (JSC) EO that aligned M.R.E. 514 with 513, but kept the constitutionally required exception in for M.R.E. 514.

A Navy VLC stated that an issue they are seeing relates to confusion about the difference between privileged communication and confidential communication.

Maj Pedden next discussed the Klemick standard (NMCCA 2006) which establishes a three part test that must be met before a military judge can order an in camera review of requested mental health records. The test requires the moving party to make a threshold showing in which it 1) sets forth a specific factual basis demonstrating a reasonable likelihood that the requested records would yield evidence admissible under an exception to the psychotherapist-patient privilege; 2) shows that the information sought is not merely cumulative of other information available; and 3) shows that it made reasonable efforts to obtain the same or substantially similar information through non-privileged sources.

A Marine VLC reported that there was a recent case where a judge held a closed 513 hearing as required; the judge found that defense met their burden, but during the review judge discovered a lot of 412 evidence. Citing 701(g), the judge asked the VLC to write an ex parte brief whether information was discoverable to all parties. The VLC brief kept the evidence from being released.

5) Sexual Assault Victim Behavior (1 hour 30 minutes)

This session was conducted by Mindy B. Mechanic, PhD, professor of psychology at California State University, Fullerton. She told the class that this is the first time she has presented to this audience. (I asked COL Marotta about how the Army connected with her to present and she told me that she has been an expert witness in courts-martial and was interested in participating)

Dr. Mechanic first told the SVCs that victim satisfaction with the process is not as much outcome driven as it is experiential satisfaction, such as feeling that their voice was heard. Her presentation covered the topics of rape myths, victim blaming, counterintuitive responses, memory for trauma,

delayed reporting (she said most are reported within 24 hours), and male victims. She noted the importance of building trust and rapport and using empathetic statements. She discussed how SVCs should begin their relationships with trauma victims. She advised them to learn to be comfortable talking about intimate/sexual topics without showing discomfort because it shuts victims down. She also emphasized the power of silence. Dr. Mechanic said we are uncomfortable with silence in the same way we are uncomfortable with tears and emotion, but this can be useful; it gives room and opportunity for things to emerge instead of just taking up space with conversation. She encouraged the SVCs to use empathetic statements such as, "I'm very sorry this happened to you. I understand this is a very tough time for you," advising that they communicate respect in language and actions.

She ended the presentation with a testimonial video of a military sexual assault victim relaying her story. It was called Darchelle's Story.

6) Self-Care and Resilience (50 minutes)

MAJ Misinec opened this session by informing the SVCs that this block has been included in the training to help them learn to deal with the trauma impact on the SVCs.

Dr. Mechanic told the SVCs that there is a professional liability to dealing with victims. She said vicarious traumatization and secondary stress was initially a concern for therapists, but it has come to be understood that other professionals need help dealing with this too.

She advised the SVCs to find ways to engage in self-care activities that will increase the outcome that they will be positively impacted by this experience. She asked the SVCs to discuss the worries they have or thoughts. One SVC noted the sense of accomplishment and of really helping someone and added that "you don't get that from doing hundreds of wills."

Another SVC said a worry is getting a warped view of their Service. He was concerned he would begin worrying about how to protect my family members. Dr. Mechanic discussed the distorted sense of prevalence that this type of work imparts to service providers, and noted that it can leave one feeling like the world is an unsafe place, that they are unsafe. Dr. Mechanic emphasized the importance of doing things that are antidote to these feelings. She said it takes active efforts on our parts to do things to reinstate the ideas that we have.

A female SVC noted that "we are talking about "victims" as though they are not in the room when there is a great likelihood that there are victims in this room. An adverse risk of having this job is unresolved personal experiences of victimization. " Dr. Mechanic noted that those who have been victimized can have a positive empathetic contribution as SVCs.

She showed a clip from CSI television that showed a prosecutor acting out from her vicarious trauma. She discussed issues about keeping appropriate boundaries.

Next Dr. Mechanic discussed what to do to promote resilience. A Navy VLC who has been doing this for two years shared that what she is seeing is more of a lack of caring, she has seen it diminish over time doing the work. She explained that they get to the point where they don't want to do it anymore. They check out.

Dr. Mechanic described the risk factors for vicarious trauma and secondary trauma stress as being younger, less experienced, highly empathetic, having prior PTSD, and beliefs that one is invulnerable. She added that personally identifying with a particular case/story is a personal risk factor. She gave example of a journalist was worried after a movie experience with his kids – he became hyper vigilant. She then described environmental risk factors such as lack of institutional support, lack of training, too few opportunities to vent, and high caseloads. She said in an ideal world, people should not do only victim work.

Dr. Mechanic's advice for decreasing risk and promoting resilience was to think about three activities you do regularly that help you cope. She said having a plan in mind of things you can do helps you when the situation arises. Focus on what is going well with the work and process experiences or feelings about difficult cases.

DAY 2 – Wednesday, January 20, 2016

1) SVC Professional Responsibility & Potential Conflicts (1 hour)

Major Allison McFeatters, U.S. Army, faculty member of the TJAGLCS, was the instructor for this course. She first addressed Rule 1.13(g) which provides that in the case of defense counsel legal assistance and SVCs, the legal obligation is to a particular client and not the Army. She added that SVCs have to navigate through the rules differently than defense counsel because they are not parties, and the rules are geared for parties to the case.

She next discussed Rule 2.1 which states that when rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social, and political factors, that may be relevant to a client's situation. She said SVC's will be giving advice on whether clients request an expedited transfer, about what medical facility they go to about which person in their chain of command to talk to.

She advised SVCs with little military justice experience to utilize peers, supervisors, and the program managers for assistance. But she emphasized the need to maintain confidentiality and find balance in how to draw on others' experiences without sharing too much. She then focused on the issue of confidentiality and Rule 1.6 which provides guidance and also discussed the presence of third parties breaking the privilege. Ultimately, she advised, the client is the gatekeeper of this rule – if they want someone there and understand the risk that means for their confidentiality.

An SVC raised an issue of a client who had previously expressed suicidal tendencies. She said at the time of the Article 32 hearing, the client went AWOL and they wanted SVC to divulge location of client and she would not claiming confidentiality. MAJ McFeatters responded that Rule 1.6 is very narrow, and if there was not a present suicide risk, the SVC did not need to break the privilege to divulge the client location.

Mr. Meixell noted that this kind of issue spotting is when SVCs should seek advice from their chief of legal assistance and then the program manager level. He advised if an attorney seeks guidance, follows that guidance, they are protected from a professional responsibility standpoint.

An SVC raised question of why an SVC wouldn't want information to be released to help the case. MAJ McFeatters' response was that it is not SVC role to help prosecution or defense but to protect client interest.

MAJ McFeatters next discussed Rule 3.3 regarding candor (and 3.4). She emphasized that this rule is talking about parties, which an SVC is not. Addressing whether it would apply when an SVC is advocating in court, she said that these rules are not read in a vacuum and when an SVC steps in front of the bar, they are a quasi-party and shall not present false evidence, assist in criminal or fraudulent act, fail to disclose, etc. She stated that if a client tells the SVC something contrary to what they tell prosecutor – the SVC has to tell the client that they can't advocate for them any longer if the client is not telling the truth.

This sparked a robust discussion with the SVCs and facilitators about real and hypothetical experiences involving a client who isn't telling the SVC the truth or who says something on the stand that contradicts what they have told the SVC. MAJ McFeatters added "you have to discuss this with the client. Rule 1.6 trumps 3.3-3.4, but you stop advocating for them and step back, and you advise the client that if they are telling lies, they will be needing defense counsel down the line, and is that really worth it?"

The last issue discussed was about the merits of the SVC seeing the entire case file and whether that helps or hurts an SVCs representation of their client.

2) Welcome from Brigadier General Charles Pede, U.S. Army – (30 minutes)

BG Chuck Pede asked the SVC trainees to share with him questions they have before embarking on SVC responsibilities and completing their training. Some of the concerns expressed to him by the SVCs were how to balance legal assistance duties with SVC docketing; and how to manage victim expectations and the limited role that SVCs are able to play. A former defense counsel in the National Guard was concerned about how to handle the clients and fully represent them in the state arena. Another SVC's concern was how to handle the low success/conviction rate and keep spirits of client and SVC up; another expressed concern about what to say to clients – and explaining bad news. A Reservist who is going to be mobilized was concerned about how to get quickly plugged in to services available to the client. Another SVC expressed concern about the lack of professional responsibility guidance since this is such a new area of law. A Reservist had questions about how to get people connected to the right resources and what does this nexus look like in the Reserves?

BG Pede emphasized to the SVCs that establishing good relationships with all of the practicing counsel is the key to success and to being the professional lawyers they aspire to be.

3) Victim Medical Issues in Sexual Crime Cases (1 hour 20 minutes)

This session was led by Ms. Kelly Taylor RN, SANE-A, who is the Medical Forensic Program Manager at the Womack Army Medical Center in Fort Bragg, NC. Ms. Taylor explained some of the benefits of establishing sexual assault forensic examiners noting that they reduce the re-victimization and retelling of the events by victims to multiple providers, they are cost effective, and they ensure trained health care providers perform the medical-forensic exam. She said the forensic exam takes from two to four hours to complete.

Ms. Taylor explained that the purposes of collecting forensic evidence are to identify the assailant, to confirm recent sexual contact, to establish presence of injury (genital or non-genital) and to compare/match evidence to the history of the person reporting the assault and or the history of the suspect. She said that SANE nurses testify for both prosecution and defense; they are looked at as the honest brokers and not aligned with government necessarily.

Ms. Taylor reviewed the components of a SAFE exam beginning with immediate medical care for injuries, which is first and foremost, to a comprehensive medical and forensic interview, collection of forensic evidence, evaluation and treatment of STDs and pregnancy and crisis intervention referrals. She explained what can and cannot be concluded from forensic evidence.

Ms. Taylor discussed the interview and documentation process which includes pre-sexual assault related history and details on consensual intercourse within the past 5 days which is often concerning to victims because they feel the SAMFE is making judgment call on the validity of their claim. She emphasized the importance of explaining it to victims. This is also an issue for questioning about drug and alcohol use, but all of these are essential pieces of information for the lab to properly interpret findings.

Ms. Taylor showed the class actual rape evidence kits. She noted that a kit can be completed up to 168 hours (7 days) after the incident because cervical swab can be taken up to 7 days after an assault. She added that forensic toxicology can be done for up to 96 hours. She said that it is very rare for victims to come in without having bathed or changed clothes, but emphasized that this should not preclude a victim from coming in. They can still collect useful evidence.

She discussed victim demeanor and the forensic examination and how frequently victims present differently that one would expect. She described the wide variance in emotions they see including anger toward the SAMFE. She described the strong fear victims have of not being believed as well as fear of retaliation and collateral misconduct, however, she emphasized that the fear of not being believed is the number one issue. Ms. Taylor said that victims will go through the whole process and if injuries aren't found they want to shut the case down because they feel no one will believe them.

Ms. Taylor welcomes SVCs to come to the forensic exam with their client but has had problems with SVCs advising clients not to answer questions. She noted that they offer SVCs to victims in the hospital and if a victim wants an SVC they will ask them if they want to see SVC before law enforcement.

Next Ms. Taylor discussed neurobiology and sexual assault. She said she sees very few claims that are not legitimate. She added that memory fragmentation is now a documented neurobiological condition and she sees this regularly during the interviews. She explained Poly Vagal Theory which explains behaviors like asking a perpetrator to at least put on a condom. She said tonic immobility is much more common than fight or flight and described a male on male case involving tonic immobility and serious injury to the victim that had made a deep impression on her. She said he was extremely traumatized and crying and said to her, "I put on a uniform and am expected to protect my country but I can't even protect myself."

Ms. Taylor discussed the FETI interview technique and the paradigm shift of Russ Strand's work. She stated that he starts his interviews by asking victim to tell him the one thing they can't forget rather than the typical investigative questions.

Ms. Taylor reported that there are 8-10 SAFEs performed per month at Fort Bragg. She discussed the evidence collection process and why it takes so long and noted that most cases of non-stranger rape do not involve injuries.

4) Introduction through Termination of Representation: The Process. (50 minutes)

This session was skit/role playing exercise presented by current SVC course facilitators demonstrating client interviews and interaction with investigators, defense counsel and the Article 32 hearing. The facilitators were SVC/VLC from the Navy, Army, Marine Corps, and Air Force.

5) Need to Know: Retaliation Awareness and Victim Rights (1 hour 30 minutes)

This session was led by Major Sean Lister, U.S. Army, faculty member of the TJAGLCS. MAJ Lister discussed the Article 6b UCMJ right to be reasonably protected from the accused, the right to notice and the right to be heard and not to be excluded. He noted that these rights have been in Department of Defense Instruction (DoDI) 1030.01 since 2004, so they aren't actually new. He added that military prosecutors were filing motions on behalf of victims before the SVC program was launched but that victims were not always protected well, so Congress enacted 6b.

MAJ Lister discussed the 2016 NDAA provisions dealing with victims' rights: sections 531, 532, 534, 536, 542. He noted that the requirement that victims be told about their right to SVC prior to investigator or trial counsel interviews stemmed from complaints of this not happening.

MAJ Lister discussed the three victim service organizations SVCs need to work with – the Sexual Harassment and Assault Response and Prevention Program (SHARP), the Family Advocacy Program (FAP), the Victim Witness Liaison (VWL), and a new organization of "SVWLs" Special victim witness liaisons that is being established. He explained that FAP and SAPR advocates are covered by privilege, but VWLs do not have privilege so it is important to explain this to clients.

MAJ Lister discussed when a restricted report becomes unrestricted under the Department of Defense Instruction 6495.02 and explained differences between Army Regulation 600-20 and the DoD policy.

He explained that a lot of SVC work will be around protecting the client's right not to participate. He reported that there are more chapter 10s (separations) happening for alleged offenders now than there are SVCs than there were before because many victims want the offender to be gone, but don't necessarily want a prosecution. He said that this is becoming a friction point between prosecutors, commanders, and SVCs. He gave example of a case where the command was going to order a victim to participate in a court-martial.

MAJ Lister discussed the DoD withholding policy that now requires the initial disposition decision to be made at the O-6 level and he noted that in Europe, the Army is withholding these decisions to the general officer level.

MAJ Lister next discussed the requirements for command meetings with victims within 14 days after an initial report, monthly within 3 days after case management groups, and 45 days after disposition. He added that DoDI 6492.02 designates that this is a non-delegable responsibility.

He discussed the expedited transfer policy and noted that expedited transfer is not for safety – it is for the comfort of the victim. He advised that a safety transfer is an immediate action that may need to be taken if there is a safety concern for the victim.

MAJ Lister discussed retaliation and noted that it became a public issue after the Rand report was released and then three retaliation incidents that were widely reported in the media – one at West Point, one in Japan and one at Fort Leonard Wood. He discussed what to do if client tells you they have been retaliated against. He said to best protect the client’s rights, the command needs to be notified, but sometimes to best protect the client’s emotional and physical well-being, they may not want the commander to know. He noted that anti-retaliation policies such as whistleblower protection apply to victims who report any crime, not just sexual assault.

An SVC who just met with TJAG on the issue told the SVC trainees that the biggest issue is not real retaliation, but victim perceived retaliation. He said it is typically action taken with good intention by the command that is perceived by a victim as retaliation – such as a safety move.

A SARC raised the issue of several expedited transfers being denied because commander determines it is not a credible report. An SVC was concerned about the instance where command ordered the victim to testify. MAJ Lister responded that this is an issue to escalate to the SVC Program manager, or go to the next higher command, or file a congressional.

6) SHARP Program Overview (50 minutes)

This session was led by Ms. Julia Armstrong, SHARP Advisor at Fort Gordon, Georgia. Ms. Armstrong explained that SHARP advisors do not deal with victims – but advise commanders and do trainings.

She told the SVCs that relationships are the critical elements of what she does every day. She said she has a lot of “hypothetical” discussions with investigators because victims will call her with questions before making a report. She said that there is only one SVC at Fort Gordon who has an extremely high caseload. Ms. Armstrong noted that if there is a strong relationship between the SHARP and SVC the SVC will have more clients coming to them.

Ms. Armstrong reported that Fort Gordon had 5 cases of alleged retaliation and all 5 came out as PPC – what she termed “piss-poor communication.” She said if the commander is not giving victim briefs or if a victim does not want to meet with the commander – this is telling you something. She said she has never dealt with a victim who didn’t want to talk to their O-6. She added that this is a commander’s opportunity to say “how can I help you?” and SVC’s can help to communicate this to commanders.

Explaining how retaliation incidents are handled, Ms. Armstrong said that the commander determines at the case management group whether a 15-6 (command directed investigation) will be initiated at the O-6 level or whether the general officer will take it. She noted that SARCs won’t know if a complaint has gone through the IG, so it will not be discussed at the case management group. She also explained the complexity of the commander’s role when caught between the victim and subject.

Ms. Armstrong believes that Domestic violence sexual assault victims should go through SHARP rather than FAP, but she said this requires a special exception. Further, she noted that at Fort Gordon there are 100 SHARP victim advocates but only 2 FAP victim advocates, so the intimate partner cases will be more demanding on SVC's because there are fewer advocate resources available to them.

She presented concerns from the field about commanders inadvertently reporting sexual assaults; a battle buddy or third party inadvertently reporting; victims not engaging SHARP personnel immediately; high SVC caseloads; retaliation/reprisal and monitoring every client; SVC/VA privilege; understanding Rule 514; and the fact that Army Regulation 600-20 dealing with SHARP is outdated and revision has been in progress for over 12 months. She emphasized that SVC attendance at the SARB (case management group) is very important – they are an important voice. An additional benefit she noted is that the SVC can be the voice to limit inappropriate conversations at the SARB.

7) Army Criminal Investigation Division (CID) Interviewing/FETI Technique (1 hour 20 minutes)

Mr. Russ Strand, Chief of U.S. Army Military Police School Behavioral Sciences Education and Training Division at Fort Leonard Wood, Missouri, gave the SVCs a presentation on the Forensic Experiential Trauma Interview (FETI) interviewing technique he has developed and trains Army criminal investigators and many others to use when interviewing victims of trauma. The technique is based on the science that explains the neurobiological effect of trauma on the brain and the impact it has on victim memory. Mr. Strand emphasizes that this technique not only reduces the inaccuracy of information obtained during interviews, but enhances understanding of the experience by law enforcement, prosecutors, SVCs and service providers.

Mr. Strand provided numerous stories and examples of instances where the technique has been extremely effective in collecting information about a traumatic event and has greatly assisted with prosecutions of crimes. The technique focuses on collecting experiential evidence, such as sights, sounds, smells, and the psychological and physical reactions to a crime experienced or witnessed by an individual as well as testimonial and physical evidence.

8) Breakout Session: “Hello they told me to call you because I was raped” (50 minutes)

This was a small group breakout session where the SVC trainees worked with experienced SVC facilitators to role play initial interview conversations.

DAY 3: Thursday, Jan 21, 2016

1) Special Victim Prosecutor Perspective (50 minutes)

This session was led by Major Faith Coutier, U.S. Army, Special Victim Prosecutor from Fort Bliss, Texas. MAJ Coutier told the SVC trainees that 99% of the time trial counsel and victim interests will

be aligned. She asked the class how many have TC and DC experience. A considerable number of the participants raised their hands.

MAJ Coutier expressed the importance of speaking with the client, knowing victims' rights and explaining them, being honest with clients and managing expectations. She advised SVCs to be aware that clients will not always be honest with the SVC, though usually it is unintentional such as a victim not telling the SVC about kissing the subject earlier in the night.

She emphasized the importance of early expectation management pre-trial, noting that at Fort Bliss defendants are not convicted at least 80% of the time. She added that the client is always going to feel like they are on trial and they need to know that trial counsel and investigators will always want their cell phone and that the client is probably not going to get it back. Additionally, she said victims need to know that there are going to be multiple interviews.

MAJ Coutier advised the SVCs to watch trials to get to know what the defense counsel are like so they can advise clients about what to expect. She also emphasized grooming standards and importance of that for both the SVCs (be sure they are in the right uniform) and the client - because credibility is everything at the trial.

She recommended not automatically denying an interview with defense counsel. She noted that the SVCs have all the control and that doing defense interviews helps victim feel more comfortable during cross examination. An additional benefit she pointed out is that it helps the SVC know what the defense theory is going to be.

MAJ Coutier gave the SVCs several examples from her experience where problems arose with SVCs.

The first example involved an M.R.E. 412 motion where the SVC did not file a response, and the military judge kicked the SVC out of court. She advised that if a judge tries to kick an SVC out of a 412 or 513 hearing, the SVC should tell the judge that the client has a right to be heard through counsel and that the SVC is attending on their behalf. MAJ Coutier discussed another case where the SVC did not speak with the client before filing a 513 response or inform her of her rights regarding motions as well as another case where the SVC was not able to state their qualifications before the judge.

She described an incident where the SVC left during trial then became angry when victim's mother provided consent to interview the client and noted that the SVC needs to always be at the trial with client. She told of another case where the SVC violated privilege resulting in the client's 513 (mental health) information being provided to the trial counsel who then had to turn it over to defense.

MAJ Coulter reported that some SVCs will not ask client about the crime at all and see themselves as support only. She said that in the Army, an SVC does not have to ask clients about details of the case and that this is a decision SVCs will have to make about their view of their role. She discussed another case where an SVC tried to find witnesses which opened the SVC up to Brady disclosure requirements because this is acting as a prosecutor.

2) Defense Perspective (50 minutes)

The presenter for this session was Major John T. Soron, U.S. Army, senior defense counsel, TDS, Fort Knox Field Office. MAJ Soron noted that he was a graduate of the first SVC course in Oct 2013, though he was not an SVC for very long and only handled a few cases in this role.

MAJ Soron began by recommending an article about SVC discovery: Army Law, Nov 2015 at 32 – MAJ John C. Olson, Jr. Discovery for Three at a Table Set for Two: An Alteration of Rule for CM 701 – Proposed changes.

He emphasized the Constitutional guarantee to criminal defendants of a meaningful opportunity to present a complete defense as held in *Holmes v South Carolina*, 547 U.S. 319, 324 (2006) and how it relates to the constitutionally required exception to M.R.E. 412. He added that in sexual assault cases, defense counsel look for instances where the victim has lied to law enforcement to meet the exception and allow 412 evidence into a proceeding.

MAJ Soron next discussed M.R.E. 513(e)(3) and the Klemick Standard (65 MJ 576 (NMCCA 2006)). He said this is the biggest change being litigated now and that different judges are applying it in different ways.

MAJ Soron discussed Article 46 and access to the SVC client. He noted that there are still ways that defense counsel can get access to an SVC client even with the new Article 32, deposition, and interview rules and hinted that usually this will be in front of the judge.

MAJ Soron also discussed joint representation situations when an SVC client also requires defense counsel for collateral misconduct. He noted that the current guidance is found in TDS policy letter 2014-01 that deals with detailing of defense counsel and formation of attorney client relationships with alleged victims of sexual offenses, (1 April 2014). He added that from a defense counsel perspective 99.9% of the time, he would advise a client not to make statement to law enforcement or an investigating officer. He also advised SVCs to be careful of the referral process and the handoff to the defense counsel because this is an area where disaster can strike.

MAJ Soron provided case examples for his advice to the SVCS. First, he advised them to keep themselves out of the investigations because their notes and work product could be discoverable if they are found to have participated in the investigation. He cited *U.S. v Muwwakill*, 74 MJ 187 (CAAF 2015).

Another area of caution he discussed is e-mail. MAJ Soron explained that the SVCs e-mails, when forwarded, are discoverable and often wind up in in investigative reports, even those that contain the SVC client's words. He provided the example of an SVC e-mail to the trial counsel about seeing the subject with the kids – that then became discoverable.

He also advised the SVCs that if they are sitting in on an interview their name should not be anywhere in that investigation or report other than notice that that they are the SVC. He emphasized that SVCs do not want to be a witness or sign as a witness (he cited DA form 2823).

MAJ Soron reflected that from a defense counsel point of view, things were so much easier before SVCs were in the picture, but even so, he believes that SVCs are an important part of the process because it forces defense counsel to do their jobs, and it makes their job harder, but this is not a bad thing. However, using a Star Wars analogy, he noted that the “force” is unbalanced right now (in favor of victims) and that the defense counsel organization is seeking to gain balance back into the “force.”

Next, MAJ Soron took questions from SVCs and there was some further discussion about the legal issues involved if an SVC turns into an investigatory participant and whether defense counsel will be searching law enforcement interviews to monitor SVC participation.

MAJ Soron advised that an SVC should not be in the room for pretext phone calls with investigators to ensure they do not become a witness. He also recalled a case where, after the interview with the client, the investigator turned to the SVC and asked if there was anything else they should ask. He noted that it is not the SVC's job to perfect the case, although a former trial counsel may think the answer is yes – there are questions a, b, c, that the investigator didn't ask, but as an SVC, you say no – this is not an SVCs role and will open up discovery for the defense.

The final discussion related to the Jencks Act and the implications of lost Article 32 hearing testimony. The issue was raised based on the Muwwakkil case that one of the SVCs had been involved in where the victim was prohibited from testifying at trial because the Article 32 testimony was lost. He noted that the Jencks Act was meant to be for the Government, not a sword for the defense, which is how it is being used now.

3) The Preliminary Hearing (50 minutes)

MAJ Trevor Barna, U.S. Army, faculty from TJAGLCS, emphasized that SVCs need to know the rules, the process, and their role in the Article 32. Addressing the previous session discussion about the lost Article 32 testimony, he advised that the SVC can protect the client who will not be able to testify because of Muwwakkil by always asking for a copy of client's Article 32 testimony tape immediately after the hearing.

MAJ Barna discussed Article 32 resources and references such as DA PAM 27-17, Procedural guide for Article 32(b) (15 Jul 2015) and R.C.M. 404A and 405.

He emphasized the limited purpose and scope of the current Article 32 hearings and advised that if and when the hearing starts to stray from this limited purpose and scope, SVCs will want to object. It is no longer a thorough and impartial investigation. He explained that the Article 32 hearing is now limited to probable cause to believe offense was committed, jurisdiction over the offense and the accused; form of the charges and recommendation as to the disposition of the charges.

MAJ Barna discussed the R.C.M. 404A disclosure requirements to defense and the exceptions for privileged, classified or "otherwise protected" information; he discussed M.R.E. 501-514 and noted that trial counsel may release information if given permission by the holder of the privilege; he also noted that the convening authority may issue a protective order to prevent further disclosure.

He explained that the purpose of the change to Article 32 is so defense counsel can no longer use it as a tactic by making the victims' experience so miserable that they go away. He added that defense counsel spends most of their time in mitigation and defense – and that this is what SVC will want to focus on.

He advised SVCs to watch for the preliminary hearing officer not outranking defense counsel and also noted that when defendants bring in outside defense counsel, the Article 32 will inevitably be delayed, which the victim will not want. He suggested that the SVC could argue that the case should go forward with military counsel if the delay is burdensome for the victim, but the SVC will

have to make specific argument. He also noted that the SVC availability issue complicates things for everyone and that SVCs need to make sure they are vocal and make it known that they want to be at the hearing, because they are important to the client's interest.

Next MAJ Barna discussed R.C.M. 405(g)(1): the balancing test for military witnesses that requires the importance of the witness to be weighed against expense, delay, effect of military operations. He said that the commander decides availability based on operational necessity or mission requirements.

As for civilian witnesses, addressed in R.C.M. 405(g)(2), he informed the SVCs that there is no compulsory process for participation. He noted that the victim is designated as not available if they decline to testify. They can be in the room, but not testifying and other evidence may be considered. He also discussed R.C.M. 405(g)(3) which allows for subpoena duces tecum to be issued for other documentary evidence.

MAJ Barna noted that M.R.E. 412 does apply at the preliminary hearing unless there is a constitutionally required exception. He added that testimony taken during the closed hearing should not be included in the preliminary hearing. Under R.C.M. 405(h), MAJ Barna explained that the preliminary hearing officer is given same authority as military judges to exclude 412 evidence, but no authority to include it.

Next, he advised that if a preliminary hearing officer asks to hear from an additional witness the SVC has an interest in asking why because it should relate to the narrow scope and purpose factors to be allowed at the Article 32. He reminded the SVCs that they are not trying to perfect the Government's case but they need to know to protect the client.

4) Post-Trial Actions : Clemency, appeals, and Writs (50 minutes)

MAJ Jeremy Stephens, U.S. Army, faculty member at the TJAGLCS, discussed issues the Government is interested in showing at sentencing – matters in aggravation and rehab potential and the issues the defense is interested in showing – matters in extenuation and matters in mitigation. He advised the SVCs that they need to understand and be able to explain this process to clients.

He noted that R.C.M. 1001(b)(4) requires that issues raised to show aggravation have to be directly related to this case and what this accused is convicted of. He discussed the new RCM 1001A which has created a right for victim to give unsworn statement the same as a defendant's right, and which can be written, but if so, the military judge, trial counsel and defense counsel get to see first.

MAJ Stephens explained that this right is independent of trial counsel calling the victim to the stand at sentencing. COL Marotta mentioned that there has been a case of SVC reading statement for victim. A Navy VLC reported that she not had victim take the stand, but read from podium. MAJ Stephens responded that procedure is not yet settled on how this works and that the SVC needs to make it known if victim wants to exercise this right.

He advised the SVCs that they need to prepare the victim that even with punitive separation the offender won't be gone immediately if no jail time is sentenced.

Regarding the documents SVCs should get, MAJ Stephens listed the Staff Judge Advocate Report (SJAR), the Convening Authority Action, Record of trial (Art 54, R.C.M. 1103) but not the accused's clemency matters although they get to see the SVC client's.

He further explained that the SJAR contains, Results of Trial Report, Copy or summary of any pretrial agreement, recommendations for clemency by the sentencing authority made in conjunction with the announced sentence; the SJA's concise recommendations; and a copy of victim submission. RCM 1106(d)(3). MAJ Stephens added that the client gets a record of trial if they testified (Art 54(e)) or if they didn't testify but still suffered "direct physical, emotional or pecuniary harm and were named in Art 120, 120b, 120c, 125, or attempt." (R.C.M. 1103)

MAJ Stephens discussed what the convening authority must consider, what they may consider and what they may not consider as set for the in R.C.M. 1107(b)(2), noting that the convening authority may not consider matters about the victim excluded by the judge.

Next, MAJ Stephens discussed extraordinary writs. He explained that there is no filing deadline, no automatic stay, they are broader than Art 62 appeals, including parties, victims, medial orgs, etc, and there is a big body of law guiding this. He referenced the case of Hasan v Gross 71 MJ 416, 418 (CAAF 2012)

Concerning what the writ filing must include, MAJ Stephens cited SS. v. COL Lippert (ACCA Order 16, Nov 14), where an SVC filed a writ seeking relief on behalf of client when the military judge had ordered victims mental health records produced. ACCA vacated the judge's order and directed the judge to comply with MRE 513. He added that ACCA immediately issued a stay in proceedings and then issued a two page order that required the military judge to hold a hearing. He continued, the judge had the hearing and said he would apply Klemick standard. Judge did an in camera review but limited it to what the defense was asking for, based on defenses proffer, judge limited what he disclosed.

MAJ Stephens noted some other issues that may come up where SVC may have standing to file a Writ such as M.R.E. 502 regarding a victim's right to protect privilege with SVC, spousal privilege, competency of a minor and clergy privilege.

Working Lunch – SVC Round Table (40 minutes)

SVC trainees watched video of SVC/Client panel from a previous SVC Training course. The panel consisted of three army enlisted soldier clients and each of their SVCs.

Small Group Break-out Sessions:

The SVCs broke into small groups and rotated through the below role-playing exercises each facilitated by the TJAGLCS faculty and guest SVCs.

1. Working with Criminal Investigators, Trial Counsel, and Defense Counsel (40 minutes)
2. "I feel like people are retaliating against me." (40 minutes)

3. Trial Time and the Curious Client (40 minutes)

4. Post-trial: Now What? (40 minutes)
