



Staff Judge Advocate to the Commandant of the United States Marine Corps



Eastern Region TCAP Training Agenda

MCB CAMP LEJEUNE
MARCH 7-11, 2016

Presented by
Trial Counsel Assistance Program (TCAP)
With support from
Navy TCAP, LSSS-East, and LSSS-NCR

Enlisted Breakout
Lecture / Demo
Practical Exercise
Admin

DAY 1: MONDAY, March 7th			
0800 – 0830	Opening Remarks and Self-Assessments Maj Jesse Schweig, Branch Head, Trial Counsel Assistance Program		
0830 – 0930	Ethics LtCol Pete Houtz <ul style="list-style-type: none"> ❖ <i>LtCol Houtz is the regional trial counsel for the National Capital Region.</i> <ul style="list-style-type: none"> ➢ Instruction will discuss ethics as applied to prosecution. It will use case law and specific examples to examine the limits of appropriate behavior. 		
0930 – 1030	The Pre-Arrest Investigation Ms. Martha Bashford <ul style="list-style-type: none"> ❖ <i>Ms. Bashford is the Chief of the Manhattan District Attorney's Sex Crimes Unit</i> <ul style="list-style-type: none"> ➢ Instruction will discuss how the Manhattan District Attorney's office investigates new reports of sexual assault. Although not specific to military practice, the goal is to stimulate trial counsel by exposing them to the methodology used in an extremely busy and extremely successful jurisdiction. 		
1030 – 1200	<table border="0"> <tr> <td> Corroborating Sex Assault / Domestic Violence cases Ms. Julia Hejazi and Ms. Kathleen Muldoon <ul style="list-style-type: none"> ❖ <i>Ms. Hejazi is the highly qualified expert for HQMC and LSSS-NCR. Ms. Muldoon is the highly qualified expert for LSSS-East.</i> <ul style="list-style-type: none"> ➢ Instruction will focus on those issues unique to SA and DV cases. </td> <td> Learning to Read an Investigation Maj Jesse Schweig <ul style="list-style-type: none"> ❖ <i>Class will focus on reading an NCIS or CID investigation and how this practically applies to gathering evidence.</i> </td> </tr> </table>	Corroborating Sex Assault / Domestic Violence cases Ms. Julia Hejazi and Ms. Kathleen Muldoon <ul style="list-style-type: none"> ❖ <i>Ms. Hejazi is the highly qualified expert for HQMC and LSSS-NCR. Ms. Muldoon is the highly qualified expert for LSSS-East.</i> <ul style="list-style-type: none"> ➢ Instruction will focus on those issues unique to SA and DV cases. 	Learning to Read an Investigation Maj Jesse Schweig <ul style="list-style-type: none"> ❖ <i>Class will focus on reading an NCIS or CID investigation and how this practically applies to gathering evidence.</i>
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1200 – 1330	Working Lunch and Review of Mock Case File Teams <ul style="list-style-type: none"> ❖ <i>The format for this year's training will be slightly different. Participants will work all practical exercises as teams. Additionally, time will be granted during the workday to prep for all events. This is the first such block of prep time.</i> 		
1330 – 1430	<table border="0"> <tr> <td> Victim Interviewing Exercise <ul style="list-style-type: none"> ❖ <i>This exercise will explore the practicalities of interviewing a victim. Counsel will have the opportunity to receive critiques based on how effectively they conduct their interview.</i> </td> <td> Creating a Proof Chart TBD <ul style="list-style-type: none"> ❖ <i>Class will focus on using the Benchbook to draft a proof chart for your TC as you create the charge sheet.</i> </td> </tr> </table>	Victim Interviewing Exercise <ul style="list-style-type: none"> ❖ <i>This exercise will explore the practicalities of interviewing a victim. Counsel will have the opportunity to receive critiques based on how effectively they conduct their interview.</i> 	Creating a Proof Chart TBD <ul style="list-style-type: none"> ❖ <i>Class will focus on using the Benchbook to draft a proof chart for your TC as you create the charge sheet.</i>
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1430 – 1530	Jury Instructions LtCol Nick Martz <ul style="list-style-type: none"> ❖ <i>LtCol Martz is the regional trial counsel for the East Region.</i> <ul style="list-style-type: none"> ➢ Instruction will focus on using instructions to craft charges. 		

1 5 3 0 – 1 7 0 0

Whiteboarding and Charging Exercise

- ❖ *This team exercise will be conducted in the small group conference rooms. The group leader will take the teams through a whiteboarding exercise and a charge analysis exercise. The teams will also generate their request for additional evidence for the mock case.*

DAY 2: TUESDAY, March 8th		
0830 – 0930	Evidentiary Foundations in Sex Assault Cases Maj Iain Pedden <ul style="list-style-type: none"> ❖ <i>Maj Pedden is the evidence instructor at TJAGLCS</i> <ul style="list-style-type: none"> ➤ Class will drill students in laying foundations for items of evidence typically seen in sex assault and strangulation cases. 	Drafting Subpoenas and Creating Witness Lists TBD <ul style="list-style-type: none"> ❖ <i>Class teaches enlisted how to obtain virtually any piece of evidence and how to pre-populate a witness list.</i>
0930 – 1130	Evidentiary Foundation Exercise <ul style="list-style-type: none"> ❖ <i>Counsel will practice laying foundations for various items of evidence in the small group settings.</i> 	Working with and Interviewing Witnesses TBD <ul style="list-style-type: none"> ❖ <i>Class will explore and provide witness interview templates.</i>
1130 – 1300	Lunch	
1300 – 1400	Proper use of an Expert Toxicologist TBD <ul style="list-style-type: none"> ❖ <i>Instructor will discuss how to use an expert toxicologist in a sexual assault case.</i> 	Discovery TBD <ul style="list-style-type: none"> ❖ <i>What discovery should mean to enlisted support</i>
1400 – 1500	Making Objections Exercise <ul style="list-style-type: none"> ❖ <i>Counsel will practice making objections in response to prepared scenarios</i> 	Enlisted Panel Discussion Legal Chiefs <ul style="list-style-type: none"> ❖ <i>Panel will explore best practices around the Marine Corps legal community.</i>
1500 – 1600	Discovery v. Production Maj Iain Pedden <ul style="list-style-type: none"> ❖ <i>Class will pull back the curtain on this confusing but vital subject area.</i> 	
1600 – 1800	Panel Discussion Reservists and Retired Marines <ul style="list-style-type: none"> ❖ <i>This panel will field questions from TCs regarding the interviewing and hiring process post Marine Corps. The panel will also discuss the reserves and what resources are available.</i> 	

DAY 3: WEDNESDAY, March 9th 		
0 8 3 0 – 0 9 3 0	Theme and Theory of the Case Mr. Rob Giles <ul style="list-style-type: none"> ❖ <i>Instructor will discuss how to derive a theme/theory from the evidence and witness interviews. Instructor will then explain how to use this theme/theory throughout the presentation of the case.</i> 	VWAP and Post-Trial Packages TBD <ul style="list-style-type: none"> ❖ <i>Class focuses on VWAP compliance, drafting confinement orders, and drafting RROT's.</i>
0 9 3 0 – 1 1 0 0	Theme and Theory Drill	Archiving a Case and CMS TBD <ul style="list-style-type: none"> ❖ <i>What needs to be part of an archived case file and how it should be maintained pursuant to regulation.</i>
1 1 0 0 – 1 2 0 0	Create a Theme and Theory for the Mock Case <ul style="list-style-type: none"> ❖ <i>Teams will work on a theme and theory and will present it to the other teams in their small group conference rooms. This exercise takes the place of the more traditional opening statement presentations.</i> 	
1 1 3 0 – 1 3 0 0	Lunch	
1 3 0 0 – 1 4 0 0	Dissecting the Direct Exam Mr. Rob Giles <ul style="list-style-type: none"> ❖ <i>Mr. Giles is the highly qualified expert for Navy TCAP.</i> <ul style="list-style-type: none"> ➢ <i>Instruction will discuss the content of an effective direct examination of a victim.</i> 	Setting up a Courtroom & Pretrial Matters TBD <ul style="list-style-type: none"> ❖ <i>This practical application class will ensure that all enlisted personnel know how to set-up a courtroom for any contested case. Class includes construction of the TC's trial notebook and preparation of evidence.</i> <ul style="list-style-type: none"> ➢ <i>Class will be held in the Camp Lejeune courtrooms.</i>
1 4 0 0 – 1 4 3 0	Prep Direct Exams <ul style="list-style-type: none"> ❖ <i>Teams will prepare a model direct of their victim. The output will be a prepared and structured written direct exam.</i> 	
1 4 3 0 – 1 6 0 0	Conduct Directs <ul style="list-style-type: none"> ❖ <i>Teams will conduct their prepared direct exams in the small group conference rooms.</i> 	
1 6 0 0 – 1 9 0 0	Optional Videotaping of and Feedback on an Opening/Closing <ul style="list-style-type: none"> ❖ <i>This gives attendees an option to deliver an opening/closing from one of their cases or from the TCAP mock case. The presentation will be videotaped and will then be reviewed with an experienced practitioner. The goal is self-evaluation and self-improvement.</i> 	

DAY 4: THURSDAY, March 10th		
0800 – 0900	Motions Practice and Bench Briefs Maj Schweig <ul style="list-style-type: none"> ❖ Class will focus on using offensive motions to canalize the defense in sexual assault and domestic violence cases 	Use of ADOBE Pro and Other Office Products TBD <ul style="list-style-type: none"> ❖ Class ensures widest dissemination of best practices regarding Office products. Focuses on shortcuts and maximizing efficiency.
0900 – 1000	Cross Examination Class and Prep Ms. Julia Hejazi <ul style="list-style-type: none"> ❖ Class discusses the theory of cross and how to use it to further the theme of your case. <ul style="list-style-type: none"> ➤ Teams will prepare a model cross of the accused. The output will be a prepared and structured written cross exam. 	
1030 – 1200	Conduct Crosses Teams <ul style="list-style-type: none"> ❖ Teams will conduct mock cross-examinations of the accused in the small group conference rooms. 	
1200 – 1300	Lunch	
1300 – 1430	The Opening Statement LTC George Brauchler, USA <ul style="list-style-type: none"> ❖ LTC Brauchler is an Army National Guard Reservist and is the District Attorney for the 18th Judicial District in Colorado. <ul style="list-style-type: none"> ➤ Instructor will give a sample opening statement relating to the mock case. He will then provide practice pointers for structuring the opening. 	
1430 – 1530	The Closing Argument LTC George Brauchler, USA <ul style="list-style-type: none"> ❖ Instruction will cover theory surrounding the closing argument. The context will be an actual closing prepared in conjunction with the mock case. 	
1530 – 1630	Creating an Effective Visual Closing LTC George Brauchler, USA <ul style="list-style-type: none"> ❖ Instruction will give pointers and techniques for incorporating technology into the closing and how to use it to supplement the argument. 	
1630 – 1900	Panel Discussion Special Guests from the Manhattan District Attorney's Sex Crimes Unit <ul style="list-style-type: none"> ❖ This panel will field questions from TCs regarding the techniques and procedures used at one of the highest profile and busiest sex crimes units in the country. The discussion will be led by MajGen Ewers, SJA to CMC. 	

DAY 5: FRIDAY, March 11th |

0830 – 0900	Course Evals	
0900 – 0930	Case Law Update TBD ❖ <i>Class will provide an update on the most recent case law.</i>	NJIS Maj Jesse Schweig ❖ <i>Explanation of where we might be headed and a solicitation of good ideas.</i>
0930 – 1100	Sentencing Argument Class and Demonstration TBD ❖ <i>An experienced TC will deliver a model sentencing argument from their own case. The class portion will explore presentencing proceedings.</i>	
1100 – 1130	Presentation of Awards RTCs	
1130 – 1200	Closing Remarks MajGen John Ewers, SJA to CMC	



Staff Judge Advocate to the Commandant of the United States Marine Corps



Western Region TCAP Training Agenda

Presented by
Trial Counsel Assistance Program (TCAP)
With support from
Navy TCAP, LSSS-West, and LSSS-Pacific

**MCB CAMP PENDLETON
FEBRUARY 1-5, 2016**

Enlisted Breakout
Lecture / Demo
Practical Exercise
Drill

DAY 1: MONDAY, February 1st			
0800 – 0830	<p>Opening Remarks - VTC MajGen John Ewers, SJA to CMC</p>		
0830 – 0930	<p>Ethics LtCol Steve Keane</p> <ul style="list-style-type: none"> ❖ <i>LtCol Keane is the regional trial counsel for the west region.</i> ➤ Instruction will discuss ethics as applied to prosecution. It will use case law and specific examples to examine the limits of appropriate behavior. 		
0930 – 1030	<p>VLCO Col Katherine McDonald</p> <ul style="list-style-type: none"> ❖ <i>Col McDonald is the OIC of the Marine Corps VLCO.</i> ➤ Instruction will discuss the role the VLCO plays in the process and how TCs can constructively interact with the VLCs assigned to their cases. 		
1030 – 1130	<table border="0" style="width: 100%;"> <tr> <td style="width: 60%;"> <p>PMMs and Sex Assault / Domestic Violence corroboration Ms. Julia Hejazi</p> <ul style="list-style-type: none"> ❖ <i>Ms. Hejazi is the highly qualified expert for HQMC and LSSS-NCR.</i> ➤ <i>Instruction will focus on those issues unique to SA and DV cases.</i> </td> <td style="width: 40%; background-color: #f4a460;"> <p>Learning to Read an Investigation Maj Jesse Schweig</p> <ul style="list-style-type: none"> ❖ <i>Class will focus on reading an NCIS or CID investigation and how this practically applies to gathering evidence.</i> </td> </tr> </table>	<p>PMMs and Sex Assault / Domestic Violence corroboration Ms. Julia Hejazi</p> <ul style="list-style-type: none"> ❖ <i>Ms. Hejazi is the highly qualified expert for HQMC and LSSS-NCR.</i> ➤ <i>Instruction will focus on those issues unique to SA and DV cases.</i> 	<p>Learning to Read an Investigation Maj Jesse Schweig</p> <ul style="list-style-type: none"> ❖ <i>Class will focus on reading an NCIS or CID investigation and how this practically applies to gathering evidence.</i>
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1130 – 1300	<p>Working Lunch and Review of Mock Case File Teams</p> <ul style="list-style-type: none"> ❖ <i>The format for this year's training will be slightly different. Participants will work all practical exercises as teams. Additionally, time will be granted during the workday to prep for all events. This is the first such block of prep time.</i> ➤ The goal is to review the mock case file and to discuss what evidence is missing. The team leader should task the team members with drafting appropriate documents to obtain these missing items of evidence. 		
1300 – 1400	<table border="0" style="width: 100%;"> <tr> <td style="width: 60%;"> <p>Sample Direct of a Strangulation Expert Mr. Jack McMahon and Ms. Gael Strack</p> <ul style="list-style-type: none"> ❖ <i>Mr. McMahon is the highly qualified expert for LSSS-Pacific</i> ❖ <i>Ms. Gael Strack is an expert in the field of strangulation as it applies to domestic violence</i> ➤ <i>Instruction will provide a template for conducting the direct examination of an expert strangulation witness.</i> </td> <td style="width: 40%; background-color: #f4a460;"> <p>Creating a Proof Chart Instructor TBD</p> <ul style="list-style-type: none"> ❖ <i>Class will focus on using the Benchbook to draft a proof chart for your TC as you create the charge sheet.</i> </td> </tr> </table>	<p>Sample Direct of a Strangulation Expert Mr. Jack McMahon and Ms. Gael Strack</p> <ul style="list-style-type: none"> ❖ <i>Mr. McMahon is the highly qualified expert for LSSS-Pacific</i> ❖ <i>Ms. Gael Strack is an expert in the field of strangulation as it applies to domestic violence</i> ➤ <i>Instruction will provide a template for conducting the direct examination of an expert strangulation witness.</i> 	<p>Creating a Proof Chart Instructor TBD</p> <ul style="list-style-type: none"> ❖ <i>Class will focus on using the Benchbook to draft a proof chart for your TC as you create the charge sheet.</i>
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1 4 0 0 – 1 4 3 0	Victimology Drill <ul style="list-style-type: none"> ❖ <i>There will be a series of “drills” throughout the training. These will be live action and will be conducted in front of the entire audience. The goal of the drills is to make counsel think on their feet in a time-compressed situation.</i> 	
1 4 3 0 – 1 7 0 0	Whiteboarding and Charging Exercise <ul style="list-style-type: none"> ❖ <i>This team exercise will be conducted in the small group conference rooms. The group leader will take the teams through a whiteboarding exercise, a charge analysis exercise, and a PMM exercise. The teams will also generate their subpoenas and other documents that will enable them to complete their case file.</i> 	
1 7 0 0 – 1 9 0 0	Optional Videotaping of and Feedback on an Opening/Closing <ul style="list-style-type: none"> ❖ <i>This gives attendees an option to deliver an opening/closing from one of their cases or from the TCAP mock case. The presentation will be videotaped and will then be reviewed with an experienced practitioner. The goal is self-evaluation and self-improvement.</i> 	

DAY 2: TUESDAY, February 2nd |

0 6 0 0 – 0 7 0 0	Optional Group PT Event	
0 7 3 0 – 0 9 3 0	Evidentiary Foundations in Sex Assault Cases RTCs ❖ <i>LtCol Keane and LtCol Lee will discuss appropriate methods of laying foundations. They will also run the class through a series of drills.</i>	Drafting Subpoenas and Creating Witness Lists Instructor TBD ❖ <i>Class teaches enlisted how to obtain virtually any piece of evidence and how to pre-populate a witness list.</i>
0 9 3 0 – 1 1 3 0	Making Objections HQEs ❖ <i>Instructors will give a short lecture on objections; however, the bulk of the class will be a group drill.</i>	Working with and Interviewing Witnesses Instructor TBD ❖ <i>Class will explore and provide witness interview templates.</i>
1 1 3 0 – 1 3 0 0	Lunch	
1 3 0 0 – 1 4 3 0	Dissecting the Direct Exam Mr. Rob Giles ❖ <i>Mr. Giles is the highly qualified expert for Navy TCAP.</i> ➤ <i>Instruction will discuss the content of an effective direct examination of a victim.</i>	Enlisted Panel Discussion Legal Chiefs ❖ <i>Panel will explore best practices around the Marine Corps legal community.</i>
1 4 3 0 – 1 5 3 0	Prep Direct Exams ❖ <i>Teams will prepare a model direct of their victim. The output will be a prepared and structured written direct exam.</i>	
1 5 3 0 – 1 7 0 0	Conduct Directs ❖ <i>Teams will conduct their prepared direct exams in the small group conference rooms.</i>	
1 7 0 0 – 1 9 0 0	Optional Panel Discussion Reservists and Retired Marines ❖ <i>The panel will field questions from TCs regarding the interviewing and hiring process post Marine Corps. The panel will also discuss the reserves and what resources are available.</i>	

DAY 3: WEDNESDAY, February 3rd |

0 6 0 0 – 0 7 0 0	Optional Group PT Event	
0 7 3 0 – 0 9 0 0	Cross Examination Demonstration and Class RTCs and HQEs ❖ <i>Class discusses the theory of cross and how to use it to further the theme of your case. Class includes a drill portion.</i>	Use of ADOBE Pro and Other Office Products Capt Mark Pfizenmayer, TC Okinawa ❖ <i>Class ensures widest dissemination of best practices regarding Office products. Focuses on shortcuts and maximizing efficiency.</i>
0 9 0 0 – 1 0 0 0	The DSO Col Steve Newman ❖ <i>Col Newman is the Chief Defense Counsel of the Marine Corps.</i> ➤ <i>Class will discuss the interaction between TCs and DCs.</i>	
1 0 0 0 – 1 1 3 0	Discovery v. Production LCDR Ryan Stormer, JAGC ❖ <i>LCDR Stormer is the deputy director of Navy TCAP.</i> ➤ <i>Class will pull back the curtain on this confusing subject area.</i>	
1 1 3 0 – 1 3 0 0	Working Lunch and Prep of Cross-Examinations	
1 3 0 0 – 1 4 3 0	Conduct Crosses Teams ❖ <i>Teams will conduct mock cross-examinations of the accused in the small group conference rooms.</i>	Setting up a Courtroom Various Instructors ❖ <i>This practical application class will ensure that all enlisted personnel know how to set-up a courtroom for any contested case. Class includes construction of the TC's trial notebook and preparation of evidence.</i> ➤ <i>Class will be held in the Camp Pendleton courtrooms.</i>
1 4 3 0 – 1 5 3 0	Proper use of an Expert Toxicologist Capt Mark Pfizenmayer and Mr. Jack McMahon ❖ <i>Instructor will discuss how to use an expert toxicologist in a sexual assault case. The class will include a model direct examination of an expert.</i>	
1 5 3 0 – 1 6 3 0	Addressing Counter-Intuitive Victim Behaviors LtCol Wilbur Lee ❖ <i>LtCol Lee is the regional trial counsel for the pacific region.</i> ➤ <i>Class will discuss ways to address counter-intuitive victim behaviors. It will include suggestions for when to call an expert.</i>	
1 6 3 0 – 1 9 0 0	Optional Videotaping of and Feedback on an Opening/Closing ❖ <i>This gives attendees an option to deliver an opening/closing from one of their cases or from the TCAP mock case. The presentation will be videotaped and will then be reviewed with an experienced practitioner. The goal is self-evaluation and self-improvement.</i>	

DAY 4: THURSDAY, February 4th |

0 6 0 0 – 0 7 0 0	Optional Group PT Event	
0 7 3 0 – 0 8 0 0	RTC Discussion of PMMs and Proof Charts RTCs ❖ LtCol Keane and LtCol Lee will discuss the utility and importance of PMMs and proof charts.	
0 8 0 0 – 0 9 0 0	The Opening Statement Instructor TBD ❖ Instructor will give a sample opening statement relating to the mock case. He will then provide practice pointers for structuring the opening.	VWAP and Post-Trial Packages Instructor TBD ❖ Class focuses on VWAP compliance, drafting confinement orders, and drafting RR0Ts.
0 9 0 0 – 1 0 0 0	Theme and Theory of the Case Mr. Rob Giles ❖ Instructor will discuss how to derive a theme/theory from the evidence and witness interviews. Instructor will then explain how to use this theme/theory throughout the presentation of the case.	Archiving a Case and CMS Instructor TBD ❖ What needs to be part of an archived case file and how it should be maintained pursuant to regulation.
1 0 0 0 – 1 1 3 0	Theme and Theory Drill	
1 1 3 0 – 1 3 0 0	Lunch	
1 3 0 0 – 1 4 3 0	Create a Theme and Theory for the Mock Case ❖ Teams will work on a theme and theory and will present it to the other teams in their small group conference rooms. This exercise takes the place of the more traditional opening statement presentations.	
1 4 3 0 – 1 5 3 0	The Closing Argument Instructor TBD ❖ Instruction will cover theory surrounding the closing argument. The context will be an actual closing prepared in conjunction with the mock case.	NJIS Maj Jesse Schweig ❖ Explanation of where we might be headed and a solicitation of good ideas.
1 5 3 0 – 1 6 3 0	Creating an Effective Visual Closing Instructor TBD ❖ Instruction will give pointers and techniques for incorporating technology into the closing and how to use it to supplement the argument.	
1 6 3 0 – 1 8 3 0	Optional Panel Discussion Special Guests (civilian district attorneys) ❖ This panel will focus on the differences between civilian and military sexual assault prosecutions.	

DAY 5: FRIDAY, February 5th |

0 7 3 0 – 0 8 3 0	<p>Military Justice Resources Maj Jesse Schweig</p> <ul style="list-style-type: none"> ❖ <i>Maj Schweig is the branch head for Marine TCAP.</i> <ul style="list-style-type: none"> ➤ Class will discuss websites, publications, and other documents pertaining to military justice. It will also include a discussion of NJIS.
0 8 3 0 – 1 0 0 0	<p>Sentencing Argument Demonstrations Experienced Marine TC and CDR Jon Stephens, JAGC</p> <ul style="list-style-type: none"> ❖ <i>Two experienced TCs will deliver model sentencing arguments from their own cases. They will then explain how they structured their argument and why.</i>
1 0 0 0 – 1 1 0 0	<p>Case Law Update Ms. Julia Hejazi</p> <ul style="list-style-type: none"> ❖ <i>Instruction will discuss recent sexual assault cases that have been overturned for lack of factual sufficiency. It will also touch on other developments relevant to our practice.</i>
1 1 0 0 – 1 1 3 0	<p>Presentation of Awards RTCs</p>
1 1 3 0 – 1 2 0 0	<p>Closing Remarks / Critiques Maj Jesse Schweig</p>

Addressing
“Counterintuitive”
Behaviors in Sexual
Assault Cases

Learning Objectives

- Identify behaviors by victims of sexual assault that might be perceived as “counterintuitive”
- Assess your case in the proper context of these behaviors
- Decide how to explain those behaviors (employ expert?)
- Understand how to use expert testimony in your case

What do we mean by “Counterintuitive?”

- *Adjective*

- coun · ter · in · tu · i · tive \-in-'tü-ə-tiv, -'tyü-

: different from what you would expect : not agreeing with what seems right or natural

What does the public/our members expect a victim to do:

- Know what is happening for what it is
- Fight back/resist
- Have injuries
- Report immediately
- Be consistent
- Remember everything clearly
- Act like a victim afterwards
- Cooperate with the effort to bring this case to justice

What do we see instead?

- Delayed reporting
- Minimizing
- Loss of memory/fragmented recollection
- Lack of resistance
- Cooperative behavior
- Reluctance to cooperate

What do we mean by
“Counterintuitive?”

Is the behavior of our
sexual assault victims
really counterintuitive?

What do we mean by “Counterintuitive?”

- Who among you have experienced a traumatic experience?
 - Car accident?
 - Combat?
 - Getting yelled at by an MJ?

What do we mean by
“Counterintuitive?”

How does the defense use
these “counterintuitive
behaviors?”

WHY IS IT IMPORTANT?

C R E D I B I L I T Y

Now What?

- You understand that “counterintuitive” behaviors are in fact often normal responses to traumatic events.
- You’ve identified the behaviors in your case that may present credibility challenges.
- How do you most effectively address those issues?

Using Experts

“[T]he victim’s behavior will not necessarily undermine his or her credibility if an expert can explain that such patterns of counterintuitive behavior often occur in sexual abuse cases.”

U.S. v. Rynning, 47 M.J. 420, 422 (C.A.A.F. 1998)

Calling all Experts

But . . .

Do you really need one?

Using Experts

- Sometimes the facts just do not support calling an expert.
- Consult your HQE, RTC, CTC, Victim advocates!

Using Experts

- You've decided you need an expert to effectively address behaviors that will be perceived as “counterintuitive.”
- Who are you going to call and why?

What do we mean by “Counterintuitive?”

- What do we see instead?
 - Delayed reporting
 - Minimizing
 - Loss of memory/fragmented recollection
 - Lack of resistance
 - Reluctance to cooperate

Using Experts

- Psychiatrists/Psychologists
- Victim Advocate
- Sexual Assault Response Coordinator
- SAMFE
- Law Enforcement Personnel
- Toxicologist

Using Experts

- What are the practical/procedural implications of calling an expert in the military justice system?

Using Experts

- Does it establish an element of the offense?
 - BWS
 - RTS
- Considerations unique to military justice:
 - Convening authority/SJA?
 - Defense will get an expert

Using Experts

- *Legal Framework:*
 - *M.R.E. 401*
 - *M.R.E. 702*
 - *M.R.E. 703*
 - *U.S. v. Houser*, 36 M.J. 392 (C.M.A. 1993)
 - *Daubert v. Merrell Dow Pharms*, 509 U.S. 579 (1993)
 - *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137 (1999)

ADMISSIBILITY

U.S. v. Houser, 36 M.J. 392 (CMA 1993)

- Qualification of the expert (702)
- Subject Matter of the Expert Testimony (702)
- Basis for the Expert Testimony (703) *****
- Logical Relevance of the Expert Testimony (401)
- Reliability of the Evidence (Daubert)
- Legal Relevance/Probative Value of the Evidence (Daubert/403)

Rule for Courts-Martial 702

- If **scientific, technical, or other specialized** knowledge **will assist** the trier of fact to understand the evidence or to determine a fact in issue, a witness **qualified** as an expert **by knowledge, skill, experience, training, or education** may testify thereto in the form of an opinion or otherwise if (1) the testimony is based upon **sufficient facts or data**, (2) the testimony is the product of **reliable principles** and methods, and (3) the witness has **applied the principles and methods** reliably to the facts of the case.

ADMISSIBILITY

- Teaching Expert:
- (1) the witness have the requisite qualifications to give expert testimony,
- (2) the testimony address a subject matter as to which the witness can be of help to the trier of fact,
- (3) the proposed testimony be reliable, and
- (4) the proposed testimony fit the facts of the case
- *****Doesn't offer an opinion**

Using Experts

Is it relevant?

Will the testimony assist the trier of fact to understand the evidence or to determine a fact in issue?

Using Experts

Is it relevant?

“Certain behavioral patterns such as failure to resist or delay in reporting a rape could be confusing to the factfinders because these may be counter-intuitive. . . . It is logically relevant for an expert to explain that certain behavior patterns occur in a certain percentage of rape cases or child abuse cases. This is not to say that the offense occurred but, rather, that these events may happen to some victims. Without the testimony the members are left with their own intuition.”

- *U.S. v. Houser*, 36 M.J. 392, 399 (C.M.A. 1993)

Using Experts

Is it relevant?

This Court also applies a "liberal" standard for admission of expert testimony.

United States v. Diaz, 59 M.J. 79, 89
(C.A.A.F. 2003)

Using Experts

Is it relevant?

“We again affirm the appropriateness of allowing expert testimony . . . where it helps the trier of fact understand common behaviors of sexual assault victims that might otherwise seem counterintuitive or consistent with consent.”

- *U.S. v. Flesher*, 73 M.J. 303, 313 (C.A.A.F. 2014)

Using Experts

Qualifications

Who can testify?

“a witness **qualified** as an expert
**by knowledge, skill, experience,
training, or education”**”

Using Experts

Qualifications

Who can testify?

- Psychiatrists/Psychologists
- Victim Advocate
- Sexual Assault Response Coordinator
- SAFME
- Law Enforcement Personnel

Using Experts

Qualifications

In what field/area of expertise will you be asking the court to qualify your witness?

Using Experts

Qualifications

- “Counterintuitive behavior?”
- “sexual or domestic violence”
- “common sexual or domestic violence myths”
- “common victim responses to trauma in sexual or domestic violence cases”
- “common victim behaviors in sexual or domestic violence cases.”

Using Experts

Subject Matter

- **How** victims may or may not behave during or following a sexual assault
- **Why** a sexual assault victim may or may not react in a particular manner.

Using Experts

Subject Matter

What is the purpose for which you are calling your expert?

Know the limitations of your expert!

Using Experts

Probative value

What is the purpose for which you are calling your expert?

Know the limitations of your expert!

Using Experts

Prep Your Witness!

- Meet with them
- Go through their testimony
- Provide them with your questions
- Know what the answers are going to be
- Anticipate cross

Using Experts

Common Objections

- Improper bolstering
- Foundation
- Legal Conclusion

Using Experts

NOT THE END ALL BE ALL
OF YOUR CASE.

- Don't discount it though.

QUESTIONS?

Direct Examination of the Victim

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Agenda

- ◆ How trial prep works to help your direct
- ◆ Dealing with VLC during trial prep
- ◆ Getting into the direct at trial
- ◆ Mock direct based on the fact pattern

“Justice though due the accused, is due
the accuser also.”

Snyder v. Massachusetts, 291 U.S. 97 (1934)

Trial Preparation

- ◆ Who do you prep?
- ◆ Everyone who is going to provide any evidence from the witness stand
 - ◆ Victim
 - ◆ Fact witnesses
 - ◆ Expert witnesses
 - ◆ Investigators/ Eye witnesses

Why We Prep Victims

- ◆ Multiple Interviews
- ◆ Multiple Testimonies
- ◆ Fear of Public Exposure
- ◆ Facing the Defendant
- ◆ Fear of Cross Examination
- ◆ Lack of Understanding of the Process
- ◆ Impact on their career
- ◆ Sequestration of Support Witnesses
- ◆ Concurrent Out-of-Home Placement
- ◆ Inadequate Preparation
- ◆ Lack of Corroborative Evidence to Support Testimony

Goals of Court Preparation

- ◆ Enhance the credibility of the witness
- ◆ Aid in the understanding of the court process by the witness
- ◆ Reduce negative consequences the witness may suffer
- ◆ Improve the ability of the witness to answer questions accurately, completely and truthfully
- ◆ Allow the witness the opportunity to practice giving narrative responses
- ◆ Learn the language witness uses

Set Ground Rules for Testifying

- ◆ ALWAYS TELL THE TRUTH!!!!!!!
- ◆ Wait to answer the question
- ◆ Don't talk if there is an objection
- ◆ Only talk to the lawyers and judge
- ◆ Just answer the question asked
- ◆ No guessing, pretending
- ◆ "I don't know", "I don't remember", "I'm not sure", "I don't understand"
- ◆ Have questions repeated
- ◆ Let the witness know that it is ok to say that they spoke with you while preparing to testify

Preparing for Direct

- ◆ Review prior statements with the witness
 - ◆ Review, refresh, remind.
 - ◆ [Police interviews, Prelim/ Art 32 transcripts]
- ◆ Address/ explain apparent inconsistencies
- ◆ Meet more than once
- ◆ Tell the witness the direction and purpose of his/ her testimony and identify the points of emphasis
- ◆ Go over the questions you will ask
- ◆ Explain the scope or intent of any question

VLC & Working with Your Victim

VLC

- ◆ Yes, conflict may arise, but if you remember that we actually have 2 goals, it won't occur that often
 - ◆ Accountability of the accused
 - ◆ Victim wholeness and healing
- ◆ Effective victim support (i.e., wholeness/ healing) increases ability to hold offenders accountable

Talking to Victims

- ◆ **COMMUNICATION WITH PERSON REPRESENTED BY COUNSEL.** - In representing a client, a covered attorney shall not communicate about the subject of the representation with a party the covered attorney knows to be represented by another attorney in the matter, unless the covered attorney has the consent of the other attorney or is authorized by law or court order.
- ◆ **JAGINST 5803.1D, Rule 4.2**

Victim Rights

18 U.S.C. §3771

- ◆ To be treated with fairness and respect for victim's dignity and privacy
- ◆ To be reasonably protected from the accused
- ◆ To be notified of court proceedings
- ◆ To receive restitution as available
- ◆ To attend public court sessions
- ◆ To confer with the attorney for the government
- ◆ To be informed about case disposition (conviction, sentencing, imprisonment and release)

Victim Discovery

- ◆ What if victim wants NCIS ROI?
 - ◆ Legal considerations
 - ◆ Victim must follow FOIA process
 - ◆ NCIS is the release authority
 - ◆ Suggestion
 - ◆ Explain the harm and advise to request after the court-martial
 - ◆ Allow victim to see any statements victim provided to NCIS

Testifying at Trial

“Poor Stepchild???”

- ◆ “Why is it that... the most important portion of any trial is treated like a poor stepchild? How often do we hear war stories about wonderful, stimulating direct examination? Yet trials are won or lost based on the evidence introduced almost totally through direct examination. Why does direct examination take a back seat to other phases of the trial? Perhaps the most important reason is that most trial attorneys are shameless hams who love the limelight and the best direct examinations take place when the attorney becomes almost invisible and allows the witness to take center stage.”
- ◆ Direct Examination , Major Richard E. Sarver, USAF (AFLR, 1987)

This is 90% of what you do
in trial with witnesses

- ◆ Will the witness's testimony advance your theory of the case?
- ◆ Will the fact finder understand and believe it to be credible? Will it persuade? Will it inform? (The snitch witness)
- ◆ How will you place the witness
 - ◆ in the "line of proof"? [Case construction]
[Primacy/ Recency]

Credibility

- ◆ 7-7-1. CREDIBILITY OF WITNESSES

- ◆ You have the duty to determine the believability of the witnesses. In performing this duty you must consider each witness's intelligence, ability to observe and accurately remember, sincerity, and conduct in court, (friendships) (and) (prejudices) (and) (character for truthfulness). Consider also the extent to which each witness is either supported or contradicted by other evidence; the relationship each witness may have with either side; and how each witness might be affected by the verdict.
- ◆ (In weighing (a discrepancy) (discrepancies) (by a witness) (or) (between witnesses), you should consider whether (it) (they) resulted from an innocent mistake or a deliberate lie.)
- ◆ Taking all these matters into account, you should then consider the probability of each witness's testimony and the inclination of the witness to tell the truth.
- ◆ (The believability of each witness's testimony should be your guide in evaluating testimony, not the number of witnesses called.)

- ◆ MRE 611 - Mode and order of interrogation and presentation (the parameters of practice)
- ◆ (a) Control by the military judge. The military judge shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment.

Testifying at Trial

- ◆ Short sentences
- ◆ Signal topic changes
- ◆ Estimates
- ◆ Literal interpretations
- ◆ No legal terms
- ◆ Avoid questions that start with can you or do you remember
- ◆ Avoid accusatory questions
- ◆ Single fact questions
- ◆ Have a flow, use logical sequencing
- ◆ Use “looping” – reflective questioning. The practice of incorporating the witness’s last answer into the body of the counsel’s next question-but use selectively
 - ◆ ”So when he touched you on your breast, what did he say?”
- ◆ Use of demonstrative & admitted evidence; Charts, diagrams, photographs, videos, maps, to illustrate the testimony.
- ◆ Listen, listen, listen

Self Preparation

- ◆ Learn/ use effective techniques to effectively elicit information from witnesses (looping, etc.)
- ◆ Have a good system that helps you (1) to ask questions effectively and (2) to record answers for future use in other parts of the trial (closing, etc.)
- ◆ Know the facts of the case ...well
- ◆ Know your witness ...well

Self Preparation

- Have a good system that helps you to ask questions effectively and record answers for future use

Question	Expected Answer/Answer in ROI	Answer given
Name	Robert Giles	Robert Giles
Age	48	48
DOB	10/27/67	10/27/67
Rate/Rank	Civilian	Civilian
On the night of 10 Oct 2015, where were you?	I was out at the bar with my friends Joe, Tim, Rob, David and Andrew	I had gone out to dinner with my wife and then met up with my friends at the bar
Who were you with?	Joe, Tim, Rob, David and Andrew	Wife and Joe, Tim, Rob, David, Andrew and Ian
What were you doing?	Drinking and watching football game	Had dinner at Southside then went over to J.T. Stones

In the Courtroom

- ◆ Where do you stand?
- ◆ If you can move the podium do you move it?
- ◆ What do you do with your body, arms, etc?
- ◆ Signals to the witness?
- ◆ How do you present when speaking to the members?

“You want the witness to be the star;
I’m merely the facilitator and stay in
the background”

Vincent Bugliosi

Forensic Toxicology

What do I do with these guys?

Assumptions for the Class

1. Context of the case will be an alcohol facilitated sexual assault under 120(b)
2. No drugs other than alcohol in the system.
3. Victim focused

What do we typically use a Forensic
Toxicologist for?

CORROBORATION

What do we typically use a Forensic Toxicologist for?

To perform a retrograde analysis of a person's level of intoxication at a given time

AND

To explain the mental and physical effects a drug(s) have on a person.

Retrograde Analysis: Widmark Formula

How much a person had to drink

(minus)

The amount eliminated from their body
over time

(equals)

The concentration of alcohol in their
blood at a given time.

Retrograde Analysis: Two Scenarios

1. *Backward:* You have a blood draw.
2. *Forward:* You have observed drinking and behavior.

A Word on Elimination Rates

1. *Measured Elimination Rate:* You have two blood draws.
2. *Standard Elimination:* Generally accepted estimate of removal rates. [0.015 g/dL/hour]

Blood Draw: What you need to establish

1. Chain of custody for the blood draws.
2. Times for the two blood draws
3. Approximate time the sexual assault occurred.
4. Approximate time the victim stopped drinking

Observed Drinking & Behavior: What you need to establish

1. Time when the victim started drinking.
2. What they were drinking
3. How many they drank
4. When they stopped drinking
5. When the sexual assault occurred

Variables to Consider:

1. Food.
2. Rate of drinking.
3. Type of drinks.
4. Size and gender of the person drinking.
5. History of drinking
6. Vomiting.***

Two things to talk about:

1. Physical Effects
2. Mental Effects

Physical Effects: Blacking out vs Passing Out

1. Blacking out: The person does not remember what they were doing but were still functional in some capacity. **There is no way to tell when a person is blacked out.**
2. Passing out: They are not moving and non-responsive.

Physical Effects: En Block vs Fragmented

En Block:

- They remember nothing during a period of time.
- They never get any memories “back”.

Fragmented:

- They remember pieces.
- Memories can be jumbled and out of order.
- They can remember more as time passes.

Dubowski Stages

STAGES OF ACUTE ALCOHOLIC INFLUENCE/INTOXICATION

BLOOD-ALCOHOL CONCENTRATION grams/100 mL	STAGE OF ALCOHOLIC INFLUENCE	CLINICAL SIGNS/SYMPTOMS
0.01-0.05	Subclinical	Influence/effects usually not apparent or obvious Behavior nearly normal by ordinary observation Impairment detectable by special tests
0.03-0.12	Euphoria	Mild euphoria, sociability, talkativeness Increased self-confidence; decreased inhibitions Diminished attention, judgment and control Some sensory-motor impairment Slowed information processing Loss of efficiency in critical performance tests
0.09-0.25	Excitement	Emotional instability; loss of critical judgment Impairment of perception, memory and comprehension Decreased sensory response; increased reaction time Reduced visual acuity & peripheral vision; and slow glare recovery Sensory-motor incoordination; impaired balance; slurred speech; vomiting; drowsiness
0.18-0.30	Confusion	Disorientation, mental confusion; vertigo; dysphoria Exaggerated emotional states (fear, rage, grief, etc) Disturbances of vision (diplopia, etc.) and of perception of color, form, motion, dimensions Increased pain threshold Increased muscular incoordination; staggering gait; ataxia Apathy, lethargy
0.25-0.40	Stupor	General inertia; approaching loss of motor functions Markedly decreased response to stimuli Marked muscular incoordination; inability to stand or walk Vomiting; incontinence of urine and feces Impaired consciousness; sleep or stupor
0.35-0.50	Coma	Complete unconsciousness; coma; anesthesia Depressed or abolished reflexes Subnormal temperature Impairment of circulation and respiration Possible death
0.45+	Death	Death from respiratory arrest

What to Know About the Expert

- How many times have they done this?
 - Some guys you just “press play”.
 - Others you have to work hard with your questions.
- What diction do they use?
 - Ensure they are effectively communicating and not alienating members.
 - The contrast with this and education endears them to members.
- What is their demeanor, tone, etc.
 - Make sure they don't appear condescending.

What to Talk to the Expert About: Education & Experience

My thoughts:

- Members LOVE this stuff.
- Legal “bolstering”, so take advantage of it.
- Watch out for experts that become “humble” on the stand.

What to Talk to the Expert About: Workplace & Testing Procedures

Three points:

1. Only necessary if you have a blood sample.
2. Necessary to lay the foundation for talking about the test results.
3. Boring: you can lose the members here.

What to Talk to the Expert About: Workplace and Testing Procedures

What you should talk about:

1. Certification.
2. Security.
3. Quality Control Mechanisms.
4. Familiarity with testing.
procedures and mechanisms.
5. How the samples are actually
tested.

What to Talk to the Expert About: Forensic Toxicology and Alcohol

Basics:

- What is forensic toxicology
- What is alcohol
- Rate of absorption
- How does it metabolize
- What is BAC and how does it relate to intoxication

What to Talk to the Expert About: Levels of Intoxication with Blood Sample

- Test results
- Elimination rate
- Timeline used
- BAC at time of the assault
- Likely effects to be seen
- Individual Variance

What to Talk to the Expert About: Levels of Intoxication with Blood Sample

What to watch out for:

- BAC values that are not “consistent with” the other testimony
- Chain of custody issues

What to Talk to the Expert About: Levels of Intoxication with observations

- How they arrived at their estimate of the amount of alcohol consumed.
- Timeline used
- Elimination rate
- Estimated BAC
- Effects likely to be seen
- Individual Variance

What to Talk to the Expert About: Levels of Intoxication with observations

What to watch out for

- The amount consumed:
 - What was in the mixed drinks
 - Size of shots
 - How many they drank after already drunk
- Managing differences in the testimony of witnesses

What to Talk to the Expert About: Dubowski Scale

- Overlapping ranges and terms belie the inaccuracy of the chart.
- Vague terms lead to inaccurate comparisons with the language used by witnesses.
- However, can be used in both directions.

Du

STAGES OF ACUTE ALCOHOLIC INFLUENCE/INTOXICATION

STAGES OF ACUTE ALCOHOLIC INFLUENCE/INTOXICATION			CLINICAL SIGNS/SYMPTOMS
BLOOD-ALCOHOL CONCENTRATION grams/100 mL	STAGE OF ALCOHOLIC INFLUENCE	CLINICAL SIGNS/SYMPTOMS	CLINICAL SIGNS/SYMPTOMS
0.01-0.05	Subclinical	Influence/effects usually not apparent or obvious Behavior nearly normal by ordinary observation Impairment detectable by special tests	usually not apparent or obvious normal by ordinary observation detectable by special tests sociability, talkativeness confidence; decreased inhibitions attention, judgment and control motor impairment information processing
0.03-0.12	Euphoria	Mild euphoria, sociability, talkativeness Increased self-confidence; decreased inhibitions Diminished attention, judgment and control Some sensory-motor impairment Slowed information processing Loss of efficiency in critical performance tests	ability in critical performance tests flexibility; loss of critical judgment perception, memory and attention sensory response; increased reaction time
0.09-0.25	Excitement	Emotional instability; loss of critical judgment Impairment of perception, memory and comprehension Decreased sensory response; increased reaction time Reduced visual acuity & peripheral vision; and slow glare recovery Sensory-motor incoordination; impaired balance; slurred speech; vomiting; drowsiness	visual acuity & peripheral vision; and slow glare recovery incoordination; impaired balance; vomiting; drowsiness mental confusion; vertigo; dysphoria emotional states (fear, rage, grief, etc) vision (diplopia, etc.) and of perception of color, form, motion, dimensions threshold ocular incoordination; staggering gait;
0.18-0.30	 Confusion 	Disorientation, mental confusion; vertigo; dysphoria Exaggerated emotional states (fear, rage, grief, etc) Disturbances of vision (diplopia, etc.) and of perception of color, form, motion, dimensions Increased pain threshold Increased muscular incoordination; staggering gait; ataxia Apathy, lethargy	approaching loss of motor functions reduced response to stimuli ocular incoordination; inability to stand or walk retention of urine and feces stupor; sleep or stupor unconsciousness; coma; anesthesia abolished reflexes depression of temperature depression of circulation and respiration

0.45+

Death

Death from respiratory arrest

What to Talk to the Expert About: Glasgow Coma Scale

- Developed to assess the state of consciousness due to “acute brain injury” – blunt force.
- Used to *identify changes*.
- VERY rough estimates of brain function at low levels.
- 0-15; Get a score of 3 for being alive.

What to Talk to the Expert About: The Teaching Experts

- There are times where you may not want to use a BAC.
- Have him explain the effect on memory and physical abilities.
- Legal way of “vouching” for the victim.



Victims' Legal Counsel Organization (VLCO)

Colonel Kate McDonald
Victims' Legal Counsel Organization
Officer-in-Charge
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Mission Statement

The Marine Corps Victims' Legal Counsel Organization provides legal advice, legal counseling, and representation to victims of sexual assault and other crimes while ensuring that victims' rights are protected at all stages of the investigation and military justice process.



Eligibility Criteria

- **10 U.S.C. § 1044 (“Traditional” Legal Assistance Statute)**
 - It states that “[s]ubject to the availability of legal staff resources, the Secretary concerned may provide legal assistance in connection with personal civil legal affairs” to eligible individuals, including:
 - Members of the armed forces who are on active duty;
 - Reservists;
 - Members and former members entitled to retired or retainer pay;
 - Military dependents of members and former members; and
 - Others as provided in the statute.
- **10 U.S.C. § 1565b (Legal Assistance to Victims of Sexual Assault)**
 - Legal Assistance to Victims of Sexual Assault “pursuant to” 10 U.S.C. §1044.



Eligibility Criteria (Cont'd)

- **Section 0705 of the JAGINST 5800.7E (JAGMAN)**
 - Those victims eligible under 10 U.S.C. § 1044, and the following:
 - DoD Civilians (CONUS & OVERSEAS)
 - Non-DoD Civilians (U.S. Citizens) overseas.
 - Contractors (U.S. Citizens) overseas employed by, serving with, or accompanying U.S. Armed Forces when they are assigned overseas more than 30 days.
 - Family members to those listed above.
 - A 20/20/20 un-remarried former spouse.
 - Spouses, former spouses, and children who are victims of abuse by members losing the right to retired pay under 10 U.S.C. 1408(h).
 - “Other persons authorized by the JAG.”
- **NDAAs FY16 – possible DoD Victims. UCMJ Offender requirement is statutory.**



10 U.S.C. §1044

Subject to the availability of legal staff resources, the Secretary concerned may provide legal assistance in connection with personal civil legal affairs to eligible individuals, including:

- Members of the armed forces who are on active duty;
- Reservists serving on active duty;
- Members and former members entitled to retired or retainer pay;
- Military dependents of members and former members; and
- Others as provided in the statute.



10 U.S.C. §1565b

- A member of the armed forces or dependent who is the victim of sexual assault shall be informed of the availability of assistance from a VLC “as soon as the member or dependent seeks assistance from a Sexual Assault Response Coordinator, a Sexual Assault Victim Advocate, a military criminal investigator, a victim/witness liaison, or a trial counsel.”
- Assistance is available regardless of whether the victim elected Restricted or Unrestricted Report.



SECDEF MEMO 14AUG13

“Secretaries of the Military Departments shall establish a special victim’s advocacy program best suited for that Service that provides legal advice and representation to the victim throughout the justice process.”



SECRETARY OF DEFENSE
1000 DEFENSE PENTAGON
WASHINGTON, DC 20301-1000

AUG 14 2013

MEMORANDUM FOR SECRETARIES OF THE MILITARY DEPARTMENTS
CHAIRMAN OF THE JOINT CHIEFS OF STAFF
UNDER SECRETARIES OF DEFENSE
DEPUTY CHIEF MANAGEMENT OFFICER
CHIEFS OF THE MILITARY SERVICES
COMMANDERS OF THE COMBATANT COMMANDS
CHIEF OF THE NATIONAL GUARD BUREAU
DIRECTOR, COST ASSESSMENT AND PROGRAM EVALUATION
DIRECTOR, OPERATIONAL TEST AND EVALUATION
GENERAL COUNSEL OF THE DEPARTMENT OF DEFENSE
INSPECTOR GENERAL OF THE DEPARTMENT OF DEFENSE
ASSISTANT SECRETARIES OF DEFENSE
DEPARTMENT OF DEFENSE CHIEF INFORMATION OFFICER
ASSISTANTS TO THE SECRETARY OF DEFENSE
DIRECTOR, ADMINISTRATION AND MANAGEMENT
DIRECTOR, NET ASSESSMENT
DIRECTORS OF THE DEFENSE AGENCIES
DIRECTORS OF THE DOD FIELD ACTIVITIES

SUBJECT: Sexual Assault Prevention and Response

Eliminating sexual assault from our Armed Forces remains one of our top priorities. This effort requires our absolute and sustained commitment to providing a safe environment in which every Department Service member and civilian is free from the threat of sexual harassment and assault. Our success depends on a dynamic and responsive approach. We, therefore, must continually assess and strive to improve our prevention and response programs.

On May 6, 2013, I directed a range of initiatives designed to strengthen our program in the areas of commander accountability, command climate, victim advocacy, and safety. Today, I am directing immediate implementation of the following additional measures to gain greater consistency of effort and enhance oversight, investigative quality, pretrial investigations, and victim support:

- Improving Victim Legal Support: Secretaries of the Military Departments shall establish a special victim’s advocacy program best suited for that Service that provides legal advice and representation to the victim throughout the justice process. Each Service will identify and periodically share best practices, and will establish an initial operating capability not later than November 1, 2013, and a fully established program by January 1, 2014.



MARADMIN 583/13

“The VLCO will provide dedicated legal advice and representation to victims of sexual assault and other crimes, ..., in order to help protect victims’ rights at all stages of the military justice process.”

Page 1 of 5

ESTABLISHMENT OF THE MARINE CORPS VICTIMS' LEGAL COUNSEL ORGANIZATION (VLCO)

By | October 31, 2013

R 311901Z OCT 13

UNCLASSIFIED/

MARADMIN 583/13

MSGID/GENADMIN/CMC WASHINGTON DC JA//

SUBJ/ESTABLISHMENT OF THE MARINE CORPS VICTIMS' LEGAL COUNSEL ORGANIZATION (VLCO)//

REF/A/MSGID: SECDEF MEMO/14AUG2013//

REF/B/MSGID: TITLE 10, USC, SECT 1044//

REF/C/MSGID: TITLE 10, USC, SECT 1565B//

REF/D/MSGID: DODI 6495.02//

REF/E/MSGID: SECNAVINST 1752.4B//

REF/F/MSGID: MCO 1752.5B//

REF/G/MSGID: MCO 5800.14//

REF/H/MSGID: MCO 1754.11//

REF/I/MSGID: JAGINST 5803.1D//

REF/J/MSGID: JAGINST 5800.7F//

REF/K/MSGID: MCO P5800.16A//

NARR/REF A IS THE SECRETARY OF DEFENSE (SECDEF) MEMORANDUM DIRECTING ALL SERVICES TO IMPLEMENT A SPECIAL VICTIM'S ADVOCACY PROGRAM. REF B IS STATUTORY AUTHORITY FOR LEGAL ASSISTANCE SERVICES TO MEMBERS OF THE ARMED FORCES AND OTHER ELIGIBLE INDIVIDUALS SUBJECT TO THE AVAILABILITY OF LEGAL STAFF RESOURCES. REF C IS STATUTORY AUTHORITY THAT EXTENDS LEGAL ASSISTANCE SERVICES TO VICTIMS OF SEXUAL ASSAULT. REF D IS THE DEPARTMENT OF DEFENSE INSTRUCTION, DATED 28 MARCH 2013, ON THE SEXUAL ASSAULT PREVENTION AND RESPONSE (SAPR) PROGRAM PROCEDURES, WHICH INCORPORATES THE REQUIREMENTS UNDER REF C. REF E IS THE SECNAVINST, DATED 13 APRIL 2013, ON THE DEPARTMENT OF THE NAVY'S SAPR PROGRAM. REF F IS THE MARINE CORPS ORDER (MCO), DATED 1 MARCH 2013, ON THE MARINE CORPS SAPR PROGRAM. REF G IS THE MCO ON THE VICTIM-WITNESS ASSISTANCE PROGRAM (VWAP). REF H IS THE MCO ON THE MARINE CORPS FAMILY ADVOCACY PROGRAM (FAP). REF I IS THE JAG INSTRUCTION (JAGINST) ON PROFESSIONAL CONDUCT OF ATTORNEYS. REF J IS THE MANUAL OF THE JUDGE ADVOCATE GENERAL OF THE

<http://www.marines.mil/DesktopModules/DigArticle/Print.aspx?PortalId=59&ModuleId=2...> 11/5/2013



VLCO Organization

- VLCO OIC, Col McDonald
- Deputy VLCO OIC, LtCol Harlow
- VLCO GS-11 Ms. White
- Regional Victims' Legal Counsel (4)
- Victims' Legal Counsel (12)
- GS-9 Paralegals (4)



Victims' Legal Counsels

Who are the Victims' Legal Counsels?

- VLCs are trained and qualified judge advocates with military justice experience who have completed a certified VLC course.
- VLCO Chain-of-Command functionally independent of CAs, TCs, and DCs, and will report to SJA to CMC.



Scope of Services

Legal Advice & Counseling

- Privileged, confidential communication with VLC.
- VLC can provide information and guidance regarding any crime committed in violation of the UCMJ.
- VLC will refer victims to Defense and/or Legal Assistance when appropriate (e.g. collateral misconduct).

Representation

- All victims of (1) sexual assault, (2) domestic violence, and (3) child abuse when requested
- All cases with issues arising under M.R.E. 412, 513, 514, when requested.
- Representation at courts-martial ends at convening authority action in the case, although additional assistance may be provided with approval by OIC VLCO (e.g. Art 138 complaints, BCNR, legal assistance matters).



VLC Advice & Counseling

- Provide overview of the military justice system, including investigation of crimes, preferral and referral of charges, Article 32 hearing, convening authority role, and post-trial role.
- Explain roles and responsibilities of the trial counsel, defense counsel, and investigators (PMO, CID, NCIS, etc).
- Explain civilian restraining orders and military protective orders.
- Explain the difference between Restricted and Unrestricted reporting of sexual assault.
- Advise victim of right to be present at military justice proceedings in accordance with Military Rules of Evidence (M.R.E.) 615 and Rules for Court-Martial (R.C.M.) 806.



VLC Advice & Counseling (Cont'd)

- Explain Government's authority to request and compel production of evidence from the victim including social media, email, text messages, journals, and other evidence.
- Explain M.R.E. 412 on sexual behavior evidence; M.R.E. 513 regarding psychotherapist-patient privilege; and M.R.E. 514 on victim advocate-victim privilege.
- Explain potential consequences of collateral misconduct and options including exercising Article 31b rights, obtaining testimonial or transactional immunity, and right to defense counsel.



Article 6b Rights

Victim Rights Afforded by Article 6b, UCMJ:

- (1) The right to be reasonably protected from the accused.
- (2) The right to reasonable, accurate, and timely notice of any of the following:
 - (A) A public hearing concerning the continuation of confinement prior to trial of the accused;
 - (B) A preliminary hearing under section 832 of this title relating to the offense;
 - (C) A court-martial relating to the offense;
 - (D) A public proceeding of the service clemency and parole board relating to the offense; and
 - (E) The release or escape of the accused unless such notice may endanger the safety of any person.
- (3) The right not to be excluded from any public hearing or proceeding described in paragraph (2) unless the military judge or [preliminary hearing officer], after receiving clear and convincing evidence, determines that testimony by the victim of an offense under this chapter would be materially altered if the victim heard other testimony at that hearing or proceeding.



Article 6b rights (Cont'd)

- (4) The right to be reasonably heard at any of the following:
 - (A) A public hearing concerning the continuation of confinement prior to trial of the accused
 - (B) A sentencing hearing relating to the offense
 - (C) A public proceeding of the service Clemency and Parole Board relating to the offense
- (5) The reasonable right to confer with the counsel representing the Government at any proceeding described in paragraph (2).
- (6) The right to receive restitution as provided in law.
- (7) The right to proceedings free from unreasonable delay.
- (8) The right to be treated with fairness and with respect for the dignity and privacy of the victim.



VLCO Impact

Positive victim responses to legal services

- Confidence to report crimes
- Increased satisfaction with military justice process

- Success protecting victims' privacy rights
 - Mental health records
 - Sexual history

- Legal services provided are based on individual client goals
 - Administrative separation
 - Expedited transfer
 - Transitional compensation
 - Declination to participate in court-martial



REFERENCES

- 10 USC §1044 – Legal Assistance
- 10 USC §1044e – Special Victims’ Counsel
- 10 USC §1565b – Legal Assistance to Sexual Assault Victims
- JAGINST 5800.7F (JAGMAN)
- SECDEF Memo – 14 Aug 2013
- MARADMIN 583/13 – 31 Oct 2013
- MCO P5800.16A – Marine Corps Manual for Legal Administration
- DODI 6495.02 – SAPR Program
- MCO 1752.5B – SAPR Program
- MCO 5800.14 – VWAP
- MCO 1754.11 – Family Advocacy Program
- 18 USC §3771 – Crime Victims’ Rights Act



QUESTIONS?