

**JUDICIAL PROCEEDINGS PANEL
REQUEST FOR INFORMATION SET # 1**

50. Services: How do trial and defense counsel obtain mental health records of non-military victims?

USA	Unless voluntarily provided by the witness, evidence not under the control of the government must be obtained by subpoena issued in accordance with R.C.M. 703(e)(2). The same privileges and procedures stated above apply.
USAF	<p>If the non-military victim is represented by counsel, trial counsel and defense counsel would be required by professional ethics rules to go through that counsel before asking for consent to release mental health records. When a non-military victim is not represented by legal counsel, trial counsel works directly with that victim to advise the victim of the MRE 513 privilege and process. The victim would have the same choices described above in RFI #49: choose to consent to trial counsel or defense counsel review, assist in obtaining sealed mental health records for possible <i>in camera</i> review by the military judge, or do nothing. If the military judge determined a hearing was necessary, the hearing would routinely be closed. The patient would have the right to be heard, including through counsel. If the military judge ordered production of the records, then trial counsel would issue a subpoena. The military judge would then conduct an <i>in camera</i> review. If any records were released to the parties for discovery, the military judge would routinely issue an extensive protective order.</p> <p>For defense counsel, the process of obtaining records of victims who are not members of the military is the same as described above in response to RFIs #46 and 49.</p>
USN	Non-military medical records are obtained either with the informed consent of the victim, or, if specifically relevant to probable cause or constitutionally required, they may be sought using a subpoena.
USMC	If the victim is non-military, his or her mental health records may only be obtained through the voluntary consent of the victim or via court ordered subpoena pursuant to R.C.M. 703(e)(2), which must be litigated pursuant to MRE 513. MRE 513(e) requires that a MJ conduct a hearing prior to ordering the production of MRE 513 information to which the patient shall be afforded a reasonable opportunity to attend the hearing and be heard. RCM 703(f) permits a custodian of evidence to request relief from compliance with the subpoena or order of production upon showing that such production would be unreasonable or oppressive.
USCG	The most common way for trial counsel to obtain mental health and other medical records of non-military sexual assault victims is to request, when needed, that the victim consent to the disclosure of the records. Trial counsel then work with the victim and relevant health care providers to obtain the requested records. Once the record is obtained, the trial counsel typically will ask the military judge to conduct an <i>in camera</i> review of the record before disclosing it to the defense. The possibility of use of a subpoena under Article 47 of the UCMJ and R.C.M. 703(e)(2) exists, but without consent of the victim, that can be counterproductive because many health care providers will fight a subpoena if the victim has not consented to the release, resulting in lengthy litigation. And health care providers in many states have concerns about complying with a subpoena for health records if they believe such compliance might conflict with existing state disclosure laws, or the rules of their licensing authority.

**JUDICIAL PROCEEDINGS PANEL
REQUEST FOR INFORMATION SET # 1**

	<p>Defense counsel usually work through trial counsel to try to obtain records of non-military witnesses as the trial counsel has subpoena authority. To the extent there is disagreement about use of a subpoena or whether to try to obtain defense requested records, defense counsel can make a motion to compel production to the military judge.</p>
--	--