

Major Katherine A. Krul*

“Military’s response to rapes, domestic abuse falls short. Reforms lag despite numerous scandals, recommended solutions.”¹

I. Introduction

As a deployed Brigade Judge Advocate (BJA) whose higher headquarters is hours away, you serve on the brigade’s Sexual Assault Review Board (SARB).² During one of your monthly meetings, the Deployable Sexual Assault Response Coordinator (DSARC), a Sergeant First Class (SFC) who volunteered for the position, briefs the commanders in attendance that a female Private First Class (PFC) was sexually assaulted after a night of drinking. Although the PFC wants to restrict the report, the Unit Victim Advocate (UVA), who is also her company commander, explained she did not have this option because she confided in a chaplain’s assistant when seeking counseling and a medic when she sought testing for sexually transmitted diseases (STDs). Instead, the company commander took her to Criminal Investigation Division (CID) and told her to make a statement because he intends to court-martial the offender, who is also in his unit. She reminds him that she does not want anyone else to find out; she just wants help dealing with the situation. The brigade commander, like the company commander, is furious about the incident. During the SARB he announces he will “castrate the next Soldier he finds messing with his females.” For their own safety, he orders all female Soldiers to always travel in buddy teams, especially at night. Your paralegal has already drafted the victim’s Article 15 for drinking in violation of General Order Number 1.

Although this scenario is notional, it is not hard to imagine. Perhaps more surprising is that most of these issues are not directly addressed by the Army’s current policy.³ While the Department of Defense (DOD) response to increasing reports⁴ of sexual assault was commendable, it is fraught with potential pitfalls, allowing scenarios like the one above to occur. Likewise, there is little guidance on how to accomplish the Judge Advocate’s (JA’s) mission as a part of the SAPR team.⁵ Parts I and II of this article will provide JAs a general overview of the program, address problem areas, and provide practical solutions to common problems. Part III will specifically address SARB implementation, and Part IV will provide guidance on SAPR implementation in a deployed environment.

II. Background and Overview

In 2004, perhaps in response to public outrage,⁶ the DOD became serious about rethinking the current sexual assault policies,⁷ and the Secretary of Defense ordered a review of sexual assaults throughout the military.⁸ Just two months later,

* Judge Advocate, U.S. Army. Presently assigned as Brigade Judge Advocate, 3d Brigade Combat Team, 25th Inf. Div., Iraq. LL.M., The Judge Advocate General’s Legal Ctr. & Sch. (TJAGLCS), U.S. Army, Charlottesville, Va.; J.D., 2000, University of South Carolina; B.A., 1997, Saint Bonaventure University, N.Y. Previous assignments include Chief, Administrative Law, Fort Jackson, S.C. 2006–2007, Chief, Criminal Law, Fort Jackson S.C. 2005–2006, Defense Counsel, Fort Jackson, S.C. 2004–2005, Brigade Judge Advocate/Trial Counsel, Fort Drum, N.Y. 2002–2004, Chief, Client Services, Kosovo 2001–2002, Legal Assistance Attorney, Fort Drum, N.Y. 2001. Member of the bars of South Carolina and the District of Columbia. This article was submitted in partial completion of the Master of Laws requirements of the 56th Judge Advocate Officer Graduate Course.

¹ Amy Herdy & Miles Mofeit, *Military’s Response to Rapes, Domestic Abuse Falls Short: Reforms Lag Despite Numerous Scandals, Recommended Solutions*, DENV. POST, Nov. 18, 2003, at A-1 (describing military sexual assault scandals including those at the Air Force Academy, and reports of sexual assaults of Soldiers deployed to Operation Enduring Freedom (OEF) and Operation Iraqi Freedom (OIF)).

² U.S. DEP’T OF ARMY, REG. 600-20, ARMY COMMAND POLICY app. F-1 (18 Mar. 2008) [hereinafter AR 600-20] (“In a deployed environment, the SARB will be convened at brigade or higher level as appropriate and follow the same format as the installation SARB.”).

³ *Id.* ch. 8.

⁴ U.S. DEP’T OF DEFENSE, TASK FORCE REPORT ON CARE FOR VICTIMS OF SEXUAL ASSAULT v (2004) [hereinafter TASK FORCE REPORT].

⁵ AR 600-20, *supra* note 2, para. 8-5(g).

⁶ See generally U.S. DEP’T OF DEFENSE, OFFICE OF THE INSPECTOR GENERAL, REPORT NO. IP02004C003, EVALUATION OF SEXUAL ASSAULT, REPRISAL, AND RELATED LEADERSHIP CHALLENGES AT THE UNITED STATES AIR FORCE ACADEMY background (2004) (describing how the investigation into this issue began).

⁷ *Sexual Assault and Violence Against Women in the Military and at the Academies: Hearing Before the Subcomm. on National Security, Emerging Threats, and International Relations, of the H. Comm. on Government Reform*, 109th Cong. 94 (2006) [hereinafter *Hearing*] (statement of Dr. Kaye Whitley) (explaining the task force was launched out of Defense Secretary Rumsfeld’s “concern about reports of sexual assault in Iraq and Kuwait”).

the DOD Care for Victims of Sexual Assaults Task Force (Task Force) released *The Task Force Report on Care for Victims of Sexual Assault*.⁹ It found that “[e]xisting policies and programs aimed at preventing sexual assault were inconsistent and incomplete,”¹⁰ and the military lacked a “standard approach in preventing sexual assault.”¹¹ Perhaps most importantly, the Task Force found the lack of confidentiality available to victims in the military prevented a significant number of victims from even reporting sexual assaults.¹²

A. Response

Congress mandated the development of a comprehensive sexual assault policy by 2005.¹³ The Under Secretary of Defense soon directed the services to adopt new policies and procedures regarding sexual assault.¹⁴ The information in these memoranda was incorporated into guidelines published by DOD.¹⁵ These included requirements for training on sexual assault prevention and the implementation of Sexual Assault Response Coordinators (SARC), as well as Victim Advocates (VAs).¹⁶ The position of Sexual Assault Prevention and Response Office (SAPRO) was created to provide oversight, guidance and accountability of sexual assaults within the DOD.¹⁷ Perhaps the most significant and controversial change was the new confidential reporting policy.¹⁸ This policy gave sexually assaulted Soldiers an option of “restricted reporting”¹⁹ so they could receive medical and psychological care without initiating an investigation.²⁰

Many military leaders are still uncomfortable with DOD’s decision to allow restricted reporting, as it represents a “major cultural shift”²¹ in our value system. Judge Advocates themselves may not believe servicemembers should have the option of restricted reporting, as some view it as turning a blind eye to crime. While the Task Force took these concerns into account,²²

⁸ See TASK FORCE REPORT, *supra* note 4, at v (expressing concern “about recent reports regarding allegations of sexual assaults on service members deployed to Iraq and Kuwait” (quoting Memorandum from Sec’y of Defense to Under Sec’y of Defense, subject: Department of Defense Care for Victims of Sexual Assault (Feb. 5, 2004))).

⁹ See *id.* at vii.

¹⁰ *Id.* at ix, 23.

¹¹ *Id.* at 9.

¹² *Id.* at 30.

¹³ *Hearing, supra* note 7, at 95 (statement of Dr. Kaye Whitley).

¹⁴ See Memoranda from The Under Sec’y of Defense to Secretaries of the Military Dep’ts et al., subject: Collateral Misconduct in Sexual Assault Cases (Nov. 12 2004); Increased Victim Support and A Better Accounting of Sexual Assault Cases (Nov. 22, 2004); Review of Administrative Separation Actions Involving Victims of Sexual Assault, DTM-04-018 (Nov. 22, 2004); Training Standards for Pre-Deployment Information on Sexual Assault and Response Training, DTM-04-016 (Dec. 13, 2004); Department of Defense (DoD) Definition of Sexual Assault, DTM-04-014 (Dec. 13, 2004); Collaboration with Civilian Authorities for Sexual Assault Victim Support (Dec. 17, 2004); Commander Checklist for Responding to Allegations of Sexual Assault, DTM-04-013 (Dec. 15, 2004); Training Standards for DoD Personnel on Sexual Assault Prevention & Response, DTM-04-015 (Dec. 13, 2004); Response Capability for Sexual Assault, DTM-04-012 (Dec. 17, 2004); Confidentiality Policy for Victims of Sexual Assault (Mar. 16, 2005); DoD Policy on Collecting DNA Samples from Military Prisoners (Apr. 18, 2005); Essential Training Tasks for a Sexual Assault Response Capability, DTM-05-010 (Apr. 26, 2005); Sexual Assault Evidence Collection and Preservation Under Restricted Reporting, DTM-05-009 (June 30, 2005); Memorandum from The Under Sec’y of Defense to Assistant Sec’y of the Army et al., subject: Data Call for CY04 Sexual Assaults, DTM-04-019 (Nov. 22, 2004).

¹⁵ U.S. DEP’T OF DEFENSE, DIR. 6495.01, SEXUAL ASSAULT PREVENTION AND RESPONSE (SAPR) PROGRAM (6 Oct. 2005) [hereinafter DODD 6495.01]; U.S. DEP’T OF DEFENSE, INSTR. 6495.02, SEXUAL ASSAULT PREVENTION AND RESPONSE PROGRAM PROCEDURES (23 June 2006) [hereinafter DODI 6495.02].

¹⁶ DODI 6495.02, *supra* note 15, para. E.3.2.

¹⁷ *Id.* para. 5.3.

¹⁸ *Hearing, supra* note 7, at 105 (statement of Dr. Kaye Whitley).

¹⁹ See AR 600-20, *supra* note 2, para. 8-4(c).

Restricted reporting allows a Soldier who is a sexual assault victim, on a confidential basis, to disclose the details of his/her assault to specifically identified individuals and receive medical treatment and counseling, without triggering the official investigative process. Soldiers who are sexually assaulted and desire restricted reporting under this policy should report the assault to the sexual assault response coordinator (SARC), victim advocate, chaplain, or a healthcare provider.

Id.

²⁰ *Hearing, supra* note 7, at 106 (statement of Dr. Kaye Whitley).

²¹ *Id.* at 105 (statement of Dr. Kaye Whitley).

²² See TASK FORCE REPORT, *supra* note 4, at 32, 41 (recognizing the concern that restricted reporting could impede commanders’ responsibilities and increase the potential for false allegations).

the policy was developed with serious consideration of the needs of our servicemember victims.²³ Army Regulation (AR) 600-20 explains

The Army is committed to ensuring victims of sexual assault are protected, treated with dignity and respect, and provided support, advocacy and care. Army policy strongly supports effective command awareness and prevention programs, and law enforcement and criminal justice activities that will maximize accountability and prosecution of sexual assault perpetrators. To achieve these dual objectives, the Army prefers complete reporting of sexual assaults to activate both victims' services and accountability actions. However, recognizing that a mandate of complete reporting may represent a barrier for victims to access services when the victim desires no command or law enforcement involvement, there is a need to provide an option for confidential reporting.²⁴

B. Educating our Leaders

Appreciation of the problem and acceptance of the policy is the first step to this program's success. Understanding the reasons behind the policy may make it more palatable for those who are not immediately convinced of the need for the option of confidentiality. A JA can help commanders who struggle with the notion of restricted reporting by explaining the rationale.²⁵

For example, a prevalent reason why both civilian and Soldier victims choose not to report is the concern for privacy.²⁶ Many circumstances can necessitate this need for privacy. The sheer emotional response²⁷ from the event may cause a person to reconsider reporting. Other victims may believe they could have prevented the assault, and therefore blame themselves.²⁸ These reasons affect not only military victims, but civilians' decisions as well.²⁹

Leaders should also understand that military victims have other, significant reasons not to report an assault.³⁰ Some do so out of a lack of faith in the military justice system.³¹ Some simply do not want to "tarnish the reputation of their unit or of the armed forces when service members are losing their lives for their country."³² It is also possible that the victim cannot escape the assailant's presence. He³³ may live in the same barracks or be her supervisor.³⁴ She may also fear prosecution for a military crime such as adultery³⁵ or fraternization,³⁶ or the stigma associated with seeking psychological care, regardless of the reason.³⁷ The lack of control that comes with "secondary victimization" is "one of the most frequently cited concerns

²³ See *id.* at 28 (finding that Soldiers did not report out of "concerns that they will not be believed, feelings of embarrassment and stigma, ambiguity about what constitutes sexual assault, concerns that the criminal justice system is largely ineffective at responding to or preventing such incidents[, and] fear of reprisal from the offender").

²⁴ AR 600-20, *supra* note 2, app. H-2.

²⁵ *Id.*

²⁶ TASK FORCE REPORT, *supra* note 4, at 10.

²⁷ See DAVE GROSSMAN, ON KILLING: THE PSYCHOLOGICAL COST OF LEARNING TO KILL IN WAR AND SOCIETY 77 (1995) ("[T]he trauma of rape, like that of combat, involves minimal fear of death or injury; far more damaging is the impotence, shock, and horror in being so hated and despised as to be debased and abused by a fellow human being.").

²⁸ Rachel Yehuda, *Post-Traumatic Stress Disorder*, 346 NEW ENG. J. MED. 11 (2002).

²⁹ NAT'L INST. OF JUSTICE, SEXUAL ASSAULT ON CAMPUS: WHAT COLLEGES AND UNIVERSITIES ARE DOING ABOUT IT 6-7 (2005) ("Victims may be embarrassed or fear reprisal; and victims who may have been drinking before the assault might fear sanctions for violating campus policy on alcohol use."); see also TASK FORCE REPORT, *supra* note 4, at ix.

³⁰ MIC HUNTER, HONOR BETRAYED: SEXUAL ABUSE IN AMERICA'S MILITARY 168 (2007).

³¹ TASK FORCE REPORT, *supra* note 4, at 28.

³² T.S. NELSON, FOR LOVE OF COUNTRY 33 (2002).

³³ The use of "he" to indicate the assailant and "she" to refer to the victim is not meant to imply that men are not sexually assaulted. The pronouns are used in this manner for ease of reading.

³⁴ NELSON, *supra* note 32, at 33.

³⁵ UCMJ art. 134 (2008).

³⁶ *Hearing*, *supra* note 7, at 212 (letter from Colonel (Retired) Patrick M. Rosenow, U.S. Air Force).

³⁷ NELSON, *supra* note 32, at 130.

about reporting an abusive situation in the military.”³⁸ This can include real or perceived “harassment from the command, the investigators, or co-workers.”³⁹ A confidentiality policy, however, gives victims the opportunity to get the help they need,⁴⁰ while ensuring that their fears do not become reality.

Another tool JAs can use to educate their commanders is to compare the victim’s experience to that of a Soldier in combat. Sexual assault victims often have Post Traumatic Stress Disorder (PTSD)⁴¹ and describing victims’ responses in relation to PTSD can alert commanders to the notion that not only do they need help on their own terms, but if they do not receive it, there may be second and third order effects.⁴² These effects may include impacts on retention, readiness, morale, and loyalty.⁴³ An explanation and perhaps literature indicating that “rape is much more likely to cause PTSD than combat”⁴⁴ may help enhance a commander’s appreciation of the situation.⁴⁵ This is because “sexual assault, particularly when committed by one’s comrades is a ‘close-up, inescapable, interpersonal’ act of hatred and aggression”⁴⁶ which is more dangerous than “impersonal death and destruction.”⁴⁷

Judge Advocates may also encounter commanders fearful of false reports. Some leaders question whether the restricted reporting option will encourage confidential, but false reports.⁴⁸ Although somewhat counter-intuitive, there is a belief that because some people make false “allegations for secondary gain,”⁴⁹ more individuals will file false reports to garner attention or other favor if they know it will not be investigated.

Despite some leaders’ concern for “false reports,” it is extremely difficult to estimate how many actually occur. While some reports are ultimately unsubstantiated,⁵⁰ the victim may still believe the assault is very real.⁵¹ For example, imagine a Specialist who consents to a sexual encounter with a command sergeant major. She may feel as if she had no choice and that she was taken advantage of. The restricted reporting option allows this Soldier to receive the emotional help she needs, without anyone judging her uninformed decision or labeling it a “false report.” Such false reports may occasionally be made by a Soldier in need of psychological help, as opposed to being made with the intent to hurt another.⁵² While DOD was sensitive to the concern of false reports when designing the SARP, the need for a policy to care for victims simply outweighed the danger of false reports.⁵³ A leader’s trust in the military justice system should be great enough to put aside fears of false reports for the good of the Soldier victims.

³⁸ *Id.* at 122.

³⁹ *Id.*

⁴⁰ See AR 600-20, *supra* note 2, para. 8-4(c).

⁴¹ HUNTER, *supra* note 30, at 182.

⁴² See NELSON, *supra* note 32, at 193 (explaining retention is one of these effects).

⁴³ HUNTER, *supra* note 30, at 209–16.

⁴⁴ ERIN SOLARO, WOMEN IN THE LINE OF FIRE: WHAT YOU SHOULD KNOW ABOUT WOMEN IN THE MILITARY 287 (2006).

⁴⁵ See Andrea Stone, *Mental Toll of War Hitting Female Servicemembers*, USA TODAY, Jan. 2, 2008, at 1A (explaining the relationship between military sexual trauma and PTSD).

⁴⁶ HUNTER, *supra* note 30, at 162.

⁴⁷ *Id.* at 182 (quoting GROSSMAN, *supra* note 27, at 81).

⁴⁸ TASK FORCE REPORT, *supra* note 4, at 42. Potential reasons for a false report may include a need for attention, a desire for a transfer to a new unit, or separation. See also AR 600-20, *supra* note 2, para. 8-5(o) (outlining commander’s duties, which include determining “if an administrative separation of the victim is in the best interests of either the Army or the victim, or both”).

⁴⁹ TASK FORCE REPORT, *supra* note 4, at 42.

⁵⁰ See U.S. GEN. ACCOUNTABILITY OFFICE, REP. NO. GAO-08-296, MILITARY PERSONNEL: THE DOD AND COAST GUARD ACADEMIES HAVE TAKEN STEPS TO ADDRESS INCIDENTS OF SEXUAL HARASSMENT AND ASSAULT, BUT GREATER FEDERAL OVERSIGHT IS NEEDED 31, 32 (2008) [hereinafter GAO-08-296] (explaining that because DOD did not provide a definition of “substantiated,” the data can vary between services, especially at academies). An unsubstantiated finding does not mean the assault did not occur, however.

⁵¹ Stephanie Sacks, *Sexual Assault and the Military: A Community Sexual Assault Program’s Perspective*, CONNECTIONS 17–18 (Fall/Winter 2005).

⁵² TASK FORCE REPORT, *supra* note 4, at 42.

⁵³ *Id.* at 41.

The rate of sexual assault in the military,⁵⁴ as well its effects on individual Soldiers⁵⁵ and the Army as a whole, demands an aggressive approach to addressing this issue.⁵⁶ This begins with a confidential reporting option. It not only helps the victim, but the command as well. “A victim who receives appropriate care and treatment, and is provided an opportunity to make an informed decision about a criminal investigation is more likely to develop increased trust that his/her needs are of primary concern to the command and may eventually decide to pursue an investigation.”⁵⁷

Perhaps the most persuasive argument for the new policy is that “it is hoped that the prevention and response measures taken over the past three years have caused a decrease in sexual assaults.”⁵⁸ In other words, the Army’s current SAPR program appears to be working.⁵⁹ Without a confidential option, significant numbers of servicemembers would likely fail to report the incident and attempt to deal with assault on their own.⁶⁰ Therefore, JAs should convince commanders that restricted reporting is necessary if we truly want our Soldiers to get the help they need.⁶¹

III. General Problem Areas and Guidance

“The Sexual Assault Prevention and Response Program reinforces the Army’s commitment to eliminate incidents of sexual assault through a comprehensive policy that centers on awareness and prevention, training and education, victim advocacy, response, reporting and accountability.”⁶² While G-1 is responsible for oversight of the program,⁶³ success at the installation level requires a team effort. In addition to the SARC, key players include representatives from the Provost Marshal’s Office, CID, Medical Command (MEDDAC), Office of the Chaplain, Office of the Staff Judge Advocate (OSJA), and Inspector General (IG).⁶⁴ These individuals not only support the SAPR mission, but also serve on the SARB, to “provide executive oversight, procedural guidance and feedback concerning the installations Sexual Assault Prevention and Response program.”⁶⁵ Although AR 600-20, *Army Command Policy*, was amended to include a chapter on the SAPR and the SARB,⁶⁶ much is still subject to interpretation. The following will address, and provide solutions to, some of the issues frequently tackled by JAs.

A. Restricted Reporting Nuances

Like many Soldiers,⁶⁷ the PFC in our example does not want her assault investigated, yet she wants help to deal with the situation. Under the current policy, a Soldier who is sexually assaulted may report a sexual assault without initiating an investigation, and with some confidentiality,⁶⁸ using the restricted reporting policy. This “allows a Soldier who is a sexual

⁵⁴ U.S. DEP’T OF DEFENSE, DEPARTMENT OF DEFENSE FY07 REPORT ON SEXUAL ASSAULT IN THE MILITARY 4 (Mar. 2008) [hereinafter DOD REPORT] (finding 2688 reports of sexual assault in 2007); *see also* HUNTER, *supra* note 30, at 175 (“[T]he Department of Veteran Affairs found that from 1994 to 2004, 21 percent of servicewomen had been raped and 30 percent had experienced attempted rape.”).

⁵⁵ HUNTER, *supra* note 30, at 251.

⁵⁶ Matthew J. Friedman, *Veterans’ Mental Health in the Wake of War*, 352 NEW ENG. J. MED. 1289 (2005).

⁵⁷ AR 600-20, *supra* note 2, app. H-4(a).

⁵⁸ DOD REPORT, *supra* note 54, at 24.

⁵⁹ *See generally id.* at 3 (FY07 Policy and Program Highlights and Accomplishments); *see also* U.S. DEP’T OF DEFENSE, INSTR. 6400.06, DOMESTIC ABUSE INVOLVING DoD MILITARY AND CERTAIN CIVILIAN AFFILIATED PERSONNEL (21 Aug. 2007) (implementing a similar restricted reporting option for victims of domestic abuse, indicating restricted reporting may be the wave of the future in DOD).

⁶⁰ *See* DOD REPORT, *supra* note 54, at 19 (finding 705 reports of sexual assault in 2007, and “[o]f these . . . reports, 489 (69%) were reports of rape” but “102 (or 14% of the total 705) Restricted Reports were changed to Unrestricted Reports at the request of the victims”).

⁶¹ Friedman, *supra* note 56.

⁶² AR 600-20, *supra* note 2, para. 8-1(a).

⁶³ *Id.* para. 8-5(a).

⁶⁴ *Id.* para. 8-5(a-h).

⁶⁵ *Id.* app. F-2.

⁶⁶ *Id.* ch. 8.

⁶⁷ *See* DOD REPORT, *supra* note 54, at 20 (reporting 705 restricted reports in FY 07).

⁶⁸ *See* AR 600-20, *supra* note 2, app. H-6 (describing the exceptions to confidentiality). The list of exceptions includes the amorphous “when disclosure is necessary to prevent or lessen a serious and imminent threat to the health or safety of victim or another.” *Id.*

assault victim, on a confidential basis, to disclose the details of his/her assault to specifically identified individuals and receive medical treatment and counseling without triggering the investigative process.”⁶⁹ She can make a restricted report only to the “sexual assault response coordinator (SARC), victim advocate, chaplain, or a healthcare provider.”⁷⁰ While the first two disclosure options are clearly defined,⁷¹ the term “chaplain” and “healthcare provider” have room for interpretation and can create questions for the JA advising the SAPR team. When addressing such issues, the JA should keep in mind the policy to “promote sensitive care and confidential reporting for victims of sexual assault and accountability for those who commit these crimes,”⁷² as well as the definition of restricted reporting.⁷³ The policy explains that “Soldiers who are sexually assaulted and desire restricted reporting under this policy *should* report the assault to the sexual assault response coordinator (SARC), victim advocate, chaplain, or a healthcare provider.”⁷⁴ Remembering this permissive language allows JAs to look at the Soldier’s intent and balance it with the purpose of the policy to prevent an honest mistake from stripping a victim of her rights.⁷⁵

Like the PFC in our example, it is easy to imagine a sexual assault victim who, intending to make a restricted report to a physician, tells a medic some of the details of her assault. Should this report now be unrestricted?⁷⁶ Department of Defense Directive 6495.01, *Sexual Assault Prevention and Response (SAPR) Program*, defines Healthcare Provider (HCP) as

those individuals who are employed or assigned as healthcare professionals, or are credentialed to provide health care services, at a military medical or military dental treatment facility, or who provide such care at a deployed location or in an official capacity. This term also includes military personnel, DoD civilian

⁶⁹ *Id.* para. 8-4(c).

⁷⁰ *Id.*

⁷¹ *See id.* para. 8-5(p)–(s). “The installation SARC is a DA or contract civilian employee who works for the Family advocacy program manager (FAPM) and reports directly to the installation commander for matters concerning incidents of sexual assault.” *Id.* para. 8-5(p). “[I]nstitution victim advocates (IVAs) are DA civilian or contract employees trained to provide advocacy services to victims of sexual assault. The IVA reports directly to the Sexual Assault Response Coordinator (SARC) for sexual assault cases.” *Id.* para. 8-5(r). “The unit victim advocate (UVA) is one of two Soldiers/civilians who is appointed on orders by each battalion-level commander and trained to perform collateral duties in support of victims of sexual assault, particularly in deployed environments.” *Id.* para. 8-5(s).

⁷² *Id.* para. 8-1(a).

⁷³ *Id.* para. 8-4(c).

⁷⁴ *Id.* (emphasis added).

⁷⁵ *See* e-mail from Nathan F. Evans, U.S. Army Deputy Program Manager, Sexual Assault Prevention and Response Program, to Captain (CPT) Katherine A. Krul, Student, 56th Graduate Course, TJAGLCS (Oct. 22, 2007) [hereinafter Evans e-mail] (on file with author) (explaining restricted reporting will likely be more thoroughly explained in future guidance.) Draft language includes:

(1) The fact that the SARC/VA knows a third-party individual (victim’s friend/roommate/family member, or other, etc) who is outside the restricted reporting protective sphere (SARC/VA, HCP, Chaplain) is aware of a sexual assault incident (either as a witness or told of the incident by the victim) does not preclude the SARC/VA from offering the victim a restricted report. When offering a restricted report under these circumstances, the SARC/VA must ensure the victim is aware that an investigation may occur if law enforcement or the chain of command learns of the incident either from the third party or any other source; and that the SARC/VA will change the report to unrestricted at that time.

(2) The SARC/VA *shall not* offer a restricted report to a victim if the SARC/VA is aware (either first-hand or told by the victim or another source) that law enforcement/CID or the victim’s chain of command (to include NCO supervisory chain) knows of the incident. Under these circumstances, the SARC/VA should advise the victim that a restricted report is not an option because the chain of command is required to report the incident and law enforcement/CID is required to investigate. The SARC/VA should immediately contact the first lieutenant colonel in the chain of command and law enforcement/CID to ensure an investigation is initiated.

(3) If the SARC/VA offers restricted reporting in good faith (i.e., the SARC/VA does not know that law enforcement/CID, or the chain of command is aware of the incident), and later learns that the chain of command and/or law enforcement/CID is aware of the incident, the SARC/VA will change the report to unrestricted and make every attempt to notify the victim. The SARC/VA should immediately contact the first lieutenant colonel in the chain of command and law enforcement/CID to ensure an investigation is initiated.

(4) The type of report (restricted or unrestricted) does not change the confidential nature of information provided by the victim to the SARC/VA. Neither the chain of command nor law enforcement/CID should pressure the SARC/VA for information about the incident that the victim does not want revealed. The victim retains the right not to cooperate with the investigation.

Id.

⁷⁶ *See id.* (“[I]f the medic learns of the assault from the victim (or anyone else) in a capacity other than the performance of their duties as a medic— then the Soldier/medic ‘should’ report the assault. However, Army policy does not mandate a Soldier (unless in the chain of command) to report an incident.”); *see also* AR 600-20, *supra* note 2, para. 8-2(a).

employees, and DoD contractors who provide health care at an occupational health clinic for DoD civilian employees or DoD contractor personnel.⁷⁷

While this definition does not specifically address medics, the expansive definition arguably intends to cover them as a restricted reporting source. The term “healthcare professionals”⁷⁸ can be interpreted to mean all those involved in the care and treatment of Soldiers. Likewise, the reference to those who “provide such care at a deployed location”⁷⁹ certainly describes medics at a remote Forward Operating Base (FOB). The last phrase, describing those who are “employed or assigned . . . in an official capacity”⁸⁰ arguably covers all those in the military healthcare profession.⁸¹

While some may find this too broad a reading of the regulation, it is a necessary and appropriate interpretation.⁸² To maintain the integrity of the program, the Army must allow a Soldier who honestly and reasonably believes she is making a restricted report to maintain her privacy, even if there is some question over a technicality.⁸³ Of course, the Soldier must intend for her report only to be used to obtain treatment.⁸⁴ Therefore, in a case such as the one in our example, the JA should advise the UVA, SARC, CID, and the commander to allow the Soldier to restrict her report.

The young Soldier in our example, familiar with the SAPR program from training she attended, also attempts to seek help from the chaplain, with the intent it will remain confidential. Due to ignorance of either the duty position or the nuances of the regulation, she instead reports the incident to the chaplain’s assistant, who in turn informs the chaplain. It is unclear whether this Soldier who intended to make a restricted report can now keep her disclosure confidential.⁸⁵ Soldiers “aware of a sexual assault should immediately (within 24 hours) report incidents.”⁸⁶ Chaplain’s assistants are not excluded from this policy. However, they are directed by their own regulation that “sensitive information normally should not be disclosed unless the declarant expressly permits disclosure.”⁸⁷ Therefore, chaplain’s assistants should report such incidents only to a Chaplain.

A strict interpretation of the regulation⁸⁸ would determine that the PFC’s report falls outside the restricted realm.⁸⁹ However, requiring an unrestricted report would not be in the victim’s, command’s, or the program’s best interest. Military Rule of Evidence (MRE) 503 provides JAs with an argument to keep the report restricted.⁹⁰ Prior to the SAPR program’s implementation, many military personnel believed a Soldier could confidentially report a sexual assault to a chaplain or a chaplain’s assistant.⁹¹ This belief was based on MRE 503’s general rule of privilege between a Soldier and a “clergyman or a clergyman’s assistant.”⁹² Although the theory that any Soldier could restrict a report if it was given to a chaplain or

⁷⁷ DODD 6495.01, *supra* note 15, para. E2.1.5.

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ See AR 600-20, *supra* note 2, para. 8-7(b)(3)(j)(1) (indicating medical services are “agencies with whom victims can initiate a restricted report”).

⁸² Telephone Interview with Charles E. Orck, U.S. Army Medical Command Attorney, in Fort Sam Houston, Tex. (Oct. 1, 2007) [hereinafter Orck Interview].

⁸³ *Id.*

⁸⁴ See *id.* (explaining that if the victim was a medic and the hospital commander was treating her, the report could still be restricted. We should look at the intent of the regulation, as opposed to the hyper-technical definitions in the regulation. Likewise, a receptionist could also be a covered source, if the patient was seeking medical treatment.)

⁸⁵ See Evans e-mail, *supra* note 75 (explaining that while a medic can sometimes qualify as a HCP, a chaplain’s assistant can never qualify as a “chaplain” for purposes of this regulation. *But see* MANUAL FOR COURTS-MARTIAL, UNITED STATES, MIL. R. EVID. 503 (2008) [hereinafter MCM] (explaining a privilege exists when a “confidential communication” is disclosed to a “clergyman’s assistant”).

⁸⁶ AR 600-20, *supra* note 2, para. 8-2(a).

⁸⁷ U.S. DEP’T OF ARMY, REG. 165-1, CHAPLAIN ACTIVITIES IN THE UNITED STATES ARMY para. 4-4(n)(2) (25 Mar. 2004) [hereinafter AR 165-1].

⁸⁸ See Evans e-mail, *supra* note 75.

⁸⁹ AR 600-20, *supra* note 2, para. 8-4(c).

⁹⁰ MCM, *supra* note 85, MIL. R. EVID. 503.

⁹¹ TASK FORCE REPORT, *supra* note 4, at 12.

⁹² MCM, *supra* note 85, R.C.M. 503.

chaplain's assistant is somewhat imperfect,⁹³ an analogy between our current regulation and MRE 503 can be made to allow restricted reporting to chaplain's assistants. Given the purpose of the SAPR program,⁹⁴ the historical privilege, and the directive regarding sensitive information,⁹⁵ the JA should argue the Soldier is entitled to the restricted reporting option.⁹⁶

A comparison of the chaplain's assistants to the broad definition of "healthcare provider"⁹⁷ can also be made as an argument for a restricted report. As discussed, this definition arguably allows for a Soldier to make a restricted report to a medic and maintain confidentiality. Analogizing a chaplain's assistant to a medic for SAPR purposes allows a victim to maintain the privacy she wants while obtaining the help she needs. However, because of the competing guidance, the JA should ensure chaplain's assistants, like medics, receive specialized training with emphasis on situations like the one in the example.

Judge Advocates cannot rely only on the AR 600-20 when addressing restricted report issues. For instance, although not specifically addressed by the regulation, a Legal Assistance or Trial Defense Service (TDS) attorney may also provide a restricted reporting option for a victim; these JAs must keep a client's confidences.⁹⁸ Therefore, those learning of a sexual assault under the cloak of attorney-client confidentiality as opposed to a victim-prosecutor relationship must respect the client's wishes.⁹⁹ Client services attorneys should be well versed in Soldiers' options and explain them in detail. If the Soldier wants to make a restricted report, the attorney should be able to put them in touch with a victim advocate as soon as possible.

Restricted reporting issues in the Initial Entry Training (IET) environment are even more abundant, and again, JAs must look beyond AR 600-20 for guidance. Training and Doctrine Command (TRADOC) Regulation 350-6, *Enlisted Initial Entry Training (IET) Policies and Administration* (TR 350-6), reminds cadre to be mindful of the restricted reporting option available to Soldiers when "collecting pre-sick call information."¹⁰⁰ In other words, it recognizes the inherent rank disparity between trainees and cadre can cause new Soldiers, who must address nearly every concern with their drill sergeant before taking action, to forget the nuances of the restricted reporting option.

Even with this provision, it is easy to imagine a situation where an IET Soldier asks a drill sergeant for permission to go to sick call, and the drill sergeant responds with "What for, Soldier?" This places the victim in a precarious situation. Given the environment, she is likely to respond truthfully to her drill sergeant's inquiry, potentially forfeiting her right to a restricted report. Although TR 350-6 explains the drill sergeant could be subject to disciplinary action for a violation of the policy, it does not address whether the Soldier has lost the ability to keep her assault confidential.¹⁰¹ After the "cat is out of the bag" to a member of the chain of command,¹⁰² restricted reporting is technically no longer an option.

In all situations, the commander should still ensure the victim has the opportunity to meet with a VA immediately. The VA may explain to the Soldier that if she still does not want to pursue an investigation, she can elect not to make a statement to CID. This would effectively allow her to maintain her confidentiality while remaining within DOD and Army guidance.¹⁰³ While some CID agents may intuitively see this as a reasonable solution, JAs should discuss this option with their servicing CID office to ensure that the agents do not unduly pressure the victim. Judge Advocates must also proactively discuss the health and safety exception with law enforcement personnel, as explained below.

⁹³ See *id.* (limiting the privilege to those "made either as a formal act of religion or as a matter of conscience"). In the case described, and many others, the privilege could therefore not be invoked.); see also Major Paul M. Schimpf, *Talk the Talk; Now Walk the Walk: Giving an Absolute Privilege to Communications Between a Victim and Victim-Advocate in the Military*, 185 MIL. L. REV. 149, 163 (2005).

⁹⁴ AR 600-20, *supra* note 2, para. 8-1(a) ("promote[ing] sensitive care and confidential reporting for victims of sexual assault and accountability for those who commit these crimes").

⁹⁵ AR 165-1, *supra* note 87, para. 4-4(n)(2).

⁹⁶ But see DOD REPORT, *supra* note 54, at 6 (directly contradicting AR 600-20 para. 8-4(c), stating that chaplains "cannot accept Restricted Reports").

⁹⁷ DODD 6495.01, *supra* note 15, para. E2.1.5.

⁹⁸ U.S. DEP'T OF ARMY, REG. 27-26, RULES OF PROFESSIONAL CONDUCT FOR LAWYERS R. 1.6(a) (1 May 1992) [hereinafter AR 27-26].

⁹⁹ But see *id.* R. 1.6 (providing exceptions to the general rule of confidentiality).

¹⁰⁰ TRADOC REG. 350-6, ENLISTED INITIAL ENTRY TRAINING (IET) POLICIES AND ADMINISTRATION app. H-4(c) (8 May 2007) [hereinafter TR 350-6].

¹⁰¹ *Id.*; see also *Hearing*, *supra* note 7, at 95 (statement of Delilah Rumburg) (identifying "loopholes" such as this).

¹⁰² AR 600-20, *supra* note 2, app. H-4(b).

¹⁰³ See e-mail from Lieutenant Colonel (LTC) Martha L. Foss, U.S. Army JAG Corps Legal Assistance Policy Div., to CPT Katherine A. Krul, Student, 56th Graduate Course, TJAGLCS (Mar. 10, 2008) [hereinafter Foss e-mail] (on file with author) (from 2004-2007, LTC Foss was the Deputy SJA at Fort Jackson, S.C).

B. Health and Safety Exception to Confidential Reporting

A “health and safety” exception has been carved out of the restricted reporting rules “to prevent or lessen a serious and imminent threat to the health or safety of victim or another.”¹⁰⁴ Judge Advocates must help determine when this exception should allow disclosure of a restricted report to the command or law enforcement to protect the intent of the SAPR policy.¹⁰⁵ It should be used carefully, looking at the totality of the circumstances.¹⁰⁶ For example, informing law enforcement that a victim claims her assailant threatened to kill her if she reports the assault could be an appropriate use of this exception.¹⁰⁷

This exception could be used when there are repeated restricted reports of sexual assault committed by the same individual. If multiple victims come forward regarding the same person, the report could lose its confidentiality in order to protect the next potential victim.¹⁰⁸ This exception should be saved for the most serious cases to maintain the integrity of the policy, and “[t]he disclosure will be limited to information necessary to satisfy the purpose of the disclosure.”¹⁰⁹ However, a disclosure could be for anything from implementing additional safety procedures to a potential court-martial, the JA should be a part of the decision making process whenever the health and safety exception is considered.

C. Jurisdictional Issues to Confidential Reporting

Although HCPs are one of the four listed confidential reporting options,¹¹⁰ they may have to report sexual assaults based on the law of the state where they are stationed.¹¹¹ When the HCP is located in a state that requires reports of sexual assaults, the medical treatment facility must report such incidents.¹¹² Although this seems counter-intuitive, especially on an exclusive federal jurisdiction installation, AR 600-20, appendix H-6(a)(5) is interpreted to mean that state law applies to sexual assault reporting.¹¹³ It waives the restricted reporting protections when “disclosure is ordered by or is required by Federal or state statute.”¹¹⁴ The state law where the medical facility is located, not the state law licensing the HCP, determines release of the information.¹¹⁵ It is crucial for JAs to understand this policy, as AR 600-20 requires the “SARC, victim advocates, and healthcare providers . . . [to] consult with the servicing legal office” on these matters.¹¹⁶ Judge Advocates must ensure that any reporting to civilian authorities is the absolute minimum to meet state law requirements.¹¹⁷

Judge Advocates should also verify that VAs and HCPs properly brief Soldiers on this nuance, especially in states that require such reporting, so victims can make a truly informed decision.¹¹⁸ Unfortunately, some victims may then choose not to report the assault at all, and fail to get the help they need.¹¹⁹

¹⁰⁴ AR 600-20, *supra* note 2, app. H-6(a)(2).

¹⁰⁵ Examples of what qualifies under the health and safety exception are not provided. *But see* Evans e-mail, *supra* note 75 (concurring that examples include circumstances where a victim’s life is threatened, or numerous victims file a restricted report on the same alleged offender).

¹⁰⁶ *See* DODD 6495.01, *supra* note 15, para. E3.1.8.6.

¹⁰⁷ Evans e-mail, *supra* note 75.

¹⁰⁸ *Id.*

¹⁰⁹ DODD 6495.01, *supra* note 15, para. E3.1.8.8

¹¹⁰ AR 600-20, *supra* note 2, para 8-4(c).

¹¹¹ Evans e-mail, *supra* note 75.

¹¹² *Id.*

¹¹³ Orck Interview, *supra* note 82.

¹¹⁴ AR 600-20, *supra* note 2, app. H-6(a)(5).

¹¹⁵ *See* Evans e-mail, *supra* note 75 (“HCPs assigned to an MTF in a state that requires sexual assault reporting will comply with that rule. In states that do not require reporting, all HCPs will follow that rule, even if they are licensed in a state that requires reporting of sexual assaults.”).

¹¹⁶ AR 600-20, *supra* note 2, app. H-6(a)(5).

¹¹⁷ *See* Evans e-mail, *supra* note 75 (“The HCP will NOT report the matter to CID or installation law enforcement, only to the state authorities as required by statute.”).

¹¹⁸ Because DD Form 2910, block 1(c)(4) prompts the VA or SARC to explain this requirement, the issue should be highlighted during training and comprehension thoroughly checked when obtaining the victim’s preference. *See* U.S. Dep’t of Defense, DD Form 2910, Victim Reporting Preference Statement (June 2006).

D. Collateral Misconduct

The paralegal in our scenario already prepared the Article 15 for the victim's drinking. However, the regulation directs commanders to, "[a]bsent overriding considerations, . . . consider exercising their authority in appropriate cases to defer disciplinary actions for the victim's misconduct until after the final disposition of the sexual assault case."¹²⁰ This directive is not always well received, as commanders are rarely comfortable allowing Uniform Code of Military (UCMJ) actions of any type to linger, and many sexual assaults involve misconduct of some sort by the victim.¹²¹ Judge Advocates must serve as a gate keeper when a commander wants to quickly address a victim's alleged misconduct. Judge Advocates can remind commanders to take the victim's alleged misconduct seriously, but in proper context of the entire situation.¹²² Leaders should be sensitive to the fact that the fear of punishment for collateral misconduct is one of the reasons victims fail to report.¹²³ Taking action against the victim will only compound the problem, not only for the individual at hand, but also for those who may be victimized in the future. Their fears will be realized.¹²⁴

Judge Advocates must also train paralegals to recognize these situations, and to inform their JA when a commander intends to take quick action. For instance, the paralegal in the introduction's example should have notified the BJA instead of preparing the Article 15 immediately. Although it is a commander's responsibility¹²⁵ to "determine how to best dispose of the victim's collateral misconduct,"¹²⁶ Judge Advocates must ensure that it is the exception, and not the general rule, that victims' collateral misconduct is handled prior to the "final disposition of the sexual assault case."¹²⁷

Judge Advocates should also recognize that some victims do not report because they are fearful of "being traumatized by the criminal justice system process."¹²⁸ In fact, some find the process "more traumatic than the sexual assault because it was perpetrated by those who were supposed to help."¹²⁹ These feelings will be even more intense if they are actually punished for misconduct surrounding the assault. Commanders and JAs alike should keep in mind that successful prosecutions and victim recovery should override the general philosophy of swift justice when it comes to victims of sexual assault. Victim recovery can be aided, or potentially hindered by UVAs, and their careful selection is crucial. The following will address who is best suited to assume UVA duties.

E. Selection of UVAs

The UVA should be able to be the one constant in the victim's life, as he or she "provide[s] crisis intervention, referral, and ongoing non-clinical support to the sexual assault victim."¹³⁰ Some of their most important duties are to "[i]nform victims of their options for restricted and unrestricted reporting,"¹³¹ "provide information to the SARC,"¹³² and "[p]rovide

¹¹⁹ See Theresa Scalzo, *Restricted Reporting and Civilian Rape Reporting Laws*, SAPR SOURCE., Apr. 30, 2007, at 2, available at <http://www.sapr.mil/contents/news/Aprill%202007%20Newsletter.pdf>; see also DOD REPORT, *supra* note 54, at 10 ("An action plan has been devised which includes outreach to civilian communities on the issue.).

¹²⁰ AR 600-20, *supra* note 2, app. G-2(o).

¹²¹ TASK FORCE REPORT, *supra* note 4, at 40.

¹²² AR 600-20, *supra* note 2, app. G-2(n) (o); see also DOD REPORT, *supra* note 54, at 25–26 ("The use of alcohol as a non-traditional weapon by perpetrators cannot be ignored. We must begin to examine the intersection between alcohol and sexual assault to determine whether we are responding in the best way possible to victims of alcohol-facilitated sexual assault.").

¹²³ HUNTER, *supra* note 30, at 168.

¹²⁴ See Assoc. Press, *Airman Who Alleged Rape Faces Court-Martial: She Ties Her Prosecution to Refusal to Testify Against Airmen She Says Attacked Her*, WASH. POST, Aug. 8, 2007, at A16 (discussing a case in which three alleged rapists received nonjudicial punishment and were granted immunity to testify against the Airman who refused to testify against them. Her charges of "committing indecent acts and . . . of consuming alcohol as a minor . . . involve the same men she accused of raping her."); see also Kelcey Carlson, *Alleged Air Force Rape Victim Won't Face Court Martial*, 14 Sept. 2007, at <http://www.wral.com/news/local/story/1813624/> (explaining she was ultimately "administered nonjudicial punishment for the underage drinking charge").

¹²⁵ AR 600-20, *supra* note 2, para. 8-5(m)(5) (withholding the authority to dispose of sexual assault cases to the battalion commander level).

¹²⁶ *Id.* app. G-2(o).

¹²⁷ See *id.* (explaining there should be "overriding circumstances" for a commander to deal with the victim's collateral misconduct first).

¹²⁸ HUNTER, *supra* note 30, at 168.

¹²⁹ NELSON, *supra* note 32, at 123.

¹³⁰ AR 600-20, *supra* note 2, para. 8-5(s)(1).

¹³¹ *Id.* para. 8-5(s)(4).

support to the victim throughout the medical, investigative and judicial process.”¹³³ Therefore, JAs should advise commanders not to select UVAs and DSARCs haphazardly. This type of preventive advocacy will ensure the program’s success, while appointing those less qualified can cause the mission to fail.

A commander may be tempted to select Soldiers who volunteer for this additional duty, as the obligation can be onerous. These individuals are not necessarily the best choice for this sensitive position, however. While AR 600-20 attempts to guide commanders by placing minimum rank requirements on UVAs and DSARCs,¹³⁴ merely meeting these minimum requirements will not promote the program’s success.

A commander should adhere to the UVA selection criteria,¹³⁵ although this can be difficult.¹³⁶ Perhaps most easily overlooked, but also the most important, are the requirements to “have outstanding duty performance, as evidenced by a review of the individual’s evaluation reports”¹³⁷ and “[d]emonstrate stability in personal affairs. Soldier will not have a history of domestic violence or severe personal problems, including significant indebtedness, excessive use of alcohol, or any use of illegal drugs.”¹³⁸ Potential UVAs who themselves are dealing with personal issues may not be the best choice. It is important to have model, yet unbiased individuals in this position, as they are responsible to “support, assist and guide the victim through the process.”¹³⁹ Someone whose obligations will not allow them to be the one constant in the victim’s life should not serve in this role.

The individual must be mature enough to assist the victim, without counseling her.¹⁴⁰ They must remain within the scope of their duties, which may be difficult for some to do.¹⁴¹ Therefore, commanders should look beyond the requirements of the regulation, and truly determine the best candidate for the job, as opposed to merely having the S-1 inquire into who currently does not hold an additional duty.

At first blush, a battalion commander may see Department of Army (DA) civilians, company commanders, and mental health professionals as ideal choices. In most cases, however, commanders should avoid appointing these individuals in UVA positions. Instead, commanders should consider appointing Equal Opportunity Advisors (EOA) and battalion and brigade staff as they are best situated for this duty.

While a DA civilian may be an attractive answer for a commander whose military leaders are stretched thin, this is often a poor choice. The servicing JA should remind the commander that although a GS-9 or above can serve as a UVA,¹⁴² they must be able to deploy with their unit.¹⁴³ The commander should also realistically address whether the DA civilian, like a military UVA candidate, is someone who is physically and emotionally accessible to potential victims. A UVA is one of the confidential reporting options and the UVA should be someone Soldiers feel comfortable addressing. Commanders must also remember that civilian employees who are members of a union cannot be appointed without first discussing the additional duty with the collective bargaining unit representative.¹⁴⁴ A UVA is on always on call¹⁴⁵ and overtime pay is another issue commander’s should keep in mind when considering a DA civilian for this position.

¹³² *Id.* para. 8-5(s)(4)(c).

¹³³ *Id.* para. 8-5(s)(6).

¹³⁴ *See id.* para. 8-5(o)(10) (requiring “two UVAs per battalion level and equivalent units. Commanders will select qualified officers (CW2/ILT) or higher), NCOs (SSG or higher), or DA civilian (GS-9 or higher) for duty as UVAs.”); *see also* para. 8-5(q) (requiring the deployable SARC to be an NCO (SFC or higher), officer (MAJ/CW3 or higher), or civilian (GS-11 or above)).

¹³⁵ *Id.* para. 8-6.

¹³⁶ The current Optempo means the best and brightest Soldiers are often already over-employed.

¹³⁷ AR 600-20, *supra* note 2, para. 8-6(d).

¹³⁸ *Id.* para. 8-6(e).

¹³⁹ *Id.* para. 8-5(s)(6).

¹⁴⁰ *Id.*

¹⁴¹ *See id.* (demanding the UVA not “make decisions for the victim, speak for the victim, or interfere with the legitimate operations of medical, investigative, and judicial processes”).

¹⁴² *Id.* para. 8-5(s).

¹⁴³ *Id.* para. 8-5(k)(9).

¹⁴⁴ *Id.* para. 8-6.

¹⁴⁵ *Id.* para. 8-5(o)(10).

Battalion or brigade commanders may require each company have a UVA.¹⁴⁶ Using the listed criteria,¹⁴⁷ they may be tempted to appoint company commanders as UVAs or SARCs, as in the scenario. However, company commanders should not be assigned these additional duties, as holding both a command and SAPR duty position creates unnecessary confusion for the victim and a conflict of duty for the commander. Holding both positions makes it difficult to determine whether a report was intended to be restricted if reported to the chain of command. Even if it is clear that the victim confided to the company commander while he was acting in the UVA role, the commander may now feel torn, especially if the alleged offender is also in the company. It is easy to imagine a junior commander who tries to convince the victim to unrestrict her report, or worse, divulges the information to law enforcement for the good of the company.

Placing a company commander in the UVA or SARC role may also discourage victims from reporting at all. One of the purposes of the program is to “[c]reate a climate that encourages victims to report incidents of sexual assault without fear.”¹⁴⁸ It is unlikely a Soldier who merely wants treatment without action from the chain of command would feel comfortable reporting to her commander. If commanders must serve in these roles due to personnel issues, a local policy should be put in place so that they do not serve as the UVA for their own Soldiers.¹⁴⁹ In this case, the JA can assist in drafting a policy memo for the unit to create such a rule, and every training session should remind Soldiers who serves as their UVA.

Just as commanders are attractive, but poor choices for UVAs, in the Initial Entry Training Environment, commanders may want to place drill sergeants in these positions. Drill sergeants are rarely the best choice, for several reasons. Drill sergeants’ schedules are incredibly rigorous, as they train alongside their Soldiers.¹⁵⁰ They simply do not have the additional time needed to dedicate to a victim.¹⁵¹ It is easy to imagine a Drill Sergeant becoming resentful towards a victim, as their duty as a UVA would take them away from training Soldiers.¹⁵²

The potential for unwanted media attention in light of the Aberdeen Proving Ground, Maryland and Fort Leonard Wood, Missouri scandals¹⁵³ is another reason to avoid having drill sergeants serve as UVAs. Although perhaps unwarranted, the opportunity for public criticism is great if commanders place drill sergeants in positions that could allow them to keep sexual abuse allegations quiet. Sexual harassment and inappropriate relationships¹⁵⁴ between drill sergeants and initial entry Soldiers are far from unusual¹⁵⁵ and the public could certainly perceive the implementation of the SAPR program in this fashion as a step backwards. As Privates interact with few leaders, if a victim accuses a drill sergeant of misconduct, a drill sergeant UVA could very well be the alleged drill sergeant’s battle buddy.¹⁵⁶ This could result in bias against the Soldier, a breach of confidentiality out of a sense of loyalty, or a rift in the leadership of the unit.

Commanders may also want to appoint psychiatrists and psychologists as UVAs, as a leader would presume they have the appropriate training to care for victims. While this assumption is almost certainly true, a JA should discourage their selection.¹⁵⁷ Unit victim advocates are directed to “provide support to the victim throughout the medical, investigative, and judicial process.”¹⁵⁸ Unit victim advocates may help schedule appointments, and on occasion, sit through appointments with

¹⁴⁵ See *id.* para. 8-5(o)(15) (requiring unit commanders to “[p]ublish contact information of SARCs, installation victim advocates, and UVAs, and provide take-away information such as telephone numbers for unit and installation points of contact”). Department of the Army (DA) civilians may not want personal contact information published throughout the unit.

¹⁴⁶ But see *id.* para. 8-5(1) (requiring two per battalion). Appointing more UVAs is not prohibited.

¹⁴⁷ *Id.* para. 8-6.

¹⁴⁸ *Id.* para. 8-1(b)(2).

¹⁴⁹ For instance, a battalion policy could state that A Company Soldiers use the B Company Commander as their UVA, and vice-versa.

¹⁵⁰ See e-mail from CPT John Koch, Trial Defense Service, to CPT Katherine A. Krul, Student, 56th Graduate Course, TJAGLCS (Mar. 8, 2008) [hereinafter Koch e-mail] (on file with author) (from 2006–2007, CPT Koch was the Chief of Justice at Fort Jackson, S.C.).

¹⁵¹ Foss e-mail, *supra* note 103.

¹⁵² *Id.*

¹⁵³ NELSON, *supra* note 32, at 86.

¹⁵⁴ TR 350-6, *supra* note 100, para. 2-3(b).

¹⁵⁵ NELSON, *supra* note 32, at 86.

¹⁵⁶ This use of “battle buddy” refers to a fellow drill sergeant who works closely with, and looks out for another drill sergeant.

¹⁵⁷ See Evans e-mail, *supra* note 75 (explaining that although the Chief of Chaplains “put out guidance that Chaplains will not serve as VA/SARC,” the SAPRO does not recognize the conflict with psychologists or psychiatrists serving in these roles).

¹⁵⁸ AR 600-20, *supra* note 2, para. 8-5(s)(6).

victims.¹⁵⁹ By appointing a health care provider as a UVA, in some respects the victim is losing an advocate, because UVAs can provide “ongoing non-clinical support.”¹⁶⁰

Appointing a psychotherapist (mental health care provider) as a UVA or SARC also creates the potential for confusion at trial. Military Rule of Evidence (MRE) 513 creates a psychotherapist-patient privilege which gives the patient the

privilege to refuse to disclose and to prevent any other person from disclosing a confidential communication made between a patient and a psychotherapist, or an assistant to the psychotherapist, in a case arising under the UCMJ, if such communication was made for the purpose of facilitating diagnosis or treatment of the patient’s mental or emotional condition.¹⁶¹

This privilege does not extend to UVAs, SARCs or DSARCs.¹⁶² Therefore, the psychotherapist who was also a Soldier’s UVA would have to constantly explain and delineate what was, and was not, a protected communication for purposes of MRE 513.¹⁶³ In addition, the psychotherapist would likely be forced to keep separate files on the Soldier; one recording the UVA relationship, and one documenting the psychotherapist-patient relationship.¹⁶⁴ The comingling of such files, although understandable if the psychotherapist was dual-hatted, would create even more confusion at trial.¹⁶⁵ The entire record would likely have to be reviewed.¹⁶⁶ The benefit of having a professionally trained psychotherapist is not only contrary to the intent of the program, but also not worth the risk or confusion created by such an appointment.¹⁶⁷

Equal opportunity advisors, however, may be a good option¹⁶⁸ for UVAs or DSARCs provided the individual can still accomplish his EO mission.¹⁶⁹ These Soldiers are mature, have already been through a stringent screening process,¹⁷⁰ and have training that will assist them with this duty.¹⁷¹ They also already hold a position Soldiers know they can turn to for help in lieu of addressing the situation with the command.¹⁷² Although there is a prohibition against EOAs serving in positions that “may subsequently disqualify them from being impartial or being perceived as impartial,”¹⁷³ this additional duty should not interfere with their support of the EO program.

Battalion and brigade staff members may be the officers best situated to hold the additional duty of a UVA. Not only will they likely have the maturity to handle sensitive situations, but they are also separated from the company command. Unlike a company commander or first sergeant, they will not feel as great a demand on them to maintain the good order and discipline of the unit. Therefore, they can focus their attention on the victim’s needs. Although a commander may see these officers as indispensable and unable to take on an additional duty, the JA must remind the commander that not only are all officers busy, but the program demands the best and the brightest serve as UVAs.¹⁷⁴

¹⁵⁹ *Id.*

¹⁶⁰ *Id.* para. 8-5(s)(1).

¹⁶¹ MCM, *supra* note 85, MIL. R. EVID. 513.

¹⁶² *Id.*; *see also* Schimpf, *supra* note 93, at 174.

¹⁶³ MCM, *supra* note 85, MIL. R. EVID. 513.

¹⁶⁴ *See generally id.* MIL. R. EVID. 513(e) (Procedure to determine admissibility of patient records or communications.).

¹⁶⁵ *But see* Evans e-mail, *supra* note 75 (explaining there is “no guidance on the use of psychologists” and their office does not “see a conflict”).

¹⁶⁶ MCM, *supra* note 85, MIL. R. EVID. 513(e).

¹⁶⁷ For similar reasons, chaplains and Judge Advocates should also not be appointed as UVAs or DSARCs.

¹⁶⁸ *But see* U.S. MARINE CORPS, ORDER 1752.5A, SEXUAL ASSAULT PREVENTION AND RESPONSE (SAPR) PROGRAM para. 5.2.d (5 Feb. 2008) [hereinafter USMC ORDER 1752.5A] (discouraging Marine commanders from appointing EOAs or EORs “because of the potential for a conflict of interest between the billets as a result from the SAPR Response Structure”).

¹⁶⁹ *See* Evans e-mail, *supra* note 75 (explaining no guidance on the use of EOAs as VAs or SARCs has been issued).

¹⁷⁰ AR 600-20, *supra* note 2, para. 6-6(a).

¹⁷¹ *Id.* para. 6-7.

¹⁷² *See id.* para. 6-3(k)(14).

¹⁷³ *Id.* para. 6-3(i)(22)(a).

¹⁷⁴ *Id.* para. 8-6(d).

The selection of UVAs is an incredibly important process and each should be carefully selected. The JA can, and should, help ensure a successful program by discussing this issue with battalion and brigade commanders at least yearly. A good opportunity to hold such a conversation is in the spring or early summer when most Soldiers PCS and new UVAs will be selected.

F. Selection of DSARCs

The proper selection of a DSARC is arguably even more important than the careful selection of a UVA. Deployable sexual assault response coordinators “[e]nsure the overall management of sexual assault awareness, prevention, training, and victim advocacy.”¹⁷⁵ They share UVA responsibilities, but also have additional, administrative duties. For instance, they “[o]versee Unit Victim Advocates in the performance of their UVA duties.”¹⁷⁶ They must also “[m]aintain liaison with the Provost Marshal/CID, medical and legal services, and commanders.”¹⁷⁷ Perhaps most importantly, they “[s]erve as the designated program manager of victim support services who coordinates and oversees implementation and execution of the Sexual Assault Prevention and Response Program.”¹⁷⁸ They essentially assume SARC duties while deployed,¹⁷⁹ but must also still fulfill their primary duties, therefore, the DSARC must be an exceptional individual.

The DSARC selection criteria are the same as those for UVAs, with the exception of rank.¹⁸⁰ A DSARC must be an “NCO (SFC or higher), officer (MAJ/CW3 or higher), or civilian (GS-11 or above).”¹⁸¹ The same concerns regarding the selection of UVAs apply to DSARCS, but because the DSARC has supervisory duties over the UVAs, rank must be more carefully considered.

It is likely some of the UVAs will be lieutenants (LTs) or captains (CPTs) and so commanders should first look to appoint a major (MAJ) or above to hold the DSARC position. The selection of a field grade officer will not only aid in the supervision of the program and its participants, but it will also facilitate the necessary relationships with the CID, OSJA, the Provost Marshal and medical authorities.¹⁸² As long as they meet the appropriate criteria, the brigade S-1 or division G-1 is a logical choice to serve as the DSARC. The individual is often co-located with the BJA, or staff judge advocate (SJA), facilitating frequent discussion about the program.¹⁸³ The SAPRO is part of Army G-1¹⁸⁴ and will also have the background, connection, and sense of ownership over the program that another officer may not.¹⁸⁵

The servicing JA should remind their commander that they should not wait until they receive orders to deploy to select a DSARC. Every brigade, brigade combat team (BCT), and higher should have a DSARC, trained and ready to assume the duties of the SARC if, and when, the unit deploys.¹⁸⁶ The DSARC should have a strong relationship with the installation SARC so that they can easily “maintain a liaison”¹⁸⁷ while deployed and understand the installation’s process and procedure for providing services.¹⁸⁸

¹⁷⁵ See *id.* para. 8-5(q)(1).

¹⁷⁶ *Id.* para. 8-5(q)(6).

¹⁷⁷ *Id.* para. 8-5(q)(8).

¹⁷⁸ *Id.* para. 8-5(q)(2).

¹⁷⁹ *Id.*

¹⁸⁰ *Id.* para. 8-6.

¹⁸¹ *Id.* para. 8-6(q).

¹⁸² *Id.* para. 8-5(q)(8).

¹⁸³ See *id.*

¹⁸⁴ *Id.* para. 8-5(a).

¹⁸⁵ But see e-mail from Major Edward W. Bayouth, Deputy Dir. Training Dep’t, Adjutant General (AG) Sch., Fort Jackson, S.C., to CPT Katherine A. Krul, Student, 56th Graduate Course, TJAGLCS (Nov. 8, 2007) (on file with author) (explaining someone with more experience and time would be a better choice. The AG Captain’s Career Course receives four hours of SAPR training, however.).

¹⁸⁶ AR 600-20, *supra* note 2, para. 8-5(q). If the BCT is a subordinate unit co-located with another headquarters that operates the SAPR program for the entire FOB, the BCT may not have to have a DSARC or run their own SARB.

¹⁸⁷ *Id.* para. 8-5(q)(3).

¹⁸⁸ *Id.*

The DSARC will likely not have extensive exposure to the SAPR program while in garrison and the BJA or SJA can be a distinct asset to them. The JA should recognize that their role may expand in a deployed environment, as they may be the only one on the staff with previous experience in this arena. This is yet another opportunity for the JA to be a force multiplier for the unit, and the SAPR team.

Judge Advocates also have the opportunity to shape the SARB, not only in the deployed environment, but in garrison as well. Although the SARB is proscribed by the regulation,¹⁸⁹ its workings are largely left up to interpretation. The following will address issues surrounding the SARB Chair and the JA's role on the SARB.

III. The SARB Implementation

Sexual assault review board standard operating procedures (SOPs) can vary by installation, as the format is not dictated by the regulation.¹⁹⁰ However, the SARC will likely be the primary point of contact for the meeting, and generally run the SARB.¹⁹¹ The SARC and the other members of the board, will "meet at least monthly to review the handling and disposition of all alleged sexual assault cases."¹⁹² Although the SARB is at the heart of the prevention prong of the SAPR program,¹⁹³ without proper JA involvement, it has the potential to create further problems.¹⁹⁴ While it is sometimes difficult, members of the SARB must remain faithful to its mission:

The SARB provides executive oversight, procedural guidance and feedback concerning the installation's Sexual Assault Prevention and Response program. This board reviews the installations prevention program and the response to any sexual assault incidents occurring at the installation. This includes reviewing cases and procedures to improve processes, system accountability and victim access to quality services.¹⁹⁵

A. The Sexual Assault Review Board Chair

Installation commanders must "establish an active SARB," and he, "or his designated representative," serves as the chair.¹⁹⁶ The term "installation commander" is defined to include "senior mission commanders, regional readiness commanders, or state joint forces headquarters level commanders."¹⁹⁷ While this seems to imply the garrison commander, commanding generals (CG) may want to convene and chair the SARB. Although not specifically prohibited by the regulation, JAs should discourage this practice.¹⁹⁸

The potential pitfalls are simply too great to have a CG chair, or even sit on the SARB. Specific dangers include unlawful command influence over commanders as well as the potential panel. Comments innocently made by a CG at the SARB regarding the proper handling of alleged sexual assaults could quickly become grounds for an unlawful command influence (UCI) claim.¹⁹⁹ For instance, statements meant to be supportive of the SAPR program, but that take too firm a stance on how offenders should be treated, could result in either actual or apparent UCI.²⁰⁰

¹⁸⁹ See generally *id.* app. F-1 (discussing in general terms the purpose, mission, composition and responsibilities of the SARB).

¹⁹⁰ *Id.*

¹⁹¹ Foss e-mail, *supra* note 103.

¹⁹² AR 600-20, *supra* note 2, app. F-4(b)(3).

¹⁹³ See *id.* app. F-4(a)(2).

¹⁹⁴ Further problems that may arise include unlawful command influence and tainting of the panel.

¹⁹⁵ *Id.* app. F-2.

¹⁹⁶ *Id.* para. 8-5(m)(4).

¹⁹⁷ *Id.*

¹⁹⁸ See Evans e-mail, *supra* note 75 (explaining the SJA representative has the responsibility to "keep commanders straight" when selecting the SARB chair).

¹⁹⁹ MCM, *supra* note 85, MIL. R. EVID. 104(a).

²⁰⁰ See generally *United States v. Stoneman*, 57 M.J. 35, 43 (C.A.A.F. 2002).

The potential for a UCI claim increases if the CG not only chairs the SARB, but also demands subordinate commanders' presence. Although brigade, battalion, and company commanders are not specifically prohibited from being members of the SARB, JAs should discourage this practice as well. The list of required members includes "[o]ther members . . . appointed by nature of their responsibilities as they pertain to sexual assault (for example, victim witness liaisons, Alcohol and Substance Abuse Program (ASAP) representative)." ²⁰¹ While it seems clear that the regulation did not intend for commanders to be regular members of the SARB, the SJA may have to persuade the CG and senior leadership to avoid these meetings. The UCI issue becomes even more problematic if the CG and the SJA, or his representative were also present, and perhaps provided comment. ²⁰² A compromise of requiring executive officers (XOs) to attend is one, although imperfect, solution. ²⁰³

Panel preservation is another reason to avoid senior leaders on the SARB. At many installations, a significant number of commanders will also be panel members and will hear about countless cases with some detail at the SARB, an effective voir dire could exclude many senior members simply because of their attendance at the board. A good defense counsel is wise to craft questions eliciting responses from the members that they have been briefed on the case, or a similar case, while at the SARB. ²⁰⁴ However, as discussed below, an effective JA SARB representative may be able to prevent some of these issues.

B. The JA's Role on the Sexual Assault Review Board

The installation Office of the OSJA must "[p]rovide a representative with appropriate experience and level of expertise to serve on the SARB." ²⁰⁵ While not explicitly stated, and depending on the SARB membership, either the chief of administrative law or the chief of military justice should serve in this position. ²⁰⁶ He will usually have the maturity and military justice experience to serve as an effective subject matter expert. ²⁰⁷ At installations where the CG and commanders attend the SARB, the chief of administrative law should serve as the board representative. If the SARB is chaired by the installation commander or his representative, ²⁰⁸ the chief of military justice can serve in this position.

The SJA may want to represent the OSJA on the board as the installation commander, or perhaps even the CG, will chair the board. However, given the potential for UCI, this is not recommended. ²⁰⁹ Where the CG and his commanders are members of the SARB, placing the chief of military justice on the board raises some of the same concerns. A real or perceived conflict of interest with the chief of justice's prosecutorial duties can develop, as he may find it difficult to "recommend or carry out an appropriate course of action . . . because of the lawyer's other responsibilities or interests" ²¹⁰ at the SARB. As the chief of justice will be intimately familiar with the cases, he may unknowingly and unintentionally disclose too much about the case in front of panel members. ²¹¹ Therefore, it is especially important to have members of the criminal law division avoid representing the OSJA at the SARB if the installation requires commanders to sit as board members. ²¹² If a board member was briefed on a case by a SJA, chief of justice, or trial counsel, and he also sits on the panel, challenges for cause could easily be granted. ²¹³ The chief of administrative law, however, will be less familiar with case

²⁰¹ AR 600-20, *supra* note 2, app. F-3(9).

²⁰² See *United States v. Kitts*, 23 M.J. 105, 108 (C.M.A. 1986) (finding an SJA has the potential for "unlawfully influencing the outcome of trials" because they "generally act[] with the mantle of command authority" (citing *United States v. McClain*, 22 M.J. 124 (C.M.A. 1986)).

²⁰³ This is not a perfect solution since XOs certainly might report to their commander about what was said at the SARB.

²⁰⁴ See Raymond McCaffrey, *Superintendent's Comments on Assault Could Play Role in Misconduct Trial*, WASH. POST, Mar. 8, 2007, at B6 (discussing a case in which defense attorneys argued that "the U.S. Naval Academy superintendent's campaign against sexual harassment and assault has tainted the jury pool").

²⁰⁵ AR 600-20, *supra* note 2, para. 8-5(g)(9).

²⁰⁶ At a BCT, the BJA, as opposed to the trial counsel, is best suited to serve in this position.

²⁰⁷ The elements of crimes are not always readily apparent, and the JA must be able explain the behavior individual charges reflect.

²⁰⁸ AR 600-20, *supra* note 2, para. 8-5(m).

²⁰⁹ See *United States v. Kitts*, 23 M.J. 105, 108 (C.M.A. 1986).

²¹⁰ AR 27-26, *supra* note 98, R. 1.7 cmt.

²¹¹ See AR 600-20, *supra* note 2, app. F-4(a)(6) (requiring the members "[m]aintain the integrity of confidential cases (that is, do not discuss any identifying information rather use case numbers or other non-identifying data)").

²¹² See *Kitts*, 23 M.J. at 108.

²¹³ See *United States v. Olson*, 29 C.M.R. 102, 105 (C.M.A. 1960) ("[T]he scales always become loaded against justice when lectures attended by court members involve extended discussion of offenses identical or closely related to those for which an accused is shortly to be tried.").

details and more concerned with the effectiveness of the program and opportunities for improvement. In these cases, the chief of administrative law would be a good choice to serve as the board representative, and coordinate with the victim witness liaison to be able to meaningfully participate in case updates.²¹⁴

Regardless of duty position, the JA representative must help ensure the SARB remains mission focused, and “provides executive oversight, procedural guidance and feedback concerning the installation’s Sexual Assault Prevention and Response Program.”²¹⁵ It is very easy for commanders and SARB staff to question each other about particular punishments.²¹⁶ For instance, when the SARC briefs that a Soldier only received an Article 15 for a sexual assault, the SARB chair may demand that the brigade commander in attendance explain why he was not court-martialed. Even a rational explanation for the commander’s decision does not rectify the situation. Such second-guessing creates a hostile environment, and subordinate leaders can feel their discretion is limited. While dispositions should be discussed,²¹⁷ JAs can help the program grow by encouraging SARB members to focus on and address opportunities for prevention.²¹⁸ The JA representative can improve the process by suggesting a portion of the meeting be dedicated to prevention opportunities.²¹⁹

The JA should also help maintain the victims’ privacy and confidentiality.²²⁰ Although the SARC is required only to “maintain the integrity of confidential cases”²²¹ discussed at the SARB, there is no reason unrestricted cases cannot be discussed with some level of privacy as well. This could be done by assigning the case a number, or referring to the victim as “PFC X.” This is especially important if the installation allows, or requires, senior leaders who are also members of the panel to attend the SARB. This is yet another way the JA can help protect the integrity of both the victim and the military justice system.

Maintaining confidentiality is even more important when dealing with restricted cases.²²² The SARC must not “discuss any identifying information rather use case numbers or other non-identifying data.”²²³ Although this seems to be a simple task, on some installations it may prove difficult. For instance, if there is only one female MAJ on a particular BCT staff, it will be easy to identify the victim. In such a case, the incident should only be reported as involving a female service member from a BCT, without mentioning her rank or unit.

The SARC, as well as members of the SARB should have a single point of contact at the OSJA.²²⁴ The chief of administrative law is the best person to serve in this role when VAs, chaplains, HCPs, and other members have questions about the program. This will likely occur naturally, if they attend the SARB together.²²⁵ However, this should also be part of the standard operating procedure to avoid forum shopping and accidental reporting of a restricted issue to a trial counsel. Establishing a good rapport with the SARC will not only prevent issues, but can make the program more efficient.

²¹⁴ See AR 600-20, *supra* note 2, app. F-4(a)(5).

²¹⁵ See *id.* app. F-2. The SARB should “review the handling and disposition of all alleged sexual assault cases” as opposed to criticize dispositions. *Id.* app. F-4(b)(3).

²¹⁶ *Id.* app. F-2.

²¹⁷ *Id.* app. F-4(b)(3).

²¹⁸ *Id.* app. F-4(a)(2).

²¹⁹ See *id.* app. F-4(b)(1) (“The SARB members will perform required functional tasks as designated by the appropriate regulations and as directed by the installation commander.”). The JA should encourage the board to ask the “so what” questions regarding the statistics, in search of trends that can illuminate specific areas of concern.

²²⁰ *Id.* app. F-4(a)(6).

²²¹ *Id.*

²²² *Id.*

²²³ *Id.*

²²⁴ *But see id.* para. 8-5(a) (explaining G-1 has overall responsibility for the program. Some new SARC’s may read the regulation and turn to AG personnel for help, initially. It is important for the JA to develop a relationship with the SARC early on to prevent this problem.).

²²⁵ Foss e-mail, *supra* note 103.

V. Deployment Issues

Deployments raise additional, unanswered questions about how to effectively implement the SAPR program. Although the program was developed²²⁶ during Operations Iraqi and Enduring Freedom, guidance on its implementation in a deployed environment is especially lacking. Judge Advocates must take preventative, and innovative measures to address this challenge. This section of the paper will discuss how JAs can help ensure a successful SAPR program in an operational setting.

A. Predeployment

The SAPR program requires at least, if not more attention in a deployed environment than in garrison.²²⁷ Prevention begins with predeployment training.²²⁸ However, this should consist of more than just a power point brief.²²⁹ Although AR 600-20, requires predeployment training,²³⁰ it does not specifically place this responsibility on any one individual or office. As a significant player in this process, every SJA and BJA should help ensure the training occurs. While they can serve as a combat multiplier and conduct this training themselves, the DSARC is the most appropriate individual to serve as the instructor.²³¹ Conducting predeployment training will force them to become competent in their additional area of expertise. Importantly, it will also allow Soldiers to meet the DSARC. He may have to enlist the help of other subject matter experts as well, as he is expected to brief Soldiers on the “customs, mores, and religious practices, and a brief history of the foreign countries or areas. The cultural customs and mores of coalition partners will also be addressed.”²³² Enlisting the help of the S-3 or G-3 will ensure the appropriate subject matter experts, such as civil affairs officers, assist in this process.

B. The Deployed Environment

The joint and coalition nature of our operations requires an understanding of not only the U.S. Army policy on sexual assault, but also an appreciation of our coalition partners’ attitudes on the matter, as well as our sister services’ rules and regulations. In some cases, the lack of uniformity²³³ creates frustration.

Sexual assault by foreign nationals or coalition forces is one of the additional, yet unanswered concerns of the SAPR program.²³⁴ Clear direction on how to deal with this type of issue is not provided.²³⁵ Instead, commanders are told to “confer with SJA”²³⁶ Therefore, JAs should be prepared to address these issues.²³⁷ Again, knowledge and prevention are essential.²³⁸ A strong relationship with our coalition partner JAs may be our strongest asset in combating this problem. Even in the absence of a memorandum of agreement (MOA) or status of forces agreement (SOFA), discussing our concern and policy

²²⁶ DODD 6495.01, *supra* note 15; DODI 6495.02 *supra* note 15.

²²⁷ See TASK FORCE REPORT, *supra* note 4, at x (explaining the combat theater “has a detrimental effect on the ability to timely and effectively investigate and prosecute cases, due primarily to heavy investigative workloads and insufficient on-the-ground resources to respond”).

²²⁸ AR 600-20, *supra* note 2, para. 8-7(c).

²²⁹ Injects during field training exercises (FTX) would help the unit determine if the VAs and DSARC are ready to tackle the difficult issue of sexual assault in a deployed environment.

²³⁰ AR 600-20, *supra* note 2, para. 8-7(c).

²³¹ See *id.* para. 8-5(q)(1) (requiring the DSARC to “[e]nsure overall management of sexual assault awareness, prevention, training, and victim advocacy”).

²³² *Id.* para. 8-7(c)(2).

²³³ See GAO-08-296, *supra* note 50, at 7 (“Inconsistencies exist in the way sexual harassment and assault data have been collected and reported because the department has not clearly articulated data-reporting requirements.”).

²³⁴ AR 600-20, *supra* note 2, para. 8-7(c)(1,2).

²³⁵ See TASK FORCE REPORT, *supra* note 4, at xi (recommending the establishment of “flexible templates for diplomatic and/or military-to-military agreements with coalition partners that address the jurisdiction and responsibility for crimes committed by a citizen of one nation against the citizen of another”).

²³⁶ AR 600-20, *supra* note 2, app. G-2(1)(5).

²³⁷ The JA should first look to their higher headquarters to determine if any agreements have been developed.

²³⁸ See TASK FORCE REPORT, *supra* note 4, at 26 (“[A]ggressive efforts must be taken to ensure U.S. service members understand the cultural and religious differences of coalition and host country foreign nationals that could affect their interactions with U.S. service members (male and female), and more specifically, how to deal with any inappropriate behavior of a foreign national.”).

against sexual assault can prompt our counterparts to address the issue with their troops. If practicable, we could also provide our coalition partners training material on what the U.S. military considers sexual assault. Out of a desire for prevention as well as respect for their soldiers, we should be willing to do the same. If an incident occurs, hopefully the established relationship will help both parties to come to a swift and appropriate resolution. At the same time, the JA should be ready to brief a commander that sometimes our only remedy is to provide the victim the best treatment possible, as we do not have jurisdiction over our coalition partners.

The current joint operating environment creates even more questions. Although all branches of Service must comply with DODD 6495.01, *Sexual Assault Prevention and Response Program*, and DODI 6495, *Sexual Assault Prevention and Response Program Procedures*, each branch of Service has implemented its own program.²³⁹ Unfortunately, no guidance has been issued on what policy to apply in a joint environment.²⁴⁰ While Joint Publication 1-0, *Personnel Support to Joint Operations*, prompts commanders to ensure all safeguards are in place to have a successful SAPR program in a joint environment, it does so by asking questions instead of providing answers.²⁴¹ Nevertheless, preventative lawyering can help alleviate some stress the lack of guidance creates.²⁴²

Judge Advocates should recommend that the Army policy applies to Soldiers, regardless of their operating environment.²⁴³ Such transparency will prevent confusion²⁴⁴ and ensure victims receive the help they need in the manner desired.²⁴⁵ All Services must comply with DODI 6495.02, *Sexual Assault Prevention and Response Program Procedures*²⁴⁶ and the senior mission commander's system of review and oversight could apply to the entire SAPR program.²⁴⁷

Regardless of service, it is easy to envision the commander in the scenario who has a strong reaction to reports of sexual assault on his FOB. He may develop rules to prevent any further assault of female Soldiers. Judge Advocates must guard against the imposition of "artificial restrictions on a selected subgroup of personnel."²⁴⁸ An example of a well intentioned, but inappropriate order is the requirement that female Soldiers have a battle buddy accompany them to the latrine at night.²⁴⁹ Instead, the JA can recommend more appropriate changes, such as better lighting, or training on how to prevent victimization.

VI. Conclusion

Sadly, the PFC's unfortunate situation in the example is too easy to imagine. Although necessary, our new policy is currently fraught with potential pitfalls, allowing mistakes with serious ramifications to occur. Well intentioned commanders, like the ones in the example, can follow the regulation²⁵⁰ and still have poor results.

Fortunately, most of these issues can be avoided when JAs are proactive. As subject matter experts, JAs are not limited to a reactive role. Instead, JAs are in a unique position to properly influence this young program and ensure its success. A

²³⁹ See SAPR Home Page, <http://www.sapr.mil> (last visited Sept. 4, 2008) (providing links to all Service's programs).

²⁴⁰ See Evans e-mail, *supra* note 75; see also DOD REPORT, *supra* note 54, at 9 (recognizing this issue must be addressed).

²⁴¹ JOINT CHIEFS OF STAFF, JOINT PUB.1-0, PERSONNEL SUPPORT TO JOINT OPERATIONS app. C (16 Oct. 2006).

²⁴² See USMC ORDER 1752.5A, *supra* note 168, paras. 3-1, 3-6 (detailing the U.S.M.C. SAPR program. Differences include; the SARC is normally an O-5 or O-6 and the SARB equivalent, known as the Case Management Group (CMG) is attended by both the trial and defense counsel.); see also U.S. DEP'T OF NAVY, SEC'Y OF THE NAVY INSTR. 1752.1B, SEXUAL ASSAULT VICTIM INTERVENTION (SAVI) PROGRAM encl. 4 (29 Dec. 06) (providing commanders a detailed checklist to follow to ensure a successful program before and after a sexual assault, including how to treat an accused).

²⁴³ See DOD REPORT, *supra* note 54, at 22 ("The Army continues to be the chief service provider to victims of sexual assault in the deployed environment.").

²⁴⁴ See AR 600-20, *supra* note 2, para. 8-2(a) (explaining Soldiers *should* report incidents (emphasis added)). *But see* USMC ORDER 1752.5A, *supra* note 168, para. 7.3 (requiring Marines to "[r]eport all incidents of sexual assault to PMO and the chain of command").

²⁴⁵ See DOD REPORT, *supra* note 54, at 20 (reporting that in the USCENTCOM FY07 saw 153 Unrestricted Reports and 22 Restricted Reports).

²⁴⁶ DODI 6495.02 *supra* note 15, para. 2.

²⁴⁷ See generally AR 600-20, *supra* note 2, app. F-3(a) (listing the senior mission commander, regional readiness commander, or state joint forces headquarters level commander as individuals who may be responsible for the SARB).

²⁴⁸ See *id.* para. 8-5(m)(12) (explaining "curfews for women only" are inappropriate).

²⁴⁹ See *id.*

²⁵⁰ *Id.* ch. 8.

dedicated, well-integrated JA can issue spot with the regulation's intent²⁵¹ in mind and prevent²⁵² such scenarios. Like many challenges, a JA can help ensure continued success²⁵³ by approaching the SAPR program with a positive attitude²⁵⁴ and a focus on the mission's intent.

²⁵¹ *Id.* para. 8-1(a).

²⁵² *See generally* DOD REPORT, *supra* note 54, at 13 (indicating the “[w]ay [a]head for FY08” is a “comprehensive prevention strategy . . . as more research on effective bystander interventions becomes available. The Department will also enlist experts in this field to help with the development of a social marketing campaign.”).

²⁵³ *See Hearing, supra* note 7, at 108–9 (statement of Dr. Kaye Whitley) (“[I]ncreased reporting means more victims receiving help and more investigations that will enable commanders to punish offenders.”).

²⁵⁴ HUNTER, *supra* note 30 at 238.