

172nd JUDGE ADVOCATE BASIC COURSE

VICTIM/WITNESS ASSISTANCE PROGRAM SEXUAL ASSAULT PREVENTION AND RESPONSE PROGRAM

RESTRICTED REPORTING FOR POLICY FOR INCIDENTS OF DOMESTIC ABUSE

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MAJ James L. Varley
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Outline of Instruction

I. REFERENCES.

A. Primary.

1. Justice for All Act of 2004, 18 U.S.C. § 3771 (2004) (repeals Section 502 of Victims' Rights and Restitution Act of 1990 (42 U.S.C. §§ 10606-10607)).
2. Victim Rights Clarification Act of 1997, 18 U.S.C. § 3510 (2003).
3. Victim and Witness Protection Act of 1982, 18 U.S.C. §§ 1503, 1505, 1510, 1512-1515, 3146, 3579, 3580 (1988).
4. Victims of Crime Act of 1984, 42 U.S.C. §§ 10601-10603 (1988).
5. 38 U.S.C. §1311-1314 (2003) (Dependency and Indemnity Compensation).
6. 10 U.S.C. §1059 (2003) (Transitional Compensation).
7. Under Secretary of Defense for Personnel and Readiness Policy Memorandum, "Restricted Reporting Policy for Incidents of Domestic Abuse" (January 22, 2006).
8. DoD Directive (DoD Dir.) 1030.1, Victim and Witness Assistance (April 13, 2004).

9. DoD Instruction (DoDI) 1030.2, Victim and Witness Assistance Procedures (June 4, 2004).
10. DoD Instruction (DoDI) 6495.02, Sexual Assault Prevention and Response Program (June 23, 2006).
11. Dep't of Army Reg. 27-10, Military Justice, Ch. 18 (16 November 2005).
12. Dep't of Army Reg. 600-20, Army Command Policy, Ch. 8 (1 February 2006).
13. Dep't of Air Force Instruction (AFI) 51-201, Victim and Witness Assistance, ch. 7 (25 April 1997).
14. SECNAVINST 5800.11A, Victim and Witness Assistance Program (16 June 1995).
15. Marine Corps Order 5800.15A, Victim and Witness Assistance Program (VWAP) (3 September 1997).
16. A National Protocol for Sexual Assault Medical Forensic Examinations, U.S. Department Of Justice Office on the Violence Against Women (September 2004).

B. Secondary.

1. Douglas K. Mickle, *The Army's Victim/Witness Assistance Program*, ARMY LAW., November 1994, at 3.
2. Warren G. Foote, *State Compensation for Victims of Crime*, ARMY LAW., March 1992, at 51.
3. Warren G. Foote, *Victim-Witness Assistance*, ARMY LAW., June 1991, at 63.
4. Michael S. Child, *Effective Use of Rape Trauma Syndrome*, ARMY LAW., October 1985, 11.

5. S.A. Young, *Rape Trauma Syndrome in Military Courts*, BULLETIN OF THE AMERICAN ACADEMY OF PSYCHIATRY AND THE LAW, 23(4) 1995, at 563.

6. E. C. Ritchie, *Reactions to Rape: A Military Forensic Psychiatrist's Perspective*, MILITARY MEDICINE, Vol. 163, August 1998, at 505.

7. OTJAG POC: LTC (Ret) Charles Cosgrove, 1777 North Kent Street, 10th Floor, Rosslyn,, VA 22209-2194; 703-588-6748 (Voice), 703-588-0144 (FAX); charles.cosgrove@hqda.army.mil.

II. DEFINITIONS.

A. **Victim:** a person who has suffered direct physical, emotional or pecuniary harm as the result of a commission of a crime in violation of the UCMJ (or in violation of the law of another jurisdiction if any portion of the investigation is conducted primarily by the DoD components), including but not limited to:

1. Military members and their family members;
2. When stationed OCONUS, DoD civilian employees and contractors, and their family members;
3. Institutional entity's representative (federal, state and local agencies are not eligible for services available to individual victims);
4. Victim under age 18, incompetent, incapacitated, or deceased (in order of preference): a spouse, legal guardian, parent, child, sibling, other family member, or court designated person; and
5. Includes victims identified as a result of investigations of potential UCMJ violations conducted under the provisions of AR 15-6.

B. **Witness:** person who has information or evidence about a crime, and provides that knowledge to a DoD component about an offense within the component's investigative jurisdiction. If witness is a minor, includes a family member of legal guardian. BUT not a defense witness, perpetrator or accomplice.

III. CRIME VICTIM'S RIGHTS.

- A. Fair treatment and respect for dignity and privacy;
- B. Reasonable protection from accused;
- C. Notification of court proceedings;
- D. Presence at all public court proceedings related to the offense, unless court determines victim's testimony would be materially affected by other testimony;
- E. Confer with Government attorney;
- F. Receive available restitution; and
- G. Receive information about conviction, sentencing, imprisonment and release of accused.

IV. COMMAND RESPONSIBILITIES.

- A. SJA's are designated as the "local responsible official" and have the following responsibilities:
 - 1. Establish and supervise Victim/Witness Assistance Program (VWAP) within their GCM jurisdiction. Ensure establishment of local policies and procedures to accord crime victims' the rights described in the Bill of Rights above.
 - 2. Establish a Victim and Witness Assistance Council where practical, to ensure interdisciplinary cooperation.
 - 3. Designate, in writing, Victim/Witness Liaison (VWL).
 - a) Preference for a commissioned or warrant officer or civilian (GS-11 and above).
 - b) Exceptional circumstances allow SSG and above, or GS-6 and above.

c) VWL's should be outside the military justice section "to the extent permitted by resources."

d) To the extent resources permit, SJA's "should refrain from appointing attorneys as VWL's."

4. Establish Victim-Witness Assistance Council, to extent practicable, at "each significant military installation."

5. Ensure Law Enforcement Agencies (LEA) inform victims and witnesses of VWL's name, location and phone number.

6. TRAINING! Must ensure *annual* training is provided to all agencies involved in program. At a minimum, training will cover victims' rights; available compensation through federal, state, and local agencies, providers' responsibilities under the VWAP program, and requirements and procedures of AR 27-10, Chapter 18.

7. Ensure DoD Victim and Witness Bill of Rights is posted in office of commanders and agencies providing victim and witness assistance.

8. Establish separate waiting areas at courts-martial and other investigative proceedings. "In a deployed environment, victims and Government witnesses should be afforded a separate waiting area to the greatest extent practicable."

9. Ensure victims and witnesses are advised that their interests are protected by administrative and criminal sanctions, i.e. obstruction of justice charges, etc., and that victims and witnesses should promptly report any attempted intimidation, harassment, or other tampering to military authorities.

10. Ensure appropriate law enforcement agencies are immediately notified in case where the life, well-being, or safety of a victim or witness is jeopardized by his or her participation in the criminal investigation or prosecution process.

11. Ensure victim's and witness' requests for investigative reports or other documents are processed under FOIA or Privacy Act.

12. Ensure DD Forms are distributed/completed.

13. Coordinate with criminal investigative agents to ensure all noncontraband property seized as evidence is safeguarded and returned; ensure victims are informed of applicable procedures for requesting return of property.

14. REPORTING REQUIREMENTS!! See Section VI, below.

B. DD and DA Forms (See Appendices).

1. DD Form 2701, Initial Information for Victims and Witnesses of Crime.

2. DD Form 2702, Court-Martial Information for Victims and Witnesses of Crime.

3. DD Form 2703, Post-Trial Information for Victims and Witnesses of Crime.

4. DD Form 2704, Victim/Witness Certification and Election Concerning Inmate Status.

5. DD Form 2705, Victim/Witness Notification of Confinee Status.

6. DD Form 2706, Annual Report on Victim and Witness Assistance.

7. DA Form 7568, Army Victim/Witness Liaison Program Evaluation.

C. Responsibilities (VWL, trial counsel, or other government representative).

1. VWL (recommended).

a) As soon as possible, but NLT appointment of Art. 32 Investigating Officer or referral of charges, ensure *victims and witnesses* are provided DD Form 2701 (Initial Information for Victims and Witnesses of Crime).

b) Inform *victim* of the place where the victim may receive emergency medical care and social service support.

c) Inform *victims* of where they can obtain financial, legal, and other support, including right to file Article 139 claim and right to transitional compensation, if applicable.

d) During investigation and prosecution of crime, *will provide* victims the earliest possible notice of significant events in the case, to include:

(1) Status of investigation of crime, with limits.

(2) Apprehension of suspected offender.

(3) Decision to prefer or dismiss charges.

(4) Initial appearance of suspect before pretrial confinement hearing or at Article 32, UCMJ investigation.

(5) Scheduling of each court proceeding victim is required or entitled to attend.

(6) Detention or release from detention of offender or suspected offender.

(7) Acceptance of plea of guilty or other verdict.

(8) Result of trial.

(9) If sentenced to confinement, probable parole date.

(10) General information regarding corrections process.

(11) Opportunity to consult with trial counsel concerning evidence in aggravation.

(12) How to submit victim impact statement to Army Clemency and Parole Board.

(13) The VWL will “make reasonable efforts to notify witnesses and representatives of witnesses, when applicable and at the earliest opportunity” of numbers one through ten above.

- e) Advise *victims and witnesses* of protections from intimidation. See Military Protective Order, Section V and Appendix 1, below.
- f) Act as intermediary between *victims and witnesses*, when requested, to arrange interviews by defense or government.
- g) Advise victims on property return and restitution.
- h) Notification of *victims’ and witness’* employers and creditors.
- i) Witness fees and costs.
- j) During trial and investigative proceedings, provide to *victims and witnesses*:
 - (1) Assistance in obtaining child care.
 - (2) Transportation/parking.
 - (3) Lodging.
 - (4) Separate waiting area outside presence of accused and defense witnesses.
 - (5) Translators/interpreters
- k) Upon sentence to confinement provide *victims (and witnesses “adversely affected by the offender”)*:
 - (1) General information regarding post-trial procedures (DD Form 2703).

(2) Prepare DD Form 2704. Victims and witnesses elect whether they want notification of changes in inmate status. Ensure copy forwarded to confinement facility and ensure offender does not have access to copy of information.

2. Trial counsel (recommended).

a) Consult victims concerning:

(1) Decision not to prefer charges;

(2) Decisions concerning pretrial restraint or release;

(3) Pretrial dismissal of charges; and

(4) Negotiations of pretrial agreements and their potential terms.

Note: Victim does not have veto power over command's decision on these matters; view is considered, not controlling.

b) Establish separate waiting areas at courts-martial and other investigative proceedings.

c) In coordination with SJA and CMCA, consider making restitution a term and condition of pretrial agreements. Also consider whether restitution was made when action is taken.

3. Commander, Confinement Facility.

a) Upon entry into confinement facility commander ensures receipt of DD Form 2704 and determines whether victim and/or witness requested notification of changes in confinement status. If victim and/or witness so indicated, commander will advise of:

(1) Offender's place of confinement and minimum release date.

(2) Earliest possible notice of:

- (a) Clemency/parole hearing dates.
- (b) Transfer of inmate to another facility.
- (c) Escape, recapture, or other form of release from confinement.
- (d) Release from supervised parole.
- (e) Death of inmate.

- b) Forward DD Form 2704 if inmate is transferred.
- c) Protect against disclosure to inmate of victim and witness addresses.
- d) Reporting requirements as set forth below.

V. MILITARY PROTECTIVE ORDERS

A. DOD policy is to use every appropriate effort to protect victims of abuse from further harm. Commanders shall issue military protect orders (DD Form 2873), attached as Appendix 1, when necessary to safeguard victims, quell disturbances, and maintain good order and discipline. Commanders will order members to avoid all manner of contact with specified individuals, against whom members are alleged, or are confirmed to have committed, domestic violence, child abuse, and any other crime, as stipulated in the terms and conditions of the orders.

B. Definition of Domestic Violence.

1. An offense under the United States Code, UCMJ, or state law;
2. that involves the use, attempted use, or threaten use of force against;
3. a person of the opposite sex, who is:
 - a) a current or former spouse;

- b) a person with whom the abuser shares a child;
- c) a current or former intimate partner with whom the abuser shares or has shared a common domicile.

C. Definition of Child Abuse.

- 1. Physical or mental injury; or
- 2. sexual abuse or exploitation; or
- 3. negligent treatment of a child; except
- 4. discipline administered by a parent or a legal guardian to his or her child in a reasonable manner and moderate degree which does not otherwise constitute cruelty is excluded.

VI. REPORTING REQUIREMENTS.

A. For each calendar year (CY), not later than 15 January of each year, SJA of each command having GCM jurisdiction must report:

- 1. The number of persons who received DD Forms 2701, 2702, 2703.
- 2. SJA's will obtain data for their reports from subordinate commands attached or assigned to their GCM jurisdiction for military justice purposes, including supported reserve component units.
- 3. Negative reports are required.
- 4. Use DD Form 2706.
- 5. Forward report through MACOM channels to Criminal Law Division, ATTN: DAJA-CL, HQDA, Office of The Judge Advocate General, 1777 North Kent Street, Rosslyn, VA 22209-2194.

B. Other required reports (*Negative reports required*).

1. Military Police channels report the number of :

a) Victims and witnesses who received DD Form 2701 or 2702 from LEA personnel.

b) Victims and witnesses who were informed of their right (via DD Form 2704 or otherwise) to notification of changes in inmate status.

c) Victims and witnesses who were notified using DD Form 2705.

d) Confinees, by service, in Army facilities about whom victim/witness notifications must be made.

2. OTJAG Criminal Law prepares consolidated report for submission to DoD Under Secretary for Personnel and Readiness, Legal Policy Office)

VII. EVALUATION OF VICTIM/WITNESS LIAISON PROGRAM

A. SJAs will ensure that each victim and witness in an incident that is prosecuted at a GCM or SPCM, or investigated pursuant to UCMJ, Art. 32, in those cases not disposed of by GCM or SPCM, receives a victim/witness evaluation form.

1. SJAs will use DA 7568 (Army Victim/Witness Liaison Program Evaluation).

2. Evaluation forms will be reviewed locally by the SJA and copies forwarded quarterly to Criminal Law Division, ATTN: DAJA-CL, ATTN: Victim/Witness Coordinator, Office of The Judge Advocate General, HQDA, 1777 North Kent Street, Rosslyn, VA 22209-2194, by mail or electronically.

B. Anonymous submission requirement for DA 7568 and SJA cover letter..

1. The evaluation form may be provided to victims and witnesses by hand, by mail or otherwise, but must be returned in an anonymous manner. AR 27-10, paragraph 18-28d suggests the installation of a drop box away from the military

justice section or the provision of a pre-addressed envelope or "other anonymous means of return" to victims and witnesses.

2. The recipients of the evaluation form must be advised that the form will be returned in an anonymous manner and cannot be accepted in any other manner. The evaluation form will be accompanied by a cover letter under the signature of the SJA. The cover letter will thank the victim/witness for assisting the prosecution, and emphasize the need for a response and the anonymous nature of the response.

VIII. OTHER ASSISTANCE AVAILABLE TO VICTIMS.

A. Installation assistance. VWL will assist victim in contacting agencies or individuals responsible for providing necessary services and relief.

1. Command Chaplain.

2. Family Advocacy Center/Army Community Service.

3. Emergency Relief Funds.

4. Legal Assistance, if appropriate.

5. American Red Cross.

6. If victims are not eligible for military services, or where military services are not available, "the VWL will provide liaison assistance in seeking any available nonmilitary services within the civilian community."

B. Pretrial Agreements - negotiated restitution.

C. Transportation and shipment of household goods. (See JFTR).

D. State and local assistance.

E. Transitional Compensation. 10 U.S.C. § 1059; DoD Instruction 1342.24 (23 May 1995); DoD Instruction 1342.24, Change 1 (May 1997); AR 608-1, *Army Community Service*, (20 November 2003).

1. Dependent-abuse offenses resulting in separation of servicemember from active duty or total forfeiture of all pay and allowances pursuant to court-martial conviction or administrative separation.

a) Applies to cases on or after 30 November 1993.

b) Applies to voluntary and involuntary separation proceedings (example: discharge in lieu of trial by court-martial UP Chapter 10, AR 635-200).

c) **Dependent-abuse offenses** - conduct by an individual while a member of the armed forces on active duty for a period of more than thirty days that involves abuse of the then-current spouse or dependent child of the member and that is a criminal offense defined by the Uniform Code of Military Justice or other criminal code applicable to the jurisdiction where the act of abuse is committed. Offenses that may qualify as dependent abuse offenses include sexual assault, rape, sodomy, assault, battery, murder, and manslaughter. This is not an exhaustive listing of dependent abuse offenses.

d) **Dependent Child.** An unmarried child, including an adopted child or stepchild, who was residing with the member at the time of the dependent abuse offense and who is

(1) Under 18 years of age;

(2) Eighteen or older and incapable of self-support because of mental or physical incapacity that existed prior to age 18 and who is dependent on the member for over one-half of the child's support;

(3) 18 or older, but less than 23, and is a college student and who is dependent on the member for over one-half of the child's support.

2. Compensation.

- a) Duration of payments dependent upon the unserved portion of the member's obligated active duty service (no less than 12 months, but no more than 36 months).
- b) Start-date: date sentence is adjudged if the sentence, as adjudged, includes a dismissal, dishonorable discharge, bad conduct discharge, or forfeiture of all pay and allowances; or
- c) However, if there is a pretrial agreement that provides for disapproval or suspension of a dismissal, dishonorable discharge, bad conduct discharge, or forfeiture of all pay and allowances, then start date is the date of the approval of the court-martial sentence if the sentence, as approved, includes an unsuspended dismissal, dishonorable discharge, bad conduct discharge, or forfeiture of all pay and allowances; or,
- d) If pursuant to administrative separation, the date of initiation of separation proceedings.
- e) Amount of compensation increases with each dependent. See 38 U.S.C. § 1311(a)(1).
- f) Dependent loses payments if remarries or cohabitates with abuser, or is an active participant in the abuse.
- g) Payment stops if administrative separation is disapproved.
- h) Payment stops if dismissal, dishonorable discharge, of bad-conduct discharge is remitted, set aside, or mitigated to a lesser punishment that does not include any such punishment.
- i) Application for transitional compensation: individual submits request through military service of member.
- j) Requires annual certification of entitlement to funds by spouse and dependent children.

k) Payment is from Operation and Maintenance Funds. Defense Finance and Accounting Service issues the payments, and administrative oversight of the funds (approval of payments and such) is through the Community and Family Support Center (CFSC), a DA level organization.

3. Other benefits –

a) Commissary and exchange privileges for length of time eligible for transitional compensation;

b) Medical and dental care for up to one year for injuries related to dependent abuse offense(s). Applies to dependents of a member separated due to dependent abuse offense (includes discharge as result of conviction as well as administrative separation).

F. UCMJ, art 58b.

1. “Waiver” of forfeitures of pay and allowances to dependents.
2. Maximum period is six months.
3. Request does not have to be made by accused; may be made by dependents or someone (VWL) on behalf of dependents.

G. UCMJ, art. 139.

1. Redress of injuries to property.
2. Willful damage or theft.
3. No conviction is required.

IX. VICTIM ATTENDANCE AT COURT PROCEEDINGS

A. Military Rule of Evidence 615 (Exclusion of Witnesses) prohibits the military judge from sequestering certain categories of witnesses to prevent them from hearing the testimony of other witnesses, including: “(4) a person authorized by statute to be present at courts-martial, or (5) any victim of an offense from the trial of an accused for that offense because such victim may testify or present any information in relation to the sentence or that offense during the presentencing proceedings.” These provisions of the Military Rules of Evidence were effective on 15 May 2002.

B. Subparagraph 4 extends to victims at courts-martial the same rights granted to victims by the Victims’ Rights and Restitution Act of 1990, 42 U.S.C. §10606(b)(4). That statute gives crime “victims” “the right to be present at all public proceedings related to the offense, unless the court determines that testimony by the victim would be materially affected if the victim heard the testimony at trial.”

C. Subpararaph 5 implements the Victims Rights Clarification Act of 1997, 18 U.S.C. §3510, and basically prohibits the military judge from sequestering a “victim” who will only testify in the presentencing proceeding. This section does not incorporate the balancing test of subparagraph 4, and does not permit the military judge to sequester a victim who will testify only on sentencing even where that victim’s testimony may be materially affected by hearing other testimony at trial.

1. The Victim Rights Clarification Act was passed in response to the federal district court judge’s ruling in the Oklahoma City bombing trial of Timothy McVeigh that precluded victims from attending the trial proceedings on the grounds that their victim impact testimony on sentencing would be materially affected by observing other parts of the trial on the merits.

D. A “victim” for purposes of Mil. R. Evid. 615 is defined as “a person who has suffered direct physical, emotional, or pecuniary harm as a result of the commission of a crime, including (A) in the case of a victim that is an institutional entity, an authorized representative of the entity; and (B) in the case of a victim who is under 18 years of age, incompetent, incapacitated, or deceased, one of the following (in order of preference): (i) a spouse; (ii) a legal guardian; (iii) a parent; (iv) a child; (v) a sibling; (vi) another family member; or (vii) another person designated by the court.”

E. The rules allowing victims to remain in the courtroom are subject to other rules, such as those regarding classified information, witness department, and conduct in the courtroom.

F. See Appendix 5 for further analysis of these changes.

X. SEXUAL ASSAULT PREVENTION AND RESPONSE PROGRAM

A. The Sexual Assault Prevention and Response (SAPR) 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 follow-up. Army policy promotes sensitive care and confidential reporting for victims of sexual assault and accountability for those who commit these crimes.

B. Sexual Assault Policy. Sexual assault is a criminal offense that has no place in the Army. It degrades mission readiness by devastating the Army's ability to work effectively as a team. Every Soldier who is aware of a sexual assault, should immediately (within 24 hours) report incidents of sexual assault. It is incompatible with the Army Values and is punishable under the UCMJ and other federal and local civilian laws.

C. Definition of Sexual Assault. For the purpose For the purpose of DoD-wide sexual assault prevention and response awareness training and education, the term "sexual assault" is defined as intentional sexual contact, characterized by use of force, physical threat or abuse of authority or when the victim does not or cannot consent. This definition does not affect in any way definition of any offenses under the UCMJ.

1. Sexual assault includes rape, nonconsensual sodomy (oral or anal sex), indecent assault (unwanted, inappropriate sexual contact or fondling), or attempts to commit these acts. Sexual assault can occur without regard to gender or spousal relationship or age of victim.

2. "Consent" shall not be deemed or construed to mean the failure by the victim to offer physical resistance. Consent is not given when a person uses force, threat of force, coercion, or when the victim is asleep, incapacitated, or unconscious.

D. Victim Advocacy Program. Victim's use of advocacy services is optional; however, commanders must ensure that victims have access to a well-coordinated, highly responsive sexual assault victim advocacy program that is available 24 hours a day/seven days a week both in garrison and in a deployed environment.

1. Garrison environment. Three echelons of sexual assault victim advocates.

- a) The Installation Sexual Assault Response Coordinator (SARC) is responsible for coordinating the local program. 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. SARCs will:

(1) Serve as the program manager of victim support services who coordinates and oversees the local implementation and execution of the Sexual Assault Prevention and Response Program.

(2) Ensure overall local management of sexual assault awareness, prevention, training, and victim advocacy.

(3) Oversee Victim Advocates and Unit Victim Advocates in the performance of their duties providing victim services.

(4) Ensure victims are properly advised of their options for restricted and unrestricted reporting. Ensure victim acknowledges in writing his/her preference for restricted or unrestricted reporting on the Victim Reporting Preference Statement (VRPS).

(5) Ensure all unrestricted reported incidents of sexual assault are reported to the first O-5 in the chain of command, CID, MPs and the Installation Provost Marshal with 24 hours of receipt.

(6) Ensure that non-identifying personal information/details related to a restricted report of sexual assault is provided to the Installation Commander within 24 hours of occurrence. This information may include: rank, gender, age, race, service component, status, time and location. Ensure that information is disclosed in a manner that preserves a victim's anonymity. Careful consideration of which details to include is of particular significance at installations or other locations where there are a limited number of minority females or female officers assigned.

b) Victim advocates work directly with the SARC, victims of sexual assault, unit victim advocates, and other installation response agencies.

(1) Installation Victim Advocates (IVAs). The IVAs are DA civilian or contract employees trained to provide advocacy services to victims of sexual assault. The IVA reports directly to the SARC for sexual assault cases.

(2) Unit Victim Advocates (UVA) are Soldiers trained to provide victim advocacy as a collateral duty. There are two UVAs 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. UVAs are supervised in the performance of their duties by the SARC. The UVA will be an NCO (SSG or higher), Officer (1LT/CW2 or higher), or Civilian (GS-9 or higher). UVAs will:

(a) When assigned by the SARC, provide crisis intervention, referral, and ongoing non-clinical support to the victim. The victim alone will decide whether to accept the offer of victim advocacy services.

(b) Report to and coordinate directly with the SARC or designated IVA when assigned to assist a victim.

(c) Inform victims of their options for restricted and unrestricted reporting, and explain the scope and limitations of the SARC's role as an advocate.

(i) If the victim chooses restricted reporting, ensure the victim is taken to a healthcare provider in lieu of reporting the incident to law enforcement or chain of command.

(ii) If victim chooses the unrestricted reporting option, UVA will immediately notify law enforcement and healthcare provider.

(iii) Safeguard documents in their possession pertaining to sexual assault incidents and protect information that is case related.

2. Deployed environment. Two echelons of victim advocates.

a) Deployable SARCs are Soldiers trained and responsible for coordinating the sexual assault prevention and response program as a collateral duty in a specified area of a deployed theater. There is one deployable SARC at each brigade and higher echelon. The deployable SARC will be an NCO (SFC or higher), Officer (MAJ/CW3 or higher), or Civilian (GS-11 or higher).

(1) Ensure overall management of sexual assault awareness, prevention, training and victim advocacy.

(2) Be trained by the Installation SARC prior to assuming duty.

(3) Advise the victim on their options for restricted and unrestricted reporting. Ensure victim acknowledges in writing his/her preference for restricted or unrestricted reporting on the VRPS.

b) Unit Victim Advocates (UVA) are Soldiers trained to provide victim advocacy as a collateral duty. There are two UVAs for each battalion-sized unit.

c) The deployable SARC and the UVA must be carefully selected as they are likely to become involved in highly charged, emotionally stressful situations in assisting victims of sexual assault. As a result all candidates must be properly screened and complete training in responding appropriately to victims of sexual assault.

3. Training. The objective of SAPR training is to eliminate incidents of sexual assault through a comprehensive program that focuses on awareness and prevention, education, victim advocacy, reporting, response, and follow up. There are four categories of training for the SAPR Program. The includes Professional Military Education (PME) training, Unit Level training, Pre-Deployment training, and Responder training.

a) PME training is progressive and sequential in areas such as (including but not limited to):

(1) Initial Entry Training;

(2) Pre-commissioning/Basic Officer Leadership Instruction – I (BOLC I) to include ROTC;

(3) Captain's Career Course;

(4) Pre-command Course.

b) Unit Level Training. All Soldiers will attend and participate in unit level SAPR training annually. Training will be scenario based, using real life situations to demonstrate the entire cycle of reporting, response, and accountability procedures.

c) Pre-Deployment Training. Pre-Deployment training will incorporate information on sexual assault and response. As part of the pre-deployment training, Soldiers will be presented with information to increase awareness of the customs of the host country and any coalition partners, in an effort to help prevent further sexual assaults outside of CONUS.

d) Responder Training. Primary responders to sexual assault incidents will receive the same baseline training throughout the DoD, to ensure that any Service member who is assaulted will receive the same level of response regardless of Service component. Training should emphasize coordinating victim support services is a team effort and to be effective all the team members must be allowed to do their job and must understand the role of the others on the team. First responders agencies include:

(1) Healthcare;

(2) MPs and CID;

(3) Judge Advocates;

(4) Chaplains;

(5) SARCs; and

(6) Installation and Unit Victim Advocates

4. Confidential Reporting. Confidential Reporting allows a uniformed member of the Army to report a sexual assault to specified individuals. Confidential reporting consists of two components: Restricted and Unrestricted reporting.

a) **Restricted Reporting.** 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.

b) Restricted reporting may be made only to the following individuals:

(1) The SARC

(2) Healthcare Provider

(3) Chaplain

(4) UVA

c) **Unrestricted Reporting.** Unrestricted reporting allows a Soldier who is sexually assaulted and desires medical treatment, counseling, and an official investigation of his/her allegation to use current reporting channels (e.g., chain of command, law enforcement, or he/she may report the incident to the SARC or the on-call Victim advocate). Upon notification of a reported sexual assault, the SARC will immediately notify a victim advocate. Additionally, with the victim's consent, the healthcare provider shall conduct a forensic examination, which may include the collection of evidence. Details regarding the incident will be limited to only those personnel who have a legitimate need to know.

5. **Sexual Assault Forensic Examination (SAFE).** If a DoD healthcare provider is not available, the victim will be appropriately referred to a civilian provider for the forensic examination, if the victim requests such a forensic examination.

a) Whenever possible, military installations should have established formal memoranda of understanding (MOU) with military facilities or off-base non-military facilities for the purpose of conducting sexual assault examinations.

b) The SARC or victim advocate will ensure that a victim is aware of any local or state sexual assault reporting requirements that may limit the possibility of restricted reporting, prior to proceeding with the SAFE at the local off-post non-military facility.

6. Restricted Report Case Number (RRCN).

a) Each Military Service will designate a military agency to generate an alpha-numeric RRCN, unique to each incident, that will be used in lieu of personal-identifying information to label and identify the evidence collected from a SAFE (i.e., Sexual Assault Evidence Collection kit (SAE kit), accompanying documentation, personal effects, clothing).

b) Upon completion of the SAFE, the HCP will package and label the evidence with the RRCN and notify the service-designated military agency trained and capable of collecting and preserving evidence, to assume custody of the evidence using established "chain of custody" procedures. MOUs with off-post non-military facilities should include instructions for the notification of a SARC, receipt and application of a RRCN and disposition of evidence back to the military agency. The RRCN and general description of the evidence shall be entered into a log to be maintained by the military agency.

c) One year storage period.

(1) Thirty days prior to the expiration of the one-year storage period, the military agency shall notify the appropriate SARC that the one year storage period is about to expire. The SARC shall notify the victim accordingly.

(2) If a victim does not desire to change to an unrestricted report and does not request the return of any personal effects or clothing maintained as part of the evidence prior to the expiration of the one-year storage period, in accordance with established procedures for the destruction of evidence, the military agency shall destroy the evidence maintained under the victim's RRCN.

(3) The evidence shall similarly be destroyed if, at the expiration of one year, victims do not advise the SARC of their decision or the SARC is unable to notify a victim because the victim's whereabouts are no longer known.

(4) If, at any time, a victim elects to change their reporting preference to the unrestricted reporting option, the SARC shall notify CID, who will then assume custody of the evidence maintained by the RRCN from the military agency under established chain of custody procedures.

7. Confidential Communication.

a) Regardless of whether the Soldier elects restricted or unrestricted reporting, confidentiality of medical information will be maintained IAW current guidelines on Health Information Privacy Portability Act (HIPPA).

b) In cases where a victim elects restricted reporting, the SARC, assigned VA (whether uniformed or civilian), and healthcare providers may not disclose covered communications to law enforcement or command authorities, either within or outside DoD, except as provided in the exceptions below.

c) Covered communications are oral, written or electronic communications of personally identifiable information made by a victim to the SARC, assigned VA or to a healthcare provider related to the sexual assault.

d) In the event that information about a sexual assault is disclosed to the commander from a source independent of the restricted reporting avenues, or to law enforcement and law enforcement from other sources, the commander will report the matter to law enforcement and law enforcement remains authorized to initiate its own independent investigation of the matter presented.

e) Additionally, a victim's disclosure of his/her sexual assault to persons outside the prospective sphere of persons covered by this policy may result in an investigation of the allegations.

f) This SAPR policy does not create any actionable rights for the alleged offender or the victim, nor constitute a grant of immunity for any actionable conduct by the offender or victim. Covered communications that have been disclosed may be used in disciplinary proceedings against the offender or the victim, even if such communications were improperly disclosed.

g) Improper disclosure of covered communications, improper release of medical information, and other violations of this policy are prohibited and may result in discipline under the UCMJ, loss of credentials, or other adverse personnel or administrative action.

8. Exceptions to Confidentiality. In cases in which victims elect restricted reporting, the prohibition on disclosing covered communications is waived to the following persons when disclosure would be for the following reasons:

a) Command officials or law enforcement when disclosure is authorized by the victim in writing.

b) Command officials or law enforcement when disclosure is necessary to prevent or lessen a serious and imminent threat to the health or safety of the victim or another.

c) Disability Retirement Boards and officials when disclosure by a healthcare provider is required for fitness for duty for disability retirement determinations, limited to only that information which is necessary to process disability retirement determination.

d) SARC, VAs or healthcare provider when disclosure is required for the supervision of victim services.

e) Military or civilian courts of competent jurisdiction when disclosure is ordered by or is required by federal or state statute. SARC, VAs, and healthcare providers will consult with the servicing legal office in the same manner as other recipients of privileged information to determine if the criteria apply and they have a duty to obey. Until those determinations are made, non-identifying information should only be disclosed.

9. Collateral Misconduct of Victim. In unrestricted reported sexual assault cases where there is evidence of collateral victim misconduct, to prevent the erroneous perception that the Department of Defense views a victim's collateral misconduct as more serious than the crime of sexual assault, commanders should defer disciplining the victim for the victim's misconduct until all investigations are complete and the sexual assault allegation has been resolved, unless extenuating or other overriding circumstances make delay inappropriate in the judgment of the commander and/or legal counsel.

a) Additionally, for those sexual assault cases for which command action on victim's collateral misconduct is deferred, Military Service command action reporting and processing requirements should take such deferrals into consideration and allow for the time deferred to be subtracted from applicable metrics and processing times.

b) Commanders and judge advocates must also be mindful of any potential statute of limitations when determining whether to defer action.

10. Essential Training Tasks for Judge Advocates. There are two distinct training categories for judge advocates.

a) Judge Advocates. All judge advocates shall receive training at initial military legal and periodic refresher training on the following essential tasks:

(1) DoD and Army Sexual Assault Response Policies:

(a) Confidentiality Policy Rules and Limitations.

(i) Use of "restricted" reports by command, investigative agencies, trial and defense counsel.

(ii) Relationship of "restricted" reports to MREs. The SAPR policy does not create any privileges outside of those already contained in the MREs (e.g., MRE 503 and MRE 513).

(b) Victim Rights:

(i) Familiarity with VWAP.

(ii) VWAP challenges in the deployed environment.

(c) Victimology. The process of analyzing victim types or victims and their behavior after an assault. Victims experience a variety of negative mental health effects from a sexual assault such as:

- (i) Post-traumatic stress symptoms.
- (ii) Reactions of family and friends.
- (iii) Secondary victimization experiences when they seek help.
- (iv) Processing the rape and post-rape experiences.
- (v) Post Traumatic Stress Disorder (PTSD). Rape is one of the most common causes of PTSD.

- (a) Traumatic Event. Experienced an event that involved actual or threatened death or serious injury or a threat to the physical integrity of self or others.

- (b) Response involved intense fear, helplessness, or horror.

- (c) Originally described in DSM-III as something “outside the realm of normal human experience.”

- (d) Rape Trauma Syndrome. The acuter phase and the long-term reorganization process that results from a forcible or attempted forcible rape, consisting of behavioral, somatic, and psychological reactions to the attack. This normally not a categorized syndrome. This term pre-dates PTSD. However, it is not a DSM-IV classification. Many consider it a subcategory of PTSD.

(d) Common and Counterintuitive Victim Behaviors.

- (i) Easily Explained Victim Behaviors.

- (ii) Counterintuitive Behaviors.
- (iii) Delayed Reporting.
- (iv) Denial, Minimization, Recantation.
- (v) Inconsistent Disclosure.
- (vi) Motivations for False Accusations.
- (vii) Military Considerations
- (viii) Alcohol Intoxication and Memory
- (ix) Expert Testimony

(e) Understanding Sex Offenders.

(i) Stereotypes/myths.

(a) Rapists are usually a stranger to the victim.

(b) Rapists usually use a weapon or inflict significant physical injury.

(c) Rapists act a certain way.

(d) False allegations of rape are common.

(ii) Rapist Typology. Most common includes five categories:

(a) Power reassurance;

(b) Power assertive;

(c) Anger retaliation;

(d) Anger excitation;

(e) Opportunistic.

(iii) The Undetected Rapist. The rapist who displays behavior often seen in the college dorm or barracks acquaintance rape situation. This offender is motivated by sexual gratification in that they intend to have sex with the victim whether the victims consents or not. The undetected rapist plans the assault. They use alcohol to reduce the victim's inhibitions or to incapacitate. They seldom use a weapon or any threats. Instead they use alcohol, size, and strength to commit the rape.

XI. CASELAW DISCUSSING VICTIMS' RIGHTS

A. *Saum v. Widnall*, 912 F. Supp. 1384 (D. Col 1996). A female Air Force Academy cadet sued the Secretary of the Air Force and others seeking declaratory and injunctive relief based on alleged sexual harassment during training, in violation of her due process and equal protection rights. The alleged harassment included a videotaped simulated "rape and exploitation" scenario as part of SERE (survival, evasion, resistance, and escape) training, during which she received injuries requiring medical attention. As part of her requested relief, plaintiff sought a declaratory judgment that she is a "crime victim" as defined by the Victims' Rights and Restitution Act of 1990 and DoD 1030.2. The Air Force argued that her claim should be dismissed because there is no private right of action under the Victims Rights Act. The court found that argument "without merit," and denied the Air Force's motion to dismiss. Although the court determined that the government "is not required to do anything under the Victims' Rights Act in the absence of an ongoing criminal investigation," if the Air Force was required to have launched such an investigation under the circumstances presented, Cadet Saum may be entitled to relief.

Cadet Saum and the Air Force settled the case and it was dismissed with prejudice in 1997. *Saum v. Widnall*, 959 F.Supp. 1310 (D. Col. 1997).

B. *United States v. Rorie*, 58 M.J. 399 (C.A.A.F. 2003). CAAF overturns 53 years of precedent and holds that it will no longer follow a policy of *abatement ab initio* for appellants who die following review by the intermediate service courts but prior to final review by the Court of Appeals for the Armed Forces. The rationale for overturning the abatement policy rested on two grounds: first, even after the death of a military defendant “there remains a substantial punitive interest in preserving otherwise lawful and just military convictions”; and second, the impact of abatement *ab initio* on victims’ rights, and, in particular, the issue of restitution as a condition of a pretrial agreements, reduced sentence, clemency, or parole. “Particularly where there has been one level of appeal of right, abatement *ab initio* at this level frustrates a victim’s legitimate interest in restitution and compensation.”

C. *United States v. Spann*, 51 M.J. 89 (C.A.A.F. 1999). The Victim Rights and Restitution Act of 1990, and the Victim Rights Clarification Act of 1997, amending F.R.E. 615, did not apply to the military prior to the dates those changes would automatically become effective under Mil. R. Evid. 1102 (18 months after the effective date in the federal system). As it happens, the President enacted changes to Mil. R. Evid. 615, effective 15 May 2002 (adding subparts 4 and 5, discussed above), which differed somewhat from the F.R.E. amendment.

D. *United States v. Lundy*, 60 M.J. 52 (2004). Accused entered into PTA term, whereby the CA agreed to defer any and all reductions and forfeitures until the sentence was approved and suspend all adjudged and waive any and all automatic reductions and forfeitures. For sexually assaulting his children, the Accused (a SSG) was sentenced to a DD, confinement for 23 years, and reduction to E-1, which subjected him to automatic reduction and forfeitures. The CA attempted to suspend the automatic reduction IAW the PTA to provide the Accused’s family with waived forfeitures at the E-6, as opposed to the E-1, rate. The parties, however, overlooked AR 600-8-19 which precludes a CA from suspending an automatic reduction unless the CA also suspends any related confinement or discharge which triggered the automatic reduction. ACCA stated no remedial action was required because the Accused’s family was adequately compensated with transitional compensation (TC), which ACCA concluded the Accused’s family was not entitled to because they were receiving waived forfeitures, albeit at the E-1 rate. The CAAF, in reversing, held if a material term of a PTA is not met by the government three options exist: (1) the government’s specific performance of the term; (2) withdrawal by the accused from the PTA, or (3) alternative relief, if the accused consents to such relief. Additionally, the CAAF held an Accused’s family could receive TC while receiving either deferred or waived forfeitures if the receipt of TC was based on a discharge and if the receipt of TC was based only on the Accused receiving forfeitures, the family could receive TC if not actively receiving the deferred or waived forfeitures. Case remanded to determine if the Gov’t could provide specific performance.

E. *United States v. Bright*, 44 M.J. 749 (C.G. Ct. Crim. App. 1996). Appellant was convicted of larceny of BAH and false official statements. Appellant's wife submitted an adverse letter to the convening authority, purportedly "in the spirit of the DoD Victim and Witness Assistance Program implementing the Victims' Rights and Restitution Act of 1990." Appellant contended on appeal that his estranged wife was not a "victim" in any sense of the word as it is defined in the relevant victim rights statutes. The court held that, while appellant may be correct, the convening authority was permitted to consider the letter upon some other basis, so long as appellant was notified properly by the SJA addendum. Further, the court held that although there may be limits to what the convening authority could consider, by failing to challenge the appropriateness of the letter at the time it was served upon him, the appellant waived the issue.

F. *United States v. Ducharme*, 59 M.J. 816 (N-M. Ct. Crim. App. 2004). Appellant was tried in July, 1999, prior to the effective date of changes to MRE 615 permitting sentencing witnesses to observe trial on the merits (the effective date of those changes is 15 May 2002). The court held that the military judge did not err when he ruled that, under Mil. R. Evid. 806 (control of spectators), one of the government's sentencing witnesses (negligent homicide victim's mother) could remain in the courtroom throughout trial. In addition, under Mil. R. Evid. 615 as it existed at the time of appellant's trial which required sequestration of witnesses upon request of either party, the trial defense counsel waived the issue. Finally, even assuming the military judge erred under Mil. R. Evid. 615 as it existed at the time of appellant's trial, any error was harmless.

XII. RESTRICTED REPORTING POLICY FOR INCIDENTS OF DOMESTIC ABUSE

A. The DoD is committed to ensuring victims of domestic abuse are protected, treated with dignity and respect, and provided support, advocacy, and care. DoD policy also strongly supports effective command awareness and prevention programs and law enforcement and criminal justice activities that will maximize accountability and prosecution of perpetrators of domestic abuse. To achieve these dual objectives, the DoD policy prefers that personnel report suspected domestic abuse incidents promptly to activate both victims' services and accountability actions. However, a requirement that all domestic abuse incidents be reported can represent a barrier for victims hoping to gain access to medical and victim advocacy services without command or law enforcement involvement.

B. In order to address these competing interests, the Deputy Under Secretary of Defense for Personnel and Readiness issued a policy memorandum on 22 January 2006 in which he provided victims of domestic violence two reporting options: unrestricted reporting and restricted reporting.

1. **Unrestricted Reporting.** Victims of domestic abuse who want to pursue an official investigation of an incident should use current reporting channels, e.g., chain of command, Family Advocacy Program (FAP), or law enforcement. Upon notification of a reported domestic abuse incident, victim advocacy services and FAP clinical services will be offered to the victim. Additionally, at the victim's discretion/request, the healthcare provider shall conduct any forensic medical examination deemed appropriate. Details regarding this incident will be limited to only those personnel who have a legitimate need to know.

2. **Restricted Reporting.** In cases where an adult victim elects restricted reporting, the victim advocate and healthcare providers may not disclose covered communications (defined in the policy memorandum) to either the victim's or offender's commander or to law enforcement either within or outside DoD, except as provided by exceptions within the policy memorandum.

a) Restricted reports must be made to one of the following individuals:

(1) Victim advocate or healthcare provider (defined in the policy memo);

(2) Supervisor of victim advocate;

(3) Chaplain.

b) **Exceptions to Confidentiality.** In cases in which victims elect restricted reporting, the prohibition on disclosing covered communications is waived to the following persons when disclosure would be for the following reasons:

(1) Named individuals when disclosure is authorized by the victim in writing.

(2) Command officials and law enforcement when necessary to prevent or lessen a serious and imminent threat to the health or safety of the victim or another person.

(3) FAP and any other agencies authorized by law to receive reports of child abuse or neglect when, as a result of the victim's

disclosure, the victim advocate or healthcare provider has a reasonable belief that child abuse has also occurred. However, disclosure will be limited only to information related to the child abuse.

(4) Disability Retirement Boards and officials when disclosure by a healthcare provider is required for fitness for duty for disability retirement determinations, limited to only that information which is necessary to process the disability retirement determination.

(5) Supervisors of the victim advocate or healthcare provider when disclosure is required for the supervision of direct victim treatment or services.

(6) Military or civilian courts of competent jurisdiction when a military, Federal, or State judge issues a subpoena for the covered communications to be presented to the court or to other officials or when required by Federal or State statute or applicable U.s. international agreement.

C. Like the Sexual Assault Prevention and Response Program, the domestic violence policy does not create any actionable rights for the alleged offender or the victim, nor constitute a grant of immunity for any actionable conduct by the alleged offender or victim, nor does it create any form of evidentiary or testimonial privilege. A draft DoD Instruction has been issued for comment and should be implement in the near future.

XIII. CONCLUSION.