



Victims' Rights and Commander Considerations

Background

Recent changes in laws and regulations, including those required by Executive Order 13730 of 20 May 16, require commanding officers to take certain actions and consider certain inputs with respect to victims at key stages in the military justice process. Items marked in red are new requirements from EO 13730 and footnotes to "victim" concerns the applicability the rule discussed. This Practice Advisory (PA) focuses on significant actions required by commanders during the military justice process. It does not include responsibilities required under the Victim-Witness Assistance Program or Sexual Assault Prevention and Response programs. This PA should be read in conjunction with PA 3-15.

Withholding in Certain Sex-Related Offenses

Withholding

- The initial disposition authority for certain sexual assault cases and collateral misconduct related to these cases must be an O-6 SPCMCA, or higher. When acting in this role, the O-6 SPCMCA, or higher, is known as a Sexual Assault Initial Disposition Authority (SA-IDA). The withholding of initial disposition authority to the SA-IDA applies to the following offenses: rape, sexual assault, aggravated sexual contact and abusive sexual contact in violation of Article 120, UCMJ; rape of a child, sexual assault of a child, and sexual abuse of a child in violation of Article 120b, UCMJ; forcible sodomy in violation of Article 125, UCMJ; and attempts to commit those offenses in violation of Article 80, UCMJ.
- This withholding applies to all other alleged offenses arising from the same incident whether committed by the accused or reported victim.¹
- The SA-IDA may not forward any offense relating to the initial incident to a subordinate commander. Unless forwarded to a superior commander for disposition, the SA-IDA maintains disposition authority over the case until final adjudication of all offenses arising from the incident, even if the SA-IDA decides to go forward on offenses other than those listed in the top block of this section or disposes of the case at a lower forum such as NJP or administrative separation. For example, if the SA-IDA finds insufficient evidence for a sex-related offense, but finds sufficient evidence of collateral misconduct, such as underage drinking, the SA-IDA will adjudicate that offense and may not forward to a subordinate commander.
- Before a SA-IDA makes an initial disposition decision under Rule for Courts-Martial (R.C.M.) 306, the SA-IDA must:
 - Consider the victim's¹ preference;
 - Review the report of investigation;
 - Review the Article 32 report (if applicable); and
 - Consult with his or her SJA.

See MCO 5800.16A, LEGADMINMAN, and PA 5-15 for additional information.

Pre-Trial

Jurisdictional preference – R.C.M. 306(e) [NEW; see also ALNAV 061/15 of 31 Jul 15]

- For alleged sex-related offenses committed in the United States, the victim² shall be provided an opportunity to express views as to whether the offense should be prosecuted by court-martial or in a civilian court with jurisdiction over the offense.
- If the victim² expresses a preference for civilian prosecution, the convening authority shall ensure the civilian authorities are notified and that the victim² is informed of any decision made by the civilian authorities if learned by the commander.
- These are continuing obligations.

Pretrial confinement hearing

- Provide the victim¹ reasonable, accurate, timely notice of the 7-day review (i.e. IRO hearing). R.C.M. 305(i)(2)(A)(iv).
- Provide the victim¹ a reasonable opportunity to confer with command representative and counsel for the government, if any. R.C.M. 305(i)(2)(A)(iv).
- Provide the victim¹ a reasonable opportunity to be heard during the review, including the opportunity to be heard through counsel. R.C.M. 305(i)(2)(A)(iv).
- Reasonably protect the victim¹ from the prisoner during the 7-day review. R.C.M. 305(i)(2)(A)(iv). **[NEW]**

Preliminary hearing

- Provide the victim³ reasonable, accurate, and timely notice of the preliminary hearing. R.C.M. 405(i)(2)(A).
- Reasonably protect the victim³ from the accused. R.C.M. 405(i)(2)(A) **[NEW]**.
- Provide the victim³ a reasonable opportunity to confer with counsel for the government during the preliminary hearing. R.C.M. 405(i)(2)(A).
- The victim³ may not be required to testify at the preliminary hearing, but may choose to testify if called as a witness. R.C.M. 405(i)(2)(B).
- The victim³ has the right not to be excluded from any portion of the preliminary hearing related to the alleged offense, unless the preliminary hearing officer, after receiving clear and convincing evidence, determines the testimony by the victim would be materially altered if the victim heard other testimony at the proceeding. R.C.M. 405(i)(2)(C).

Pretrial agreements – R.C.M. 705(d)(3) [NEW]

- Whenever practicable, prior to accepting a pretrial agreement (PTA), provide the victim³ an opportunity to express views concerning the PTA's terms and conditions.
- The convening authority shall consider any such views provided prior to accepting a pretrial agreement.

Trial

- Reasonably protect the victim¹ from the prisoner during the trial. R.C.M. 806(b)(6).

Post-Trial

- A crime victim of an offense tried by a court-martial of which the accused was found guilty and on which the convening authority is taking action under R.C.M. 1107 shall have the right to submit a written statement to the convening authority after a sentence is adjudged. That convening authority shall consider any such statement prior to taking action. R.C.M. 1105A and 1107.
- If part of the sentence was suspended and the probationer is now subject to a vacation hearing under R.C.M. 1109, provide reasonable, accurate, and timely notice of any vacation hearing to any victim of the underlying offense for which the probationer received the suspended sentence, or any victim of the alleged offense that is the subject of the vacation hearing. R.C.M. 1109(h)(9). **[NEW]**

Definitions:

- 1 "Victim" means an individual who has suffered direct physical, emotional, or pecuniary harm as a result of the commission of an offense under the UCMJ.
- 2 Applies to victims who have suffered direct physical, emotional, or pecuniary harm as a result of the commission of an alleged sex-related offense. "Sex-related offense" means any allegation of a violation of Article 120, 120a, 120b, 120c, 125, or any attempt thereof under Article 80, UCMJ.
- 3 "Victim" means a person/individual who is alleged to have suffered direct physical, emotional, or pecuniary harm as a result of the matters set forth in a charge or specification under consideration and is named in one of the specifications under consideration.

Points of Contact

Military justice policy questions may be directed to the Head, JMJ, LtCol Angela Wissman at angela.wissman@usmc.mil (703) 693-9005; or Deputy Head (Policy and Legislation), JMJ, Maj Eldon W. Beck, at eldon.beck@usmc.mil (703) 614-1513; or Maj Harlye S.M. Carlton, JMJ, at harlye.carlton@usmc.mil (703) 693-9299.