

MIDLANT Legal Compass

Guiding Warfighters through Legal and Ethical Waters

**THIS EDITION FOCUSES ON
THE CRIME OF SEXUAL
ASSAULT**

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The *MIDLANT Legal Compass* is a periodic newsletter published by the RLSO MIDLANT Command Services department.



Strategic Direction on Sexual Assault Prevention and Response

- LT Medardo Martin, Assistant Staff Judge Advocate, Navy Medical Center Portsmouth

I saw that the Service Chiefs released a document on May 7, 2012 called “Strategic Direction to the Joint Force on Sexual Assault Prevention and Response.” Could you outline what that means with respect to legal matters?

The Chiefs published strategic direction to all Commanders and Leaders of the Armed Forces. They noted that sexual assault “strike[s] at the health, welfare, and dignity of our Servicemembers and undermines the readiness of our Force.” They wrote the *Strategic Direction* with the aim of improving awareness of these crimes, operationalizing their commitment, and facilitating dialogue and open communications across the services and ranks.

The *Strategic Direction* identifies the mission as follows: “*Commanders reduce—with a goal to eliminate—incidents of sexual assault through improved prevention, accountability and victim advocacy/services at all levels of the Joint Force in order to preserve a culture of trust and respect consistent with the Profession of Arms and our core values and to maintain the health, discipline and readiness of the Joint Force.*”

How will we accomplish that mission?

The strategy is not just about a program, it is fundamentally about leadership. It operationalizes sexual assault prevention and response throughout the Joint Force along five Lines of Effort (LOE) supported by five Overarching Tenants. The implementing LOEs of Prevention, Investigation, Accountability, Advocacy, and Assessment are reinforced by the Overarching Tenants of Leadership, Communication, Culture/Environment, Integration, and Resourcing.

Do you have any legal guidance on these issues?

Several changes to Article 120 of the UCMJ went in to effect on June 28, 2012. Commanders are directed to coordinate with their servicing judge advocates to ensure that they fully understand these changes. Similarly, commanders must ensure that all leaders and Servicemembers thoroughly understand DoD’s broader scope regarding sexual assault, which reflects a higher standard of accountability than most civilian jurisdictions. While most Servicemembers inherently understand the more serious offense of Rape, many do not fully appreciate the criminal elements or misconduct associated with the lesser offenses of Sexual Assault, Aggravated Sexual Contact, and Abusive Sexual Contact.

Clear training on what the objective elements are in sexual assault offenses can help to reduce instances of sexual assault crimes and lead to more successful prosecution of these offenses when they do happen. The plan also highlights the importance of education and training on the consequences of high-risk behaviors that are often precursors to the offense. Because there are no clear guidelines on how much alcohol or what level of intoxication negates a person's capacity to consent, Servicemembers need training to ensure they understand how the consumption of alcohol can impair the judgment of both parties and the adverse consequences an alcohol-related sex crime can have on the victim, the offender, the unit, and the overall readiness of the Joint Force.

What about accountability and the military justice system?

The Accountability LOE covers actions for adjudicating an alleged sexual assault crime from the initial unrestricted report through its appropriate disposition consistent with the objective of military justice to fairly dispose of all allegations of misconduct in a timely manner at the most appropriate level. Commanders must take action to protect the health and safety of the victim while safeguarding the due process rights of the alleged offender; support the ongoing investigation; and take appropriate action based on the facts and evidence in consultation with legal counsel.

When presented with the results of a sexual assault investigation, commanders are charged with making the initial disposition decision. This is one of the most important decisions they will make, with broad ranging consequences to the victim, alleged offender, and the unit. The latter cannot be overstated; commanders' decisions have a direct impact on command climate/environment, unit cohesion, and readiness.

To operationalize the Accountability LOE, the Services will expand the availability, sequencing, and scope of commanders' legal courses to ensure commanders have the necessary information to execute their authorities and responsibilities, particularly for adjudicating complex disciplinary actions such as sexual assault crimes. Other actions for this LOE include specialized training for judge advocates, investigators, and victim-witness assistance personnel and implementing the new DoD policy withholding initial disposition authority in certain sexual assault cases from all commanders who do not possess at least Special Court Martial Convening Authority (SPCMA) and who are not in the grade of O6 or higher.

The release of the *Strategic Direction* demonstrates that sexual assault prevention and response is a top priority for the Chairman and the Service Chiefs. Implementing this new strategy should reduce sexual assaults within the Joint Force because it makes sexual assault prevention and response intuitive in the way we think, plan, and operate.

Commanders must take action to protect the health and safety of the victim while safeguarding the due process rights of the alleged offender, support the ongoing investigation, and take appropriate action based on the facts and evidence in consultation with legal counsel.

Elevation of Initial Disposition Authority for Sexual Assaults

- LTJG Coli McMahon, RLSO Tenant Command Services Norfolk

As of June 28, 2012, the authority to determine how a sexual assault case is disposed of initially (such as by court-martial, administrative separation, non-judicial punishment (NJP), or other administrative measures) now resides with Sexual Assault Initial Disposition Authorities (SA-IDAs). A SA-IDA is defined as an officer in the grade of O-6 or above who possesses special court-martial convening authority. This represents a significant change, meaning officers who are not SA-IDAs by rank or office (such as O-5 COs), may NOT make an initial disposition determination in cases involving specified alleged sexual offenses, but instead they must forward the matter to the appropriate SA-IDA.

This change in disposition authority was directed in Secretary of Defense memorandum of 20 April 2012 and implemented in the Navy by NAVADMIN 195/12 released on 28 June 2012.

Specifically, the withholding of disposition authority applies to the following offenses under the Uniform Code of Military Justice (UCMJ): Rape (UCMJ Article 120), Sexual Assault (UCMJ Article 120), Forcible Sodomy (UCMJ Article 125), as well as all attempts to commit these offenses (UCMJ Article 80). It does not apply to sexual contact offenses under UCMJ Article 120 (aggravated sexual contact and abusive sexual contact). This policy change also applies to any other alleged offenses arising from or relating to the reported sexual offense whether committed by the alleged accused or the alleged victim. Examples of this would be if either party engaged in under-aged drinking on the night of the incident or if either one of them gave a false official statement during the course of the investigation.

Commanders who are not SA-IDAs that are presented with a sexual assault case must do the following:

- Forward the allegation of sexual assault to the SA-IDA. The allegation should be forwarded within 30 days of receipt of the allegation. The commander may provide the SA-IDA a recommendation as to disposition.
- If the SA-IDA forwards this matter (returns) the case, the subordinate commander may take any action deemed appropriate and is not bound by their initial recommendation to the SA-IDA.

Commanders who are SA-IDAs must do the following when presented with a sexual assault case:

- When a case is forwarded to an SA-IDA, the SA-IDA must make an initial disposition decision. Initial disposition options (Rule 306 of the Rules for Courts-martial) include: no action, administrative action, NJP, courts-martial, and forwarding for disposition.
- The disposition decision must be documented.
- SA-IDAs may also forward the matter (return) to a subordinate commander for action deemed appropriate by the subordinate commander.

As of June 28, 2012, the authority to determine how a sexual assault case is disposed of resides with an officer in the grade of O-6 or above who possesses special court-martial convening authority.

Within the Fleet Forces and Pacific Fleet claimancies, additional implementing guidance has been released in a coordinated message, COMUSFLTFORCOM Norfolk VA 071040Z AUG 10. This message directs additional actions including consultation with a judge advocate and when practicable, NCIS, prior to making an initial disposition decision. It also directs that the SA-IDA for any collateral misconduct by the victim will be the SA-IDA designated for the victim's command. When a case involves two or more SA-IDAs, communication between SA-IDAs is highly encouraged and can be coordinated through Staff Judge Advocates.

“JAG, When Can I Finally Close Out This SITREP?”: Role of the RLSO Prosecutors

- LT Aaron Riggio, Trial Counsel, RLSO MIDLANT

One of your Sailors is accused of sexual assault. Now what? Besides actions your command must take, such as sending an initial special incident report message, you have to rely on entities outside your control with specialized expertise in handling sexual assault crimes. NCIS has to conduct a criminal investigation. After the investigation, a judge advocate general (JAG) has to be consulted. In fact, the final SITREP must include the name, command, and contact information of the JAG consulted on how to handle the case.

The best practice when faced with an allegation of sexual assault is to contact your legal advisor at the very outset. For commands without a JAG, contact your designated RLSO MIDLANT command services attorney immediately when you are notified of any report of sexual assault. When a case involves an allegation of sexual assault, the RLSO MIDLANT Command Services Department will coordinate internally with the Trial Department for a review of the case to determine its prosecutorial merit.

Why does this matter to you? First of all, our trial counsels are a separate group of attorneys than our command services attorneys. Although they work together closely, these two groups represent different areas of legal expertise and serve different functions for your command. Second, the process for reviewing a sexual assault case usually means the case will not be disposed of as quickly as you might want. Our goal is to adjudicate criminal cases swiftly while ensuring a fair and equitable military justice system for both the victim and the accused. Sexual assaults are felony level offenses. Prosecuting these cases requires significant coordination and diligence to ensure a fair and just process by taking all claims of sexual assault seriously while simultaneously protecting the due process rights of any person accused of such a crime. Allowing the time needed to fully investigate, adequately prepare, and zealously advocate the case is paramount to ensuring the right result.

Once your case arrives in the Trial Department, a dedicated trial attorney is assigned to the case. This person is now your primary RLSO MIDLANT point of contact for the case. He or she will meet with you early on to explain the court-martial process, the expected timeline, and what impacts there may be to your command.



Every sexual assault case is briefed to the Senior Trial Counsel, highlighting the important facts of the case, the applicable laws, and the recommended course of action.

Sexual assault cases are vastly different than typical command services issues. The primary difference is the burden of proof. Whereas in administrative proceedings the burden of proof is a preponderance of the evidence, in criminal courts-martial the government must prove every element of the charged offense beyond a reasonable doubt. This higher burden of proof imposes a significant hurdle to overcome in sexual assault cases, which typically involve only two parties with first-hand knowledge of what actually happened and often with memory loss or impairment due to alcohol consumption.

In an effort to meet the burden of proof, trial counsel must conduct rigorous analysis to validate the evidence in the case. Simply reviewing written statements is usually not sufficient; meeting (perhaps multiple times) with the victim who reported the assault is necessary. One of the critical legal issues in these cases is the defense of consent, which requires thorough review of factual details to determine if the victim's claim can be corroborated.

Oftentimes, additional coordination with NCIS is needed to conduct further investigation after the initial trial counsel review. If there is evidence requiring forensic analysis, such as DNA, lab reports may significantly delay completion of the investigation and a legal recommendation from the trial counsel.

Every sexual assault case also is briefed to the Senior Trial Counsel, highlighting the important facts of the case, the applicable laws, and the recommended course of action. The Senior Trial Counsel is RLSO MIDLANT's resident expert on military justice. This additional level of oversight on sexual assault cases ensures you receive an appropriate initial disposition recommendation from a JAG.

Another important part to understanding the legal process includes the procedures involved with prosecuting a sexual assault case. Before proceeding to a general court-martial, there is an Article 32 pretrial investigation, which includes a hearing in which an investigating officer receives evidence before making a recommendation on the case to the convening authority. The hearing typically requires testimony from the victim and all critical witnesses. The defense attorneys also require time to prepare their case. While the trial counsel may have had a case for weeks, analyzing and validating the evidence in preparation for charging, the defense counsel typically only receives the evidence after the charges have been preferred. If charges are referred to court-martial, the case must be docketed with the court. The average sexual assault trial will be fully contested and last four days. The trial process represents countless hours of preparation by both the prosecution and the defense.

As your case moves through the legal process, the trial counsel should keep you frequently updated. Each case is unique, and the countless variations in each case can significantly affect the overall timeline. We ask that you remain patient and trust in the process.

Eliminating sexual assault in the Navy is a team effort. Your understanding and cooperation will help move us closer to the conclusion of the legal process—and the day when that final SITREP can be sent.

Amendments to Sexual Assault Law Take Effect June 28, 2012

The FY-12 National Defense Authorization Act contained many amendments to the UCMJ dealing with the issue of sexual assault. Of note for commanders, the statute under which most sexual assaults in the military are prosecuted underwent significant revisions.

The amendments include the division of Article 120 into four offenses, including Article 120 (Rape and sexual assault generally (adults)), Article 120a (Stalking), Article 120b (Rape and sexual assault of a child), and Article 120c (other sexual misconduct). Also, the changes clarified the statute by separating penetration sexual offenses from non-penetration sexual offenses.

Furthermore, the definition of sex act was made gender neutral to include both oral and anal penetration; the definition of consent was further defined and the statute states that a "sleeping" person cannot consent; the definition of bodily harm now includes a nonconsensual sex act or contact; and the offense of indecent acts was removed from Article 120 and moved back to Article 134 with the next Executive Order.

It is also important to note that these changes became effective on June 28, 2012. Offenses occurring prior to that date will be prosecuted under the previous version of the law.

Direction to Preserve Documents Related to Sexual Assault Cases

Due to ongoing litigation regarding the Department of Defense's handling of sexual assault cases, the Department of Justice has directed that certain documents be preserved in anticipation of a future requirement to release those documents in response to a Freedom of Information Act (FOIA) request.

No FOIA searches for responsive documents are required at this time, nor is reporting that a command may hold records. This direction is only to preserve and not destroy relevant records until this litigation is complete - even if normal procedures or record disposition guidelines would dictate otherwise. This guidance applies to records (both paper and electronic) of ANY allegations or investigations or resulting actions (NJP, ADSEP, courts-martial, etc.) relating to any claims of sexual assault, sexual harassment, or domestic violence from FY2006 – FY2010.

For more information regarding this requirement, please contact your servicing SJA or a RLSO MIDLANT command services attorney.

*Commanders' Quick Reference for Sexual Assault Reporting Requirements***Required reports:**

1. Is the report of sexual assault restricted or unrestricted? If restricted, there are no reports to make.
2. For unrestricted reports, the following must be determined:
 - a. Who are the actors involved?
 - i. **Active Duty:** Reporting is required for all incidents where the alleged victim or offender is active duty, a dependent, or a Reservist on active duty.
 - ii. **Civilians:** Reporting is required for incidents involving civilians who are sexually assaulted on property under DON jurisdiction.
 - b. Who should report? Reporting commands for both victim and alleged offender are to coordinate efforts for submitting a report. The command with cognizance over the victim is responsible for monthly continuation/follow-on NAVY UNIT SITREPS to provide new or revised information. See 4 below.
3. If you determine a report is required by your command, you must determine what type of OPREP-3 is required. The nature of the offense and the amount of anticipated media interest will determine whether you need to release a NAVY BLUE or NAVY UNIT SITREP. See Chapters 4 and 5 of OPNAVINST F3100.6J Ch-2.
 - a. **NAVY BLUE:** Required for all RAPES, ATTEMPTED RAPES, and AGGRAVATED SEXUAL ASSAULTS.
 - b. **UNIT SITREP:** Required for all incidents of sex assaults to include any unwanted or offensive touching of a sexual nature, or attempted touching of a sexual nature. Touching or attempted touching must involve the genitalia, breasts, or buttocks.
 - c. **Exception:** If an incident falls under the realm of a UNIT SITREP, but will garner media attention, release a NAVY BLUE.
4. **SITREP Update:** Commands with cognizance over the victim will forward monthly continuation/follow-on OPREP-3 NAVY UNIT SITREPS to provide new or revised information only (OPNAVINST 1752.1B). See also SECNAVINST 1752.4A which states that follow-on reports shall be submitted "at least quarterly."
5. **SITREP Close-out:** A final OPREP-3 NAVY UNIT SITREP will be released documenting official resolution of the case. Final resolution refers to completion of judicial, investigative, disciplinary, and/or administrative actions. **The final SITREP MUST provide the name and contact information for the JAG consulted on the case.**



The following 4 items must be addressed in all sex assault reports:

1. Status of Military Protective Order (MPO);
2. Status of transfer/reassignment of victim and/or offender;
3. Status of victim's collateral misconduct investigation and/or disposition (e.g. underage drinking); and
4. Information pertinent to the ongoing incident response.

Other required notifications:

1. NCIS: NCIS has the “right of first refusal” for all sex assault allegations. Internal command inquiry or investigation shall be reserved only for incidents where NCIS or civilian law enforcement has declined to investigate.
2. First Flag Officer in your COC.
3. Notify first O-6 in your chain of command with Special Court Martial Convening Authority. The decision on how to dispose of the case now rests with him or her.
4. Consult with your Staff Judge Advocate. If you are unsure of whom that is, contact a RLSO MIDLANT command services attorney.
5. Sex Assault Response Coordinator and/or victim advocate.

Other actions to take:

1. Offer victim medical care if warranted.
2. Provide the victim with Victim and Witness Assistance Program information (DD Form 2701). This is usually done via the Command VWAC (Victim Witness Assistance Coordinator).
3. Assign a trained SAPR command liaison to act as the single point of contact between victim and command executive level.
4. Provide victim access to a Chaplain (suggested, not required).
5. Evaluate the need for an MPO. Duration of MPO should be determined by the best judgment of the CO, but recommended to be no shorter than 72 hours. It can also be indefinite, but still needs to periodically be reviewed. Per DOD Directive 6495.01, if anyone mentioned in the MPO lives off base, the appropriate civilian authorities need to be notified of the issuance of the MPO and of the individuals involved in the order.

Victim update: At least monthly, victims must receive an update on the status of their case until final disposition. The SAPR Command Liaison shall coordinate this. Victims must also be consulted on potential decisions in the case and their input provided to the Commander making the decision.

Close-out actions: Only an O-6 officer with Special Courts-Martial Convening Authority can decide to close a case. Required items:

1. Final Message released (see SITREP closeout). Final SITREP must also name and provide contact information for the JAG consulted.
 2. Sex Assault Disposition Report signed and provided to JAG consulted.
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Realignment of Navy Legal Services

On October 1, 2012, Naval Legal Service Command will undergo a significant realignment of its subordinate commands. In short, the eight commands known as Naval Legal Service Offices (NLSOs) throughout the world will be replaced by four new commands known as Defense Service Offices (DSOs). The DSOs will provide defense counsel for courts-martial and administrative boards and personal representation advice. The personal legal assistance mission, to include powers of attorney, wills and estate planning, family law advice, consumer law, and landlord-tenant issues, will be assumed by the nine Region Legal Service Offices (RLSOs).

The purpose of this realignment is two-fold. First, this structure provides better training and professional development for all first tour judge advocates to prepare them more quickly to meet the Navy's legal needs. All first tour judge advocates will rotate through the three core capability areas during a 24-month rotation while assigned to the RLSO for government services and legal assistance and to the DSO for defense services. Second, a smaller cadre of experienced trial litigators will be focused on our complex military justice cases while developing the majority of judge advocates to better meet the Navy-wide demand for experienced staff judge advocate support.

This change should not impact the availability of legal services and is intended to make the JAG Corps better able to provide high quality legal advice and services to individual Sailors and commanders in support of operational requirements.
