

# MIDLANT Legal Compass

*Guiding Warfighters through Legal and Ethical Waters*

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The primary mission of Region Legal Service Office Mid-Atlantic (RLSO MIDLANT) is to provide prosecution, command services, and legal assistance support to eligible commands and persons in support of Fleet operational readiness.

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

## *No Sailor Left Behind*

*No Sailor Left Behind* is the theme for this edition of the Region Legal Service Office Mid-Atlantic (RLSO MIDLANT) Legal Compass. The JAG Corps is committed to providing guidance and resources to the Fleet so that it can fully support the Navy’s most valuable resource: its sailors. Whether it be in protecting a victim of sexual assault, providing information to sailors with immigration issues, ensuring that sailors in same-sex marriages get the benefits their entitled to, or treating sailors struggling with mental health issues with respect, it is in our best interest to take care of our sailors. We hope that this newsletter improves your understanding of new developments and empowers you to better lead and support your sailors.

As I take over as Commanding Officer of RLSO MIDLANT, I consider it an honor and a privilege to serve with all of the commands in this AOR. Today’s Navy is more complicated than the one I joined, but I have full confidence that, together, we can continue to navigate this constantly-changing and demanding legal environment.

Very Respectfully,  
/S/  
D.G. Wilson  
CAPT, JAGC, USN  
Commanding Officer, RLSO MIDLANT



## *Protecting Our Shipmates: A New Change to the SAPR Restricted and Unrestricted Reporting Requirements*

LTJG Alaric Piette, Command Services Department, RLSO MIDLANT

On 8 Aug 2013, the Sexual Assault Prevention and Response (SAPR) Instruction, SECNAVINST 1752.4B, became effective and brought with it a significant change to Restricted and Unrestricted Reporting Requirements. While it remains true that the only people authorized to accept a Restricted Report are the Sexual Assault Response Coordinator (SARC), a SAPR Victim Advocate, and a healthcare personnel, a victim may now disclose that a sexual assault has occurred to certain third parties without fear that that disclosure will cause him or her to lose the Restricted Reporting option.

SECNAVINST 1752.4B Encl.(4)(e) states that a victim's communication with another person—as long as that person is not in his or her chain of command or a member of DoD law enforcement—does not, in and of itself, prevent the victim from later electing to make a Restricted Report. So, what does the change mean? How will it affect commands?

In short, the change means that when a victim confides in a third-party who is not part of the victim's chain of command, that third-party cannot be disciplined for failing to report misconduct, or for failing to report that a sexual assault occurred (note that this will only affect military members). Nothing in the new Instruction prevents the third-party from reporting the assault and triggering the mandatory reporting and investigation by the command.

We must think of the reporting options as striking a balance between the victim's right and need for privacy and treatment and the Navy's interest in good order and discipline. When choosing to make a restricted or unrestricted report, each victim weighs and considers innumerable motivations and factors. At the same time, a victim of sexual assault may need treatment, both physical and psychological. The Navy has an interest in the wellbeing of its Sailors, and therefore has created the Restricted Reporting option so that Sailors may receive treatment without being part of a criminal investigation or their chain of command knowing that they are a victim. The new change to the Instruction recognizes that victims may need to share their struggles with a third party without fear of full disclosure.

On the other side of the scale, good order and discipline requires investigating and disciplining those found to have committed misconduct. This is why the Navy has created the Unrestricted Option, as well as the various exceptions to the Restricted Reporting option. The main exception is that if a command learns of the assault through an independent investigation, the Restricted Reporting option is lost. An Independent Investigation is broadly defined to include any instance in which a command learns of sexual assault "from a source other than a victim who has elected Restricted Reporting or where no election has been made by the victim." SECNAVINST 1752.4B Encl.(4)(f). This source could very well be a third-party in whom the victim confided, even if that victim intended to keep the assault private.

*The change means that when a victim confides in a third-party who is not part of the victim's chain of command, that third-party cannot be disciplined for failing to report misconduct.*

*Good order and discipline requires investigating and disciplining those found to have committed misconduct.*

It's important to note that SECNAVINST 1752.4B Encl.(4)(e) states that communication between the victim and the third-party are NOT confidential in the same way communications between the SARC, SAPR Victim Advocate, and health care personnel would be. This means that once an investigation is opened, the third-party could become a witness.

When issues involving sexual assault reporting options arise, keep in mind the dual interests of the Navy in providing victims treatment and privacy, as well as maintaining good order and discipline to ensure mission success. RLSO MIDLANT has command service, legal assistance and trial attorneys available to help you navigate these changing waters.

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### *Same-Sex Marriage in the Military: New Guidance from the Pentagon*

L'TJG Clayton S. McCarl, III, Command Services Department, RLSO MIDLANT

On August 13, 2013, the Secretary of Defense (SECDEF) and the Under Secretary of Defense for Personnel and Readiness both issued new guidance for same-sex couples in the military. In the words of SECDEF, "It is now the Department's policy to treat all married military personnel equally." Servicemembers can now register their lawful spouse in DEERS for all spousal benefits.

This new guidance is a significant change from the system for same-sex couples that DOD was implementing. Since the first day for same-sex ID cards under the old system would have been September 3, this new guidance replaces the old system completely. Under that system, same-sex couples would have used a special form to register in DEERS as Same Sex Domestic Partners (SSDP). The SSDP system extended many new entitlements to same-sex couples, but several significant spousal benefits were not included. Among other items, the old system did not offer medical or dental benefits, dependent rate BAH, or PCS allowances. To qualify, the proposed SSDP form DD 653 required an indefinite, committed relationship between adults of the same sex. Based on the new guidance, same-sex couples wanting military benefits will need to marry in a state where same-sex marriage is authorized.

DOD had established the SSDP framework after the repeal of Don't Ask Don't Tell (DADT) and before the Supreme Court ruled on the Defense of Marriage Act (DOMA) on June 26, 2013. After the repeal of DADT SECDEF guidance from February 11, 2013 extended many benefits to same sex domestic partners, but DOD was limited in many respects because of DOMA. Federal statutory benefits use the word 'spouse' to authorize certain entitlements, and through DOMA Congress defined the term spouse to require a husband and wife. Now that the Supreme Court found that provision of DOMA unconstitutional, DOD is able to recognize same-sex marriages authorized under state law. Entitlements will be retroactive to the date of the Supreme Court's DOMA decision, June 26, 2013.

*"It is now the Department's policy to treat all married personnel equally."*

*Same-sex couples wanting military benefits will need to marry in a state where same-sex marriage is authorized.*

What about unmarried same-sex couples assigned to a duty station in a state which does not offer same-sex marriage? Servicemembers assigned to a duty station more than 100 miles from a location that allows same sex marriage may be eligible for uncharged leave to lawfully marry a same-sex spouse in another state. The guidance from the Under Secretary of Defense for Personnel and Readiness modified DOD Instruction 1327.06 "Leave and Liberty Policy and Procedures." Secretaries now may authorize up to 7 days of non-chargeable leave to members in CONUS and 10 days for OCONUS members. Marriage leave may only be granted once in a career.

Takeaways:

- DOD will now recognize all marriages which are valid where performed and offer the same benefits for those marriages.
- After technical updates to DEERS, same-sex spouses will get the same spousal ID cards as opposite-sex spouses.
- DOD will no longer use the Same Sex Domestic Partner (SSDP) framework established between the Don't Ask Don't Tell (DADT) repeal and the Defense of Marriage Act (DOMA) ruling from the Supreme Court.
- Spousal benefits are now available to all married Service members.
- Entitlements are retroactive to the date of the Supreme Court's DOMA decision, June 26, 2013.
- Not all states allow same-sex marriage. Service members assigned to a duty station more than 100 miles from a location that allows same-sex marriage may be eligible for uncharged leave to lawfully marry a same-sex spouse in another state.

*Service-members assigned to a duty station more than 100 miles from a location that allows same-sex marriage may be eligible for uncharged leave to lawfully marry a same-sex spouse in another state.*

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### *Command Involvement in the Discovery Phase*

LTJG Halley Allaire, Trial Department, RLSO MIDLANT

What is discovery?

Discovery is, by definition, evidence possessed by the government being given to the defense. This action is required to take place after charges have been referred in a case before the case goes to trial. Information which must be provided includes the charges and accompanying paperwork, the convening order and amending orders as applicable, and any relevant sworn or signed statements. On request the Government must allow defense counsel to review any documentation, photographs, objects, or places which either side needs in order to prepare their case. This can include medical reports and scientific tests which are material to the trial or defense case. Usually, the material which the trial counsel must provide in discovery includes only that which military authorities are in possession or control of. Discovery is a continuing obligation on the part of both trial and defense counsel as new information comes to light throughout the court martial process. Any evidence favorable to the defense must be disclosed to them as soon as practicable once its existence is known.

*The Government must allow defense counsel to review any documentation, photographs, objects, or places with either side needs in order to prepare their case.*

*Frequently, data is lost that would not only be helpful, but that could be mandatory to turn over in discovery.*

What does this mean practically for the Command of the accused sailor?

Typically, the trial counsel will request from the command Service Records and Division Officer Records of the accused and access to important witnesses involved in the incident. Discovery requires only that relevant information be shared. For example, if a witness has Page 13s in their records, trial counsel will want to be aware of these. Depending on the circumstances of the incident and related charges, the trial counsel may request that the Command assist in obtaining copies of emails sent by the accused from their Navy email, relevant data from any government computer they may have access to, or, commonly, assistance in arranging meetings between counsel and witnesses.

How can commands help?

Preservation of information is essential. Very often, once an incident occurs the accused is transferred from their Command. This can result in a purge of records on that sailor. Frequently, data is lost that would not only be helpful, but that could be mandatory to turn over in discovery. So please help our trial department by collecting information early and often and retaining it until the resolution of the case!

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### *Assisting Sailors with Immigration Matters*

Diana Baker and Alyssa Degner-Lopez, Legal Interns, RLSO MIDLANT

*“E Pluribus Unum”* – Out of Many, One. The United States is a nation of immigrants. American citizenship is a goal of most aliens who serve in the Navy. The Navy has a responsibility to assist alien servicemembers in the quest to gain citizenship.

#### **1. What is the Navy’s role in Sailors’ immigration matters?**

The Navy cannot grant alien servicemembers or their families citizenship or entry into the United States. Immigration matters are governed by United States Citizenship and Immigration Services (USCIS). However, servicemembers and their families benefit from exceptions to some naturalization requirements. The Navy provides resources to assist Sailors with the naturalization process.

#### **2. What are the requirements for naturalization for military members?**

Generally, immigrants must meet demanding requirements for citizenship, such as continuous residence in the U.S. for a period of years. However, a special wartime provision allows alien servicemembers to file for immediate citizenship. To be eligible, the alien must have honorably served on active duty in the Armed Forces or as a member of the Selected Reserve of the Ready Reserve on or after September 11, 2001. The alien servicemember does not need to have a green card at the time of filing so long as his or her enlistment was held in the U.S., or its territories, or aboard a U.S. vessel. Good moral character is required and the filing fee is waived.

*A special wartime provision allows alien servicemembers to file for immediate citizenship.*

**3. What steps should a Sailor take when seeking to be naturalized?**

A Sailor seeking to gain citizenship should obtain "A Guide to Naturalization" (Form M-476) for more information about the application process.

The Sailor must submit an "Application for Naturalization" (Form N-400) and a "Request for Certification of Military or Naval Service" (Form N-426). These forms are available at [www.uscis.gov/forms](http://www.uscis.gov/forms).

The Guide to Naturalization contains a checklist of documentation to include with the application, including a passport-style photograph, a fingerprint card, and a certification of the applicant's English translation abilities. (See page 34 of the Guide.)

If the Sailor's application is accepted, USCIS will contact him or her to schedule an interview. If citizenship is granted, USCIS will schedule an oath ceremony.

The military application process, from filing until a grant of citizenship, is expected to take between four and eight months.

**4. What resources must commands provide for Sailors seeking assistance on naturalization matters?**

Under NAVADMIN 113/08, Commanding Officers must appoint a Command Citizenship Representative (CCR) to provide assistance to servicemembers applying for citizenship. The CCR must brief all alien command members on application procedures for citizenship. The CCR is responsible for reviewing applications, obtaining certificates of military service, scheduling appointments for fingerprinting, and forwarding application packages to the USCIS processing facility for military applications.

**5. What resources are available for servicemembers through USCIS?**

USCIS has established a toll-free "Military Help Line" for members of the military and their families, 877-CIS-4MIL (877-247-4645). More information is available at [uscis.gov/military](http://uscis.gov/military), and servicemembers can contact USCIS at [MilitaryInfo.NSC@dhs.gov](mailto:MilitaryInfo.NSC@dhs.gov).

The USCIS Norfolk field office is located at 5678 Virginia Beach Boulevard, Norfolk, VA 23502. Military members and their spouses can contact the office via [norfolk.military@dhs.gov](mailto:norfolk.military@dhs.gov).

*The military application process, from filing until a grant of citizenship, is expected to take between four and eight months.*

***Command Involvement in the Discovery Phase***

LTJG Zach Dembo, Command Services Department, RLSO MIDLANT

On 19 June 2013, the Secretary of the Navy cancelled SECNAVINST 6320.24A, Mental Health Evaluations of Members of the Armed Forces. While new Navy guidance will be forthcoming, in the interim all Navy mental health evaluations (MHEs) are now governed by DOD Instruction 6490.04, Mental Health Evaluations of Members of the Military Services.

The new guidance is substantially similar to the old one with one significant addition which is discussed below. For those who may not be familiar with the old guidance, here is a review of the parts that are substantially unchanged:

- MHE instructions do NOT apply to voluntary referrals, drug or alcohol rehab screening, RCM 706 mental competency inquiries, pre or post deployment examinations, or FAP screenings;
- Commanders are specifically cautioned against using MHEs as a form of reprisal or punishment, especially for communicating with a member of Congress or the Inspector General;
- There are two types of MHEs: non-emergency and emergency;
- Emergency MHEs are done when the commander determines that the Servicemember is at risk of inflicting serious injury on himself or others or has a severe mental illness;
- For an emergency MHE, the commander will take every step necessary to ensure the member's safety and the safety others and will send him to a mental treatment facility (MTF) as soon as possible. The commander will also inform the mental health provider (MHP), as soon as possible of the events and circumstances leading up to the emergency referral, preferably before the Service member arrives or when he is en route to the MTF;
- For a non-emergency MHE, the commander will set up an appointment with a MHP, and in a letter to the Service member, inform the member of the name and contact information of the MHP, and the time, date, and place of the MHE;
- Following a referral, an MHP can decide to hold the Service member for inpatient psychiatric care – this decision is reviewed by an independent psychiatric provider within 72 hours of the Service member's admission and the patient is entitled to have a JAG or civilian counsel present at the review;
- Throughout the process, as long as the Service member's condition allows it, the Service member has the right to talk to friends, relatives, attorneys (including JAGs), chaplains, members of Congress, and Inspectors General; and
- Any Service member who believes he or she was referred for an MHE as reprisal for protected communication with Congress or the IG can file a complaint with the DoD IG.

The primary change is that the DoD's official policy is now "to ensure that policies and procedures are implemented in a manner that removes the stigma associated with Service members seeking and receiving mental health services." To that end, all MHE letters from commanders are required to have a sentence informing the Service member that there is no stigma associated with seeking mental help, which will undoubtedly reassure any Service member receiving said letter. It should be anticipated that, at the least, when the new Navy guidance comes out it will incorporate these changes.

*All MHE letters from commanders are required to have a sentence informing the Service member that there is no stigma associated with seeking mental help.*

## *What is Clemency and What Does a Convening Authority Do With it?*

LT Jason Meyer, Command Services Department, RLSO MIDLANT

**What is the rule?** Rules for Courts-Martial (R.C.M) 1105 provides an opportunity for a convicted member to seek leniency from the convening authority (CA) during the post-trial process. The CA must consider any clemency matters submitted by Defense Counsel in addition to the Results of Trial and SJAR (Staff Judge Advocate's Recommendation), if required, before acting on the sentence.

**Who else may offer views on clemency?** In addition to Defense Counsel, the military judge may offer views on clemency at the time that the sentence is announced. In court-martials involving victims, the victim must also be given the opportunity to provide the CA with his or her views on the convicted member's clemency request. This MUST be considered by the CA. The victim is notified of their right to submit comments by the Trial Counsel and those would be forwarded directly to the CA from the victim.

**What does this look like?** Generally clemency comes in the form of a letter from defense counsel, on behalf of the defendant, to the CA. It will often contain enclosures similar to what was presented at sentencing. The CA is only required to consider matters submitted in writing, but may consider whatever he or she desires.

### **When is clemency submitted?**

- If a SJAR is required, clemency matters must be submitted within 10 days of service of the SJAR on Defense Counsel or Accused.
- If no SJAR is required, clemency matters must be submitted within 10 days of service of the Record of Trial on Defense Counsel/Accused.
- The convicted member or Defense Counsel may request a 20-day extension for "good cause." Any Staff Judge Advocate may approve an extension request, however only the CA may deny it.

**What matters should the CA consider when contemplating what action to take?** When taking action on an adjudged sentence, the CA must consider Results of Trial prepared by Trial Counsel right after trial, SJAR/Legal Officer Review if applicable, 1105 Clemency Matters and R.C.M. 1106 Matters, if applicable.

**How does clemency affect CA's Action ?** CA's Action MUST include action on every piece of the sentence adjudged by the court. The CA has the following options available to him or her when taking action of the adjudged sentence

- Approve: Just like it sounds.
- Approve & Suspend: Approve the sentence, but not order it executed. Instead, often as part of a Pre-Trial Agreement, suspend some or all of the punishment for a specific period of time.

*The CA must consider any clemency matters submitted by Defense Counsel in addition to the Results of Trial and SJAR, if required, before acting on the sentence.*

*CA's Action MUST include action on every piece of the sentence adjudged by the court.*

*The accused, through his Defense Counsel, must be given an opportunity to submit matters in clemency to the CA.*

- Disapprove: Rejects that portion of the punishment. May never be brought back.
- Mitigate or Commute: To lessen the punishment.

**What is important for the Convening Authority to keep in mind regarding clemency?**

- The accused, through his Defense Counsel, must be given an opportunity to submit matters in clemency to the CA.
- The CA may not have an inflexible attitude toward clemency.

**MIDLANT Adjudged Courts-Martial Sentences**

Navy E5 with 12 years, 6 months of service sentenced to restriction for a period of 60 days; to be reduced to the pay grade of E-1; and to be discharged from the Naval Service with a bad conduct discharge for stealing military property of a value of more than \$500.00.

Navy E8 with 19 years, 6 months of service sentenced to confinement for a period of 60 days; to be reduced to the pay grade of E-5; and to forfeit \$500.00 pay per month for 6 months for unlawfully striking another service member.

Navy E3 with 8 years, 1 month of service sentenced to confinement for a period of 2 years; to be reduced to the pay grade of E-1; to forfeit all pay and allowances; and to be discharged from the Naval Service with a dishonorable discharge for knowingly and wrongfully possessing child pornography.

Navy E3 with 4 years, 7 months of service sentenced to confinement for a period of 11 months; to be reduced to the pay grade of E-1; to be fined \$12,120.00; and to be discharged from the Naval Service with a bad conduct discharge for violating a lawful general order on divers occasions and stealing \$33,962.10 on divers occasions.

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