

# PRO BONO ATTORNEY TRAINING MANUAL

*Representing victims of military sexual violence in  
the investigation and prosecution of the perpetrator*



JUNE 2020



**Protect Our Defenders (POD)** is the only national organization solely dedicated to ending the epidemic of rape and sexual assault in the military and to combating a culture of pervasive misogyny, sexual harassment, and retribution against victims. We honor, support, and give voice to survivors of military sexual assault and sexual harassment – including service members, veterans, and civilians assaulted by members of the military.

We seek reform to ensure all survivors and service members are provided a safe, respectful work environment and have access to a fair, impartially administered system of justice.

Protect Our Defenders provides **free legal and other assistance** for military sexual assault survivors, including active-duty service members, veterans, and civilians.

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## QUICK REFERENCE: ACRONYMS

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<b>AWOL</b>	Absence Without Leave
<b>CA</b>	Convening Authority
<b>CAAF</b>	The United States Court of Appeals for the Armed Forces
<b>FOIA</b>	Freedom of Information Act
<b>GCM</b>	General Court-Martial
<b>GCMCA</b>	General Court-Martial Convening Authority
<b>JAG</b>	Judge Advocate General
<b>MPO</b>	Military Protection Order
<b>MRE</b>	Military Rules of Evidence
<b>MST</b>	Military Sexual Trauma
<b>NDAA</b>	National Defense Authorization Act
<b>PHO</b>	Preliminary Hearing Officer
<b>SPCM</b>	Special Court-Martial
<b>SPCMCA</b>	Special Court-Martial Convening Authority
<b>SVC</b>	The Special Victims' Counsel
<b>UA</b>	Unauthorized Absence
<b>UCMJ</b>	Uniform Code of Military Justice
<b>VLC</b>	Victims' Legal Counsel

## WHAT IS MILITARY SEXUAL VIOLENCE?

Military sexual violence is when a member of any branch of the armed services (Army, Navy, Air Force, Marine Corps, Coast Guard, or National Guard), who is active duty or Reserve (not engaged in full-time active duty service) sexually assaults or pervasively sexually harasses either a fellow member of the armed services, a Department of Defense (DoD) civilian employee, or a civilian. Your client may be on active duty, a Reservist, a veteran, a DoD civilian employee, or a civilian not employed by the military.

Public awareness has been heightened about the impact of sexual violence on survivors with the advent of the #MeToo movement. Much like the stories we have heard about the dynamics of sexual violence in the entertainment and business industries, the perpetrators often have and exploit much higher levels of influence, control, and command over their victims. This dynamic is heightened in the military, where the command level, rank, length of service, and assigned duty are all explicitly stated and enforced as an integral part of the military social, political, and cultural structures.

**One of the unique and particularly troubling aspects of sexual violence in the military is that the perpetrator and the victim not only often work together, but also often live in very close proximity to each other on the same base, in the same unit\*, in the same barracks, or on the same ship.**

Furthermore, the ethos and culture of the military promotes and requires trust in and between its members. The job functions literally can require life or death decision-making and an enduring commitment to no man left behind.

Consequently, sexual assaults committed by service members are a particularly shocking violation of trust from the survivors' perspective. Fear and distrust compound this sense of betrayal because the command structure that is in place to ensure good order and discipline is the same command structure that is tasked with investigating and prosecuting the crime<sup>1</sup>. This "double duty" of the commander can create conflicts of interest. More information to follow.

*\*Each branch of the military has its own terms for its ranks, roles, and structures. When you first meet with your client, ask him or her to give you a quick briefing on his or her particular branch. It will go a long way toward building trust that you are interested in learning the unique terminology and culture of that branch.*



The Veteran 101: Service Branch Overview can be found [here](#).

<sup>1</sup> There are many reasons why the current command-based military justice process is fraught with challenges for a survivor. Review the documents that can be accessed through this [link](#) for explanations and special insights into all that a survivor faces after making the difficult decision to report the sexual assault.

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## RATES OF MILITARY SEXUAL VIOLENCE

The DoD, which oversees all branches of the military except the Coast Guard, is required by law to issue an annual report to Congress on the rates of sexual assault and other relevant data points for each branch of the military.

The DoD Sexual Assault Prevention and Response Office (SAPRO) is responsible for collecting the data and issuing the annual SAPRO report. POD analyzes that data and makes it easily accessible through its [website](#).

**Despite consistent attention to the issue of military sexual violence since the Tailhook scandal of the early 1990s, the rates of sexual violence remains pervasive and alarmingly high.**

POD works to educate the public and policymakers on sexual violence in the military. POD's policy priorities to create systemic change are enumerated [here](#). Many of the improvements to the system in which you will be representing your client can be attributed to the [advocacy of POD](#).

For a well-articulated overview of the challenges facing survivors of military sexual violence, read the following law review article: [Protecting Our Defenders: The Need to Ensure Due Process for Women in the Military Before Amending the Selective Service Act](#), Kelsey L. Campbell, Hastings Constitutional Law Quarterly, Vol. 45, No. 1, Fall 2017.

## HOW VICTIMS FIND AND ENGAGE POD

Most survivors of military sexual violence who contact POD have learned about POD through word-of-mouth from fellow service members, Congressional offices, internet searches, and the media.

All potential clients are asked to complete an online intake form before they are contacted by a POD staff member for an interview. Through the intake process, POD staff obtains important information such as: branch of service and rank (or civilian status) of the survivor, the branch and rank of the perpetrator, the status of the investigation and court-martial proceeding, and the outstanding issues the survivor is facing.

In consultation with POD's President, Col (Ret.) Don Christensen, former chief prosecutor of the Air Force and military judge, POD determines whether a case is appropriate for placement with a pro bono attorney.

**POD's staff and other experts who are associated with POD are available to provide you with advice and consultation throughout your representation of the client.**

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# THE ROLE OF ATTORNEYS IN THE MILITARY JUSTICE SYSTEM

## THE SPECIAL VICTIMS' COUNSEL (SVC)/VICTIMS' LEGAL COUNSEL (VLC)

Starting in 2012, the Air Force led the military in establishing the Special Victims' Counsel (SVC) program. In August 2013, then-Secretary of Defense Chuck Hagel ordered the Secretaries of all the branches to establish similar victims' counsel programs. This program is called the Victims' Legal Counsel (VLC) in the Navy and the Marine Corps, and SVC in the Air Force and the Army. The role of the SVC/VLC is to represent the victim in court-martial proceedings and enforce the rights provided to victims of sexual assault and, as of 2019, domestic violence.

The right to independent counsel to advocate for the victim is further affirmed under case law established in [LRM v. Katsenberg, 72 MJ 364 \[2013\]](#). In *Katsenberg*, the military's highest court, the Court of Appeals for the Armed Forces\*, held that a victim's right to be heard includes the right to be heard through counsel.



*\*The United States Court of Appeals for the Armed Forces exercises worldwide appellate jurisdiction over members of the armed forces on active duty and other persons subject to the Uniform Code of Military Justice. The Court is composed of five civilian judges appointed for 15-year terms by the President with the advice and consent of the Senate. Cases on the Court's docket address a broad range of legal issues, including constitutional law, criminal law, evidence, criminal procedure, ethics, administrative law, and national security law. Decisions by the Court are subject to direct review by the Supreme Court of the United States.*

## PRO BONO COUNSEL

**Though an SVC/VLC is often assigned to a survivor (more information to follow on who might qualify for military representation), there is still an important role for civilian attorneys in representing the victim. First and foremost, the civilian attorney is from outside the military and has no real or perceived conflicts attributed to current military service.** The assigned SVCs/VLCs are typically in the same service as the accused, the victim, and the JAG assigned to prosecute the case. Many victims have little faith in the process and are wary of being represented by a military attorney.

Knowing that there is someone representing his or her interests without any possibility of split allegiances, pressures from command, fears of impact on one's career, or in the extreme, being given conflicting instructions regarding whose interests they serve, can make an enormous difference for the victim.

Furthermore, civilian attorneys have the support and resources from POD and the firm at which they work to devote sufficient time to fully investigating the case, bringing forward evidence that may not be known or sufficiently appreciated by the military, and to advocate strongly for the outcome most wanted by the victim. It is also common for SVCs/VLCs to rotate off their assigned duties during the pendency of a matter, resulting in a loss of institutional knowledge and client trust.

The rules governing the role of the SVC/VLC do vary a bit depending on which branch of the military the SVC/VLC serves (which will normally be the same branch that the accused and/or victim serves within).

See [page 9](#) for branch specific practice rules.

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Civilian attorneys are also necessary because civilian victims who are not military dependents or DoD employees are not entitled to a military SVC/VLC. The court-martial process is confusing even for victims who are military members. For civilian victims, all aspects of the military are likely foreign to them, but especially the military justice process. Because the civilian victim is not entitled to an SVC, the victim will most likely not understand the role the chain of command plays, or his or her rights during the process. **A civilian attorney is crucial to ensure the victim has a champion, who can also help him or her make informed decisions.**

Where a military SVC/VLC is assigned to a matter, it may be possible to work with him or her collaboratively.<sup>2</sup> In such a situation, the civilian attorney's role is to help the SVCs/VLCs do their challenging job. To start off on a productive and rewarding relationship with the SVC/VLC, it is important to remember that civilian lawyers may have much to learn from the SVC/VLC about military culture and commonly-used language or jargon. However, whether new or seasoned in the job, SVCs/VLCs will typically welcome the perspective and resources that civilian attorneys bring to the table when civilian attorneys take on meaningful tasks to help strengthen the victim's representation. Coordinating with the SVC/VLC, the civilian attorney can, for example, help to identify and obtain evidence, review and organize documents, draft timelines, research legal issues, draft motions and the response to motions, argue motions, prepare the client for interviews with the JAG prosecution team, respond to requests from the prosecution team and defense team, and be readily available to the victim who will have many questions and concerns throughout the process.

## JUDGE ADVOCATE GENERAL (JAG)

Each service has both military and civilian attorneys who represent the legal interests of the service. These attorneys are part of the Judge Advocate General Corps (JAGC). Military attorneys are referred to as judge advocates or JAGs. Each JAGC is led by a senior JAG. In the Air Force and Army, the senior JAG is called The Judge Advocate General (TJAG). In the Navy the senior JAG is referred to as the Judge Advocate General (JAG), and in the Marine Corps the senior attorney is referred to as the Staff Judge Advocate to the Commandant. All JAGs are graduates of accredited law schools and members of a state bar. Selection to become a JAG is highly competitive and most JAGs are excellent attorneys. However, the military values generalist attorneys over specialists resulting in few JAGs with extensive litigation experience.

**If a court-martial is convened, an attorney from the JAG Corps will serve as the "prosecutor," another as the defense attorney, and a third senior officer of the JAGC as the judge.**

<sup>2</sup> In some cases, the relationship with the SVC/VLC and the client may be strained beyond repair, and it may be best for the civilian attorney to proceed alone in the representation.

## TRIAL COUNSEL

In the military, prosecutors are referred to as “trial counsel”. The trial counsel presents the government’s case during the pretrial probable cause hearing and at trial, but does not possess many of the traditional authorities of the prosecutor. For example, the trial counsel does not have the authority to send charges to a court or to dismiss charges. The trial counsel cannot enter into a plea deal with the defense and needs a convening authority’s<sup>3</sup> permission to use expert witnesses at the government’s expense. The trial counsel is responsible for issuing subpoenas for both government and defense witnesses, and procuring the testimony of military witnesses. Additionally, they swear in witnesses for both sides. The military has a very broad view of defense discovery rights and trial counsel are duty-bound to provide the defense with any statements by the victim that may be inconsistent with prior statements. Therefore, be very careful about what you share with trial counsel. At the same time, it is nice to have a good working relationship with trial counsel, so do all you can to be helpful.

## STAFF JUDGE ADVOCATE (SJA)

The Staff Judge Advocate (SJA) is the legal advisor to the convening authority (discussed below). The SJA by law cannot serve as trial counsel in any case they are also serving as SJA. SJAs provide legal advice to the convening authority on whether a case should be sent to a court-martial. The recommendation that a case be sent to a court-martial is not binding on the convening authority who may choose to ignore the advice. Article 34 of the UCMJ requires the convening authority to receive advice from the SJA prior to sending a case to a general court-martial.

SJAs are usually more senior in rank and some SJAs will have extensive litigation experience. Unfortunately however, many will have very little court-martial experience. The military values generalist JAGs. As a result, most SJAs will not have tried a case in many years, if not decades. Very few SJAs will have more than minimal experience prosecuting sex offenses.

## MILITARY JUDGE

All military judges are JAGs and are usually more senior. Some will have extensive litigation experience but many will not. Judges rotate on and off the bench frequently and often have only been on the bench for short period. Judges have authority similar to civilian judges including contempt authority, but there are no standing courts. Courts are not created until a case is referred to court-martial. It is only then that a judge has authority to rule on most pretrial motions.

*“Then I heard about Protect Our Defenders. Not only did they provide legal assistance and support, but most importantly, they listened, and for the first time I felt validated and understood. I can honestly say without the support of POD, I would not have been able to continue.” —SHERRY, A POD CLIENT*

<sup>3</sup> As explained in the [Overview of the Military Justice System](#) below, a convening authority is the commander who “convenes” a court-martial.

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## OVERVIEW OF THE MILITARY JUSTICE SYSTEM

You may have little or no experience interacting with people in the military, so getting used to all the military terms and norms can feel intimidating. Taking a little bit of time to familiarize yourself with this new system and its associated terminology will increase your confidence exponentially.

[PsychArmor](#) has an enormous catalogue of free online courses that will give you some good background information, particularly in the Military Culture section.

Additionally, POD has compiled an extremely helpful list of [Frequently Asked Questions](#). To learn about the equivalent aspects of the civilian judicial system in the military justice system, read the answers to these questions in particular:

**You must become familiar with these terms below.**

All terms are also included [here](#).

[What are military ranks?](#)

[What is the Chain of Command?](#)

[What is the Military Justice process?](#)



Click [here](#) to learn more about military ranks and insignia.

### WHAT IS NON-JUDICIAL PUNISHMENT?

Non-judicial punishment is a process under Article 15\* of the UCMJ designed to allow a commander to quickly handle minor misconduct. The commander determines whether the military member committed an offense under the UCMJ, and if he or she did, what the appropriate punishment will be. Article 15s (called the Captain's Mast in the Navy and Marine Corps), are supposed to be limited to minor offenses, but this limit is often ignored and Article 15s are used for serious offenses. A minor offense is any offense with a maximum punishment of a year or less of confinement. A military member may refuse the process and assert that the allegations be heard at a court-martial. If the member accepts the Article 15, they may still contest the charges. The UCMJ does not establish a particular burden of proof to determine if someone committed an offense, so each service has its own practice regarding the burden of proof. Punishment options range from reduction in rank, to forfeitures of pay and restrictions depending on the rank of the commander and the person receiving an Article 15. A military member cannot be sent to confinement or discharged from the service as part of Article 15 punishment.



\*See [Article 15](#) of the UCMJ for more information about this process.

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If victims believe the non-judicial punishment process or the potential punishment is too lenient given the offense, he or she has the right to communicate his or her views to the commander. If victims feel that the commander did not take his or her preference into consideration, he or she also has the right to seek redress from a higher authority.

### WHAT IS A CONVENING AUTHORITY?

**A Convening Authority (CA) is the commander who “convenes” a court-martial, which is a criminal trial and functions as the military’s judicial process.** By convening a court-martial, the CA is sending charges against an accused to be tried at a court-martial. The CA will almost always be in the accused’s chain of command. The vast majority of commanders are not convening authorities. In 2013 there were approximately 14,500 commanders in the DoD. Of those, only 15.5% were special court-martial CAs (misdemeanor equivalent) and only 2.7% were general court-martial CAs (felony equivalent).

CAs are not attorneys or prosecutors. Instead, they are military professionals such as pilots, artillery officers or surface warfare officers who serve in quasi-judicial roles. They control the military justice process and the decision on whether to prosecute any offense including a sexual offense. The CA is advised by a Staff Judge Advocate. The CA has vast discretion on the disposition of allegations and approves any plea agreements (plea bargains) or alternate dispositions.

### WHAT IS AN ARTICLE 32 HEARING?

**An Article 32 hearing is the military justice pre-trial hearing (used in lieu of preliminary hearings or grand juries), to determine if there is sufficient evidence in a case to proceed to a general court-martial.** A preliminary hearing officer (PHO) presides over the Article 32 hearing. The PHO will usually be a JAG and in some services will likely be a military judge. When serving as a PHO, a military judge has no judicial authority. The government is represented by trial counsel. Unlike a grand jury, the accused and his or her counsel attend the hearing and cross-examine witnesses and present evidence. Following recent reforms, an SVC and the victim are now also entitled to attend the hearing. The PHO oversees the proceeding, and determines which witnesses and evidence will be considered. At the conclusion of the hearing, the PHO prepares a report with a nonbinding recommendation on whether to prosecute. That report goes to the convening authority who ordered the hearing. The convening authority is not bound by the recommendations of the PHO.

Due to reforms championed by POD, a victim can no longer be forced to testify at an Article 32 hearing. Prior to reforms, an Article 32 hearing was a mini-trial that could last days, with defense counsel given wide latitude to engage in exhaustive “discovery” through lengthy and often unfettered cross-examination. The victim was often re-traumatized by the lengthy cross-examinations, which were designed to intimidate, confuse, exhaust, and/or demoralize. As a result, it was not unusual for the victim to decline further participation in the case after testifying at an Article 32 hearing. **Article 32 hearings now serve as preliminary hearings to determine whether probable cause exists and are no longer used for defense discovery.**

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## WHAT IS MILITARY RULES OF EVIDENCE (MRE) 412?

MRE 412 is the military's "rape shield law" and is designed to protect victims' privacy. It states that a victim's sexual history, sexual orientation, and other sexually related details are generally inadmissible as evidence in any military justice proceeding. There are three exceptions to this rule and defense counsels are often given wide latitude to explore the exceptions. The initial questioning of a victim into these matters is procedurally reserved for a closed MRE 412 hearing to protect the victim's privacy. Unfortunately, in practice, this is not always the case and sometimes victims are questioned about these personal and protected details in an open hearing. This is why your advocacy at this stage is paramount to protect your client's privacy and keep him or her from having to face intrusive questioning in an open hearing.

## WHAT HAPPENS AT A COURT-MARTIAL?

A court-martial is a military trial and is similar in many ways to a civilian trial. The first part of the court-martial is known as the "findings phase" of trial. Generally the persons involved are the military judge, the military jury (called the "members panel"), the defense, defense counsel, the defendant (called the "accused"), the trial counsel, and the witnesses. The military judge is usually at the rank of O5 or O6, and is always a JAG officer. The military judge rules on objections, admits or denies evidence, instructs the jury, and presides over the court-martial. The prosecutors, defense counsel, and witnesses generally have the same roles they would otherwise have in the civilian sector.

The members panel is slightly different from the civilian jury. If the accused is enlisted, he or she can select to have the jury comprised of at least 1/3 enlisted members, although all court-martial members must be senior in rank to the accused where practicable. For a General Court-Martial (GCM) there are 8 members, and for a Special Court-Martial (SPCM) there are 4 members. Unlike all civilian jurisdictions, the members do not have to reach a unanimous verdict of either guilty or not guilty, so hung juries are not possible. In the military system, a conviction occurs when at least 3/4 of the members vote for a guilty verdict. An acquittal occurs when less than 3/4 of the members vote for a guilty verdict. The accused also has the option of having the case heard by a military judge instead of court members.

## WHAT IS MILITARY RULES OF EVIDENCE (MRE) 513?

MRE 513 establishes privilege in your client's mental health records. A victim has the right of privacy to confidential communication made to a psychotherapist, which includes mental health records. With the support of POD, Congress recently strengthened the protections of MRE 513, making it more difficult for military judges to indiscriminately review such evidence to turn over to the defense. Again, your advocacy is critical to ensure that the military judge does not improperly review and release your client's mental health records and history. Some defense counsel will seek access to mental health records simply to embarrass or harass the victim, and others will press for disclosure out of fear that a failure to do so will be viewed as ineffective assistance of counsel.

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If the accused is found guilty of any offense, the court-martial immediately moves to the second phase known as the “sentencing phase”. During this proceeding, prosecutors may present matters in “aggravation,” which is evidence that tends to increase punishment, and is an opportunity for a victim to describe in greater details how he or she has suffered. Defense counsel may present matters in “extenuation and mitigation,” which is evidence that tends to decrease punishment, and often includes testimony from friends and family. In the military system, the accused has a choice of being sentenced by the military judge or court members. If sentencing is by members, they vote on what they consider to be an appropriate sentence. The lightest punishment that has the agreement of 3/4 of the members is the sentence adjudged. At a court-martial, an accused can be sentenced to a range of punishments such as fines and forfeitures, extra duty, restriction, confinement, a punitive discharge—bad conduct discharge, dishonorable discharge, or dismissal (for officers)—or even no punishment at all. Penetrative sexual offenses under Article 120 carry a mandatory minimum of either a dishonorable discharge or a dismissal (the officer equivalent of a dishonorable discharge).

## LEGAL AUTHORITY – “RULES OF THE ROAD”

Below are some important resources to consult when preparing to represent the victim in a court martial proceeding. The Manual for Courts-Martial applies to all branches of the military. The others links are to branch-specific regulations and instructions. Which rules apply depends on which branch of the military the accused serves within.

### THE UNIFORM CODE OF MILITARY JUSTICE (UCMJ)

The UCMJ is the body of law that governs the military. It was enacted by Congress and went into effect on May 31, 1951. Before that time, the Army and Navy operated under laws derived directly from the British Articles of War, which had been in force before the Revolutionary War. Today, the UCMJ contains most common law crimes such as murder, rape, theft, and assault. It also contains military-specific crimes such as Unauthorized Absence or Absence Without Leave (UA or AWOL), Orders Violations, and Conduct Unbecoming an Officer.

### MANUAL FOR COURTS-MARTIAL

You can find a digital copy [here](#) or in your law library. **Pay special attention to Rule 32 and forward, as these are the procedural rules.**

[AIR FORCE MILITARY JUSTICE PROCEDURES INSTRUCTION](#)

[ARMY JUSTICE PROCEDURES REGULATION](#)

[NAVY JUSTICE PROCEDURES REGULATION](#)

### RIGHT TO COUNSEL FOR VICTIMS

[LRM v. Katsenberg](#), 72 MJ 364 (2013)

This is the United States Court of Appeals for the Armed Forces (CAAF) decision that establishes the victim’s right to be heard through counsel.

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## ARTICLE 120 OF UCMJ

### [Rape, Sexual Assault and other Sexual Misconduct](#)

#### CRIME VICTIM RIGHTS CODIFIED IN ARTICLE 6B

Full citation is 10 U.S. Code § 806b. Art. 6b. [Rights of the victim are spelled out under this chapter.](#)

#### MRE 412

Below are some key cases interpreting this rule. Please reach out to POD for exemplar briefs on this rule and how it should be applied.

[United States v. Carpenter](#), 77 M.J. 285 (C.A.A.F. 2017)

[United States v. Erikson](#), 76 M.J. 231 (C.A.A.F. 2017)

[United States v. Ellerbrock](#), 70 M.J. 314 (C.A.A.F. 2010)

[United States v. Gaddis](#), 70 M.J. 248 (C.A.A.F. 2011)

#### MRE 513

Please reach out to POD for exemplar briefs on this rule and how it should be applied. CAAF has rarely addressed the application on Rule 513. Their [most recent opinion](#) addressing it is from 2006. The rule was significantly changed recently to provide better protections for the victim and to make it more difficult for an accused to access records, but the impact of these changes has not been reviewed by CAAF. The military service courts have treated the issues inconsistently and CAAF has been unwilling to resolve the conflicts. While trial judges are much less likely to order production of mental health records now, some judges have abated proceedings until the victim consents to the release of the records.

## THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES (CAAF)

Review the [link](#) to the CAAF Opinions Digest by subject for case law that is binding to all branches of the military.

[United States v. Mangahas](#) — a recent CAAF decision that imposes a statute of limitations of five years on cases of rape that happened before October 2006. There is no statute of limitation on rape cases that occurred after October 2006. Currently, POD is working with survivors who were raped before October 2006 to decide whether to seek charges in the civilian criminal court system. Civilian law enforcement in the state in which the rape took place *could* decide to prosecute if the statute of limitations for rape in that state has not passed. You can look at [this website](#) to see each state's statute of limitations for rape. If the statute of limitations has not passed, the survivor will have to make a complaint (often called "pressing charges") with the civilian police in the city or town in which the rape occurred. There is no guarantee that the police will pursue an investigation and prosecution, especially if it is an older case without substantiating evidence. But a survivor (with your help and guidance) does have the option of trying that course of action.

*Mangahas* resulted in the overturning of a number of convictions. [Three of those cases](#) are currently before the Supreme Court to decide if CAAF's ruling was in error. Due to COVID-19, the hearings have been postponed until the next term.

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# REPORTING A SEXUAL ASSAULT: A VICTIM'S OPTIONS

A military victim, dependents of a military member, and DoD employees have two options for reporting a sexual assault.

## 1 RESTRICTED REPORT

A restricted report enables the victim to access services such as medical care and legal advice without a formal investigation being initiated. Only certain individuals are privy to a restricted report such as an SVC/VLC, Sexual Assault Response Coordinator (SARC), or medical provider. Legal authorities and the chain of command will not be provided details of the report, such as the name of the victim or the perpetrator, but evidence such as a rape kit can be preserved for later use.

## 2 UNRESTRICTED REPORT

An unrestricted report can be made to law enforcement, the chain of command, or a supervisor. By law, an unrestricted report must be investigated by military investigators. Generally, civilian victims may only file an unrestricted report. Military victims who file an unrestricted report also have access to the same victim services that are available to those who file restricted reports, including access to counseling, a Victim Advocate, and an SVC/VLC.

If a survivor chooses to go forward with the unrestricted reporting option, the branch-specific investigative unit will begin an investigation into the allegations. Throughout the investigation process, an SVC/VLC and/or civilian counsel are critical to ensuring that a victim's rights are being upheld.

Once the investigation is complete (which can only take place after an unrestricted report is made), a copy of it must be sent to the offender's commander. Prior to 2012, the immediate commander of the subject had what was known as "initial disposition authority". Initial disposition authority allowed a commander to take no action or initiate a range of actions including preferring charges, which is the first step of the court-martial process. In 2012, the then-Secretary of Defense elevated disposition authority for sex assault, forcible sodomy, and rape to the Special Court-Martial Convening Authority (SPCMCA) in the grade of at least O6. In other words, lower ranking commanders no longer have the ability to "kill" sex assault or rape cases, but the lower level commander may still prefer charges. The commander must forward the investigation and charges if preferred along with disposition recommendations to the SPCMCA.

The SPCMCA operates under the restrictions of Rules for Courts-Martial (RCM) 306 when exercising initial disposition authority. For a good example of how this is supposed to work, see [Air Force Instruction 51-201, paragraph 5.7](#). The SPCMCA has the following options: take no action; administrative action; nonjudicial punishment; or disposition of any charges by dismissing the charges, referring the charges to a special court (penetrative offenses can only be referred to a general court-martial), or forward the charges to the General Court-Martial Convening Authority (GCMCA) with recommendations for an Article 32 hearing. If no charges have been preferred, the SPCMCA could prefer charges themselves.

**Most importantly for you, the victim has the right to express his or her views on how the case should be handled, including whether the victim would prefer that a civilian jurisdiction prosecute the offender. Those views must be considered prior to SPCMCA's initial disposition.** The commander or convening authority is required to notify the victim that she or he has the right to opt out of the military system and pursue charges in the civilian court, but rarely does. **It is imperative to educate yourself on the local jurisdiction to give the victim informed advice on which path to pursue.**

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## STEP BY STEP ACTIONS TO TAKE, TIMELINE, AND TIME COMMITMENT

The most common steps for representing your client effectively are listed below, roughly in the order in which you will encounter each issue. However, every case is unique and unexpected things can occur. You will not want to wait to address certain issues and may need to respond immediately or on short notice. It is hard to predict how quickly a case may be resolved, but as a general guideline, cases typically take around 450 days from when an offense is reported to when a court-martial concludes.

### RUN CONFLICTS CHECK

When you first receive a case referral from POD, you will need to run a conflict of interest check with your practice/firm.

**However, please note that the DoD and/or specific military branches are NOT the adverse party, so you will not be conflicted out if you have ever provided legal representation to those entities, nor will you create a conflict for later work with them.**

### AGREE ON ENGAGEMENT

Confer with your prospective client, telephonically or, if possible, in person, to discuss the proposed representation, procedural posture of the matter (including pending deadlines), and to agree on the terms of engagement. See [page 20](#) for a sample engagement letter.

### MEET WITH CLIENT

Meet with your client, telephonically or, if possible, in person, to review the facts and the procedural posture of the case, to identify any pending deadlines, and to start building your list of action items.

### SVC/VLC

Determine who is the assigned SVC/VLC on the case and reach out to that person.

### TRIAL COUNSEL

Determine who is the trial counsel and reach out to that person. File a notice of appearance if appropriate.

### DOCUMENTS YOU WILL NEED TO REVIEW AND/OR REQUEST

At your first meeting with your client, ask him or her to bring (or send to you if you are meeting remotely) all the forms and paperwork she or he has been given. You will want to review all of those documents.

**You may need to submit a FOIA as soon as possible to get copies of records that your client does not have** (see more information on [page 14](#)).

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**Survivors United** was founded by survivors of military sexual crimes, and is a helpful [website](#) that explains reporting processes in the military. It also provides guidance regarding what forms are necessary to fill out and/or obtain as counsel to a victim. Ask your client about each of the forms listed below and obtain copies for review.

### Important DoD Forms You Are Entitled To:

[DD FORM 2910](#) Information about the difference between restricted and unrestricted reporting. DD stands for Department of Defense so these forms are military-wide and not branch-specific.

[DD FORM 2911](#) This form is to obtain information about the forensic exam, if your client has had one.

[DD FORM 2701](#) This form explains the victim's rights, as well as the rights of a witness of a crime. It also provides resources afforded to a victim. This form should be provided to you by the criminal investigative official assigned to your client's case.

[DD FORM 2702](#) A brochure that explains the court-martial process and court proceedings to victims and witnesses. If your client has not been provided this form, please notify the legal team and/or the SVC/VLC assigned to assist your client.

### These forms should be given to your client post-trial:

[DD FORM 2703](#) A brochure that explains to a victim what happens post-trial and how to exercise the rights afforded to a victim.

[DD FORM 2704](#) This form is for victims and appropriate witnesses to elect to be notified of changes in the offender's status while in confinement. For all cases resulting in a sentence to confinement, this form should be completed and forwarded to the Service Central Repository, the gaining confinement facility, local responsible officials, and the victim or witness/witnesses.

[DD Form 2705](#) This form is completed and sent to victims and witnesses to notify them of a change in a prisoner's status. It affords the victim an opportunity to appear before a Clemency/Parole Board regarding the convicted perpetrator of the crime.

## SURVIVORS' BILL OF RIGHTS ACT OF 2016

This bill amends the federal criminal code to establish statutory rights for sexual assault survivors, including the right to: (1) not be prevented from receiving a forensic medical examination and not be charged for an examination; (2) have a sexual assault evidence collection kit (i.e., a rape kit) preserved for 20 years or the maximum applicable statute of limitations, whichever is shorter; (3) receive written notification prior to destruction or disposal of a rape kit; and (4) be informed of these rights and policies. Learn more about the Survivors' Bill of Rights [here](#).

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## CRIMINAL INVESTIGATIVE REPORTS & COURT PROCEEDINGS

As a survivor of sexual assault, your client has a right to request copies of the Report of Investigation and General & Special Court-Martial proceedings. It is strongly encouraged that you complete a Freedom of Information Act (FOIA) request for all documentation regarding your client's case. In order to obtain any information regarding the legal proceedings in your client's case, you will need to submit a FOIA to the criminal investigative agency of the appropriate branch of service as well as to the Office of Military Courts. Both civilians and active duty military can submit FOIA requests regarding legal proceedings.

The [Survivors United website](#) has critical information on how to prepare and submit a FOIA request, specific to each branch of the military.

## MILITARY PROTECTIVE ORDER (MPO)

Your client's safety may be an immediate concern, especially if your client is living on the same base as the perpetrator. It is important that you ask your client IMMEDIATELY if he or she has any safety concerns and whether he or she would like to seek a Military Protective Order (MPO).

An MPO is a short-term order issued by a unit commander against an active duty service-member under his or her command. The law permits commanders to issue MPOs under [10 US Code § 1567\(a\)](#). There is no hearing involved in the process, and there is no stated length of time that they are in effect. Generally, an MPO is supposed to be issued upon the request of a victim or victim's advocate. Violations of MPOs can be charged as violations of orders under Article 90 of the UCMJ. MPOs can be issued verbally or in writing. The orders are most commonly issued in writing via [DD Form 2873](#). The DoD Instruction on the matter, and the DD Form 2873, clearly state that the MPO is intended to:

- + Safeguard victims;
- + Quell disturbances; and
- + Maintain good order and discipline while victims have time to pursue protection orders through civilian courts.

Here is a [link](#) to more information about MPOs.

## ASSERTING RIGHTS OF CLIENTS IN COURT-MARTIAL PROCESS

The assertion of some rights can be made before the court-martial begins. Here are the enumerated rights of the victim:

- + The right to be treated with fairness and respect for your dignity and privacy;
- + The right to be reasonably protected from the accused offender;
- + The right to reasonable, accurate, and timely notice of public preliminary hearings, pretrial confinement hearings, court proceedings, and clemency and parole hearings related to the offense;
- + The right to be present at all public proceedings related to the offense unless the hearing officer or military judge determines that your testimony would be materially altered if you as the victim heard other testimony;
- + The right to reasonably confer with the prosecutor/trial counsel in the case;
- + The right to receive available restitution;

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- + The right to be reasonably heard at: 1) a public hearing concerning the continuation of any pretrial confinement of the accused; 2) a sentencing hearing related to the offense; and 3) a public Military Department Clemency and Parole Board hearing related to the offense;
- + The right to submit a written statement for the consideration of the convening authority prior to taking action on findings and sentence;
- + The right to proceedings free from unreasonable delay; and
- + The right to be provided information, if applicable, about the conviction, sentencing, imprisonment, convening authority's action, appellate review, and release of the offender.

**MRE 412 and 513 further protect the right to privacy.**

The most common violations are:

- + The right to privacy;
- + The right to notice and conferring with trial counsel;
- + The right to be heard; and
- + The right to restitution.

You must assert these rights as soon as you are aware of any violations. You should immediately notify trial counsel and the SVC/MLC about these violations, and then file a motion before the military judge so that the violations can be addressed and rectified. Consult the appropriate branch's court rules (see above) on how to properly file a motion.

**ARTICLE 32 HEARING**

**A victim has a right to attend the hearing and can no longer be forced to testify at the hearing. The victim may choose to testify if she or he wants to.** As counsel to the victim, you will want to attend this hearing and listen to

the proceedings. You will get a very clear sense of the posture of the case, the strength of the trial counsel's case, what the defense case theory is, and where you may need to assist in gathering additional evidence or witnesses. The testimony at the hearing is recorded and your client is entitled to a copy of the recordings, but a victim will have difficulty obtaining or seeing copies of any exhibits offered during the hearing.

**DISCOVERY**

**The defense will almost without exception try to get access to your client's mental health records. However, the records are privileged under MRE 513, so be prepared from the start to oppose these discovery requests.**

Additionally, prepare your client for the opposition's efforts to discover and introduce the victim's sexual history. The defense also often seeks access to your client's social media accounts, phone records, cell phone data, financial records and even school transcripts. The military gives an accused much greater discovery rights than civilian jurisdictions. These rights are often used in attempts to invade a victim's privacy and intimidate him or her.

A victim named in a charge must be notified unless exceptional circumstances exist before any subpoena is served seeking production of personal or confidential information, RCM 703(g)(3)(C)(ii). A victim can move to quash the subpoena before a military judge or magistrate, RCM 703(g)(3)(G). Military subpoenas may only be issued after preferal of charges. Searches and seizures of your client's possessions may occur before preferal pursuant to authorization by a commander or military magistrate, and it is unclear what remedy they may have to stop any such searches or seizures at that time. This is particularly problematic during the initial investigation when, as often occurs, a victim's phone is seized by investigators.

## ALTERNATIVE DISPOSITIONS

Your client may be asked whether he or she supports a number of alternatives to a court-martial or a plea agreement. The accused will often seek to avoid going to court-martial by offering to accept nonjudicial punishment or to be discharged from the service with less than honorable conditions in lieu of a court-martial. The accused may also seek to enter into a plea agreement to reduce his or her sentence or to avoid pleading to an offense that requires a sex offender registration. You will need to be able to advise your client on whether he or she should support or oppose such an alternative resolution. The convening authority is required to consider your client's input, but may approve or disapprove an alternative resolution or plea agreement contrary to your client's wishes. You can propose terms of a plea deal such as restitution or the surrendering of weapons by the accused.

## VOIR DIRE

You and your client will want to be present for court member selection. Though your client will not have any formal say over who remains as a court member, you will want to develop a relationship with trial counsel such that he or she is conferring with you and your client about exercise of challenges. **The court member panel can feel very rigged in favor of the accused, and this can be a grueling process. Prepare your client well in advance.**

## TRIAL

In many ways the trial will appear similar to a federal criminal procedure. One major difference is that courts-martial are not standing courts. Courts are created for each new offense at the time of referral. As such, it is more difficult for either party or the victim to seek redress from a judge early in the process. Recent changes do give judges authority to act on a number of pre-referral issues such as subpoenas and warrants. For victims, this may include the ability to quash subpoenas. See Article 30a, UCMJ.

A victim has standing to argue on any 6b right, MRE 412, MRE 513, MRE 514 or MRE 615 issues after referral and at the Article 32. It is up to the trial judge for the form and timing of any assertions of these rights, but you should always be aggressive in arguing for your client.

## APPEAL

Article 6b(e) gives a victim the right to appeal certain rulings at an Article 32 or those made by a military judge. The appeal is by a petition for a writ of mandamus and is limited to rights contained in 6b or MRE 412, 513, 514 or 615. A victim may also seek to quash an order to submit to a deposition. The petition will have priority over all other matters to the extent practical before the Court of Criminal Appeals (CCA) or the Court of Appeals for the Armed Forces (CAAF).

The writ standard is exceptionally unfavorable to the victim. A writ of mandamus is viewed as a "drastic and extraordinary remedy" reserved for "really extraordinary causes," *E.V. v. United States*, 75 M.J. 331 (CAAF 2016). Still, there have been successful reversals of a military judge's order to produce and disclose a victim's mental health records. See for example, *J.M. v. Payton-O'Brien*, 76 M.J. 782 (NMCCA 2107) and *D.B. v. Lippert*, (ACCA 1016) WL381436.

If a case has been tried to a verdict and has resulted in a conviction, most often the accused is entitled to an automatic appeal. The victim has very little rights at this appellate level, but may seek to have an adverse appellate ruling by a CCA certified to CAAF. The government has no ability to appeal an adverse ruling by a CCA, but the service TJAG may certify an issue to CAAF. CAAF must accept a certified issue for review. The defense, government, or the victim can seek certification from a TJAG, and on several occasions, victims have persuaded a TJAG to certify an adverse holding to CAAF. *Kastenberg* is one such case, and another, *Collins* is now (as of March 2020) pending before the United States Supreme Court.

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## SENTENCING

The military sentencing system is unlike most civilian systems. One stark difference is that in the military sentencing system, the rules of evidence apply at sentencing, including hearsay. The government may call witnesses to provide victim impact testimony. However, this testimony is under oath and subject to cross-examination. Under RCM 1001A, the victim may elect to present his or her own victim impact statement, either sworn or unsworn. This is a distinct right separate from the government's pre-sentencing case, and occurs after the government case but before the defense's. The statement is restricted and must be limited to impact that is financial, social, psychological, and/or medical, and directly relating to or arising from the offense. The victim cannot recommend any type of sentence.

If sworn, the victim will be subject to cross-examination. If unsworn, the victim's impact statement can be done in writing, orally, or both. It can be read by either the victim or his or her counsel. Any mention of psychological harm or treatment may open the door to mental health records. Many judges also require that a victim submit the statement to the judge and counsel for approval before presenting it at the pre-sentencing hearing.

The victim or his or her counsel are the only ones who can offer the evidence under RCM 1001A. See *United States v. Barker*, 77 M.J. 377 (CAAF 2018). Also see [U.S. v. Hamilton](#), a CAAF case issued in February 2019 regarding the inadmissibility of certain unsworn victim impact statements presented at sentencing.

## SPECIAL ISSUES

The vast majority of sexual assault allegations are never prosecuted in the military, yet for many victims, getting a case to trial is their ultimate goal. A victim has a right to consult with the trial counsel and to make his or her preferences as to case disposition known to the convening authority. A victim who believes a case is not being handled properly can also contact his or her Congressional Representative or Senator.

## WORKING WITH MILITARY JUDGES

Most judges are now used to having SVCs in their courts and will treat you with respect. However, each trial judge may also have his or her own unique rules for SVCs, and you will still run into trial judges who are hostile to the idea of SVCs. For example, some will allow SVCs to attend RCM 802 sessions (out of court session with the parties) while others will not.

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## HOW POLICY CHANGES HAVE IMPACTED HOW MILITARY SEXUAL ASSAULT CASES MOVE FORWARD

Every year Congress must pass the [National Defense Authorization Act](#) (NDAA), which specifies the annual budget and expenditures of the US Department of Defense, establishes funding levels, and sets the policies under which the money will be spent.

Because the NDAA is sure to be considered and passed by Congress (since it is a required piece of legislation to keep the military running), it is also a vehicle for getting other DoD legislative reforms. Since NDAA 2013, POD has achieved [significant reforms](#) to the military justice system—but there is still so much more to be done.

Some of the most significant reforms are:

**Article 32:** Prior to the 2013 reform, the Article 32 process had little if any protections for a victim appearing before the pre-trial hearing. Rather than being a probable cause hearing, the Article 32 process was viewed as an investigation and discovery tool for the defense. This led to often abusive questioning of a victim of sexual assault or rape, having nothing to do with probable cause. The 2013 reform refocused the [Article 32](#) on the question of probable cause, enhanced victim protections (including mental health and Rape Shield), and most importantly gave the victim the option of testifying at the hearing. The victim is also entitled to a copy of the recording of the hearing. See Article 32 and RCM 405.

### **Codify Right to In-Court Representation for SVC/VLC:**

While all branches of the DoD established a Special Victims' Counsel or Victim's Legal Counsel program to represent victims of sexual assault and rape, the actual scope of a SVC/VLC authority in a court-martial was and is still unclear. In the past, most judges would not allow SVCs/VLCs to speak on behalf of their clients at a court-martial, severely restricting counsel's ability to fight against unwarranted intrusions into the mental health records and sexual histories of a victim. Based on CAAF's holding in *Kastenber*, [Congress rectified this by making it clear that the SVC role included representation in court, allowing SVC's to file motions, and make arguments defending their clients' rights](#). More recently, SVC/VLC services were expanded to include dependents and DoD civilian employees who are victims of sexual assault or rape. In NDAA FY 2019, Congress further extend SVC/VLC representation to victims of domestic violence committed by military members.

*"If it wasn't for POD, I wouldn't be standing here with strength to keep going. I am getting my Masters to be a therapist to other girls and guys that are raped, and be a voice to help them through dark times."*

—BRITTANY, A POD CLIENT

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*“I can never repay Protect Our Defenders for the work they’ve done. [They] gave me the support and clarity I needed to make informed decisions. Thank you for empowering me, providing honest and professional feedback, but most of all for treating me as an individual who matters and not as a circumstance.”*

—TRACI, A POD CLIENT

**Mandate Consultation With Victims’ Counsel During Scheduling of Proceedings:** Congress instructed the Secretary of Defense to establish policies and procedures designed to ensure that any counsel of a victim of a sexual offense is provided prompt and adequate notice of the scheduling of any hearing, trial, or other proceeding in connection with the prosecution of his or her case.

**Reform of Pre-Trial Depositions:** After victims were given the right not to testify in Article 32 hearings, the defense sought to use depositions as a means of forcing victims to be subjected to cross-examinations prior to a trial. The deposition rule in effect at the time was poorly written and was used by judges to force victims who were willing to testify at court to undergo invasive depositions. The law was changed making it clear that depositions should not be ordered for any witness who is willing to appear at a trial absent “exceptional circumstances.” Refusal to meet with the defense or to testify at an Article 32 is not an exceptional circumstance. See RCM 702.

**Enhanced Appellate Rights for Victims:** For the first time, the victim of a sexual assault crime can appeal a military judge’s ruling violating a victim’s rights, such as his or her mental health privilege or the right to be treated with fairness.

**Criminalize “Revenge Porn:”** Recognizing the widespread impact on victims who had their intimate images shared without their consent, Congress criminalized the distribution on social media or other means of such videos and photographs by military personnel. The sharing of such images by military personnel, as demonstrated by the [Marines United scandal](#), was particularly devastating for military women. See Article 117a.

**Domestic Violence:** For the first time, domestic violence was made a specific offense in the UCMJ. Prior to this, perpetrators of domestic violence escaped being appropriately labeled for their crimes. This legislation ensures that when a military member’s conviction is reported to civilian authorities, his or her crimes will be properly identified as domestic violence, making it less likely that the offender will have access to firearms. See Article 128b.

**Thank you so much for taking on these important cases.  
Please contact POD with any questions you may have.**

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## SAMPLE ENGAGEMENT LETTER

[\_\_\_\_\_] , 2020

### VIA E-MAIL

[\_\_\_\_\_]
[\_\_\_\_\_]
[\_\_\_\_\_]

### Re: Legal Representation

Dear [\_\_\_\_\_]:

We are delighted that you have selected [\_\_\_\_\_] as legal counsel. This letter describes the scope and terms of our engagement. We apologize for the formality of this letter, but much of this language is required by the ethical rules under which we practice. Although this letter addresses the formalities of our engagement, we want you to know how honored we are that you have placed your trust in us.

[\_\_\_\_\_] will represent you in connection with asserting your legal rights as a survivor of sexual assault in pending and/or potential criminal proceedings against [\_\_\_\_\_]. We will not be responsible for assisting you in any other legal matters unless separately agreed to by us in writing.

We have agreed to handle this matter on a pro bono basis. We will not charge you for our time on this matter. We also do not plan to bill you for our out-of-pocket expenses. However, we reserve the right not to incur expenses in this matter in excess of \$1,500.

To enable us to represent you effectively, you agree to cooperate fully with us in all matters related to your case and to fully, accurately, and timely disclose to us all facts and documents that may be relevant to the matter or that we may otherwise request. This information will form the basis of our legal advice. We also need you to immediately notify us about any change in phone number or address and to make yourself reasonably available to us for necessary meetings, conferences or other proceedings. If you send information electronically that is time sensitive, you are responsible for confirming that it was received.

Nothing in our agreement to represent you and nothing in our statements to you should be construed as a promise or guarantee about the probable outcome of this matter. Any expression of our professional judgment is, of course, limited by our knowledge of the facts, the law, and subject to factors or conditions beyond our control.

For any litigation matters, if you are allowed, awarded or otherwise recover (or are eligible to recover) from a court, agency or some other person or entity, any legal fees or disbursements incurred or paid on your behalf, you will fully cooperate with us to maximize the recovery from such court, agency or other person or entity for all such charges. To the extent you are allowed, awarded or otherwise recover from someone else for fees and disbursements, that allowance, award or other recovery shall be paid immediately by you to [\_\_\_\_\_] for reimbursement of the fees and disbursements we have paid or incurred on your behalf. and we will reimburse you for any disbursements you have paid if there is any excess after reimbursement to ourselves for our fees and for disbursements we have paid.

Your communications with us about legal matters are subject to the attorney-client privilege. Confidential information can be kept from the world at large, except for situations involving crime, fraud or where a court can compel disclosure. The attorney-client privilege may be waived if you discuss the substance of your communications with outside parties. Please do not do so. However, you agree that, as either you or we deem necessary, we may discuss your matter with Protect Our Defenders and that such communications do not waive any attorney-client privilege that we may have to protect the confidentiality of our communications. If we need to establish relationships with legal colleagues or other legal service providers, we do not share fees or personnel.

Our representation of you does not include acting as counsel for any family member or other person, unless this additional representation is separately and clearly undertaken by us. If in the future we and you mutually agree to expand our representation of you to include anyone else, it is agreed that the terms, conditions and consents contained herein will apply to such representation(s).

You are free to terminate our services at any time and to retain separate counsel outside of [\_\_\_\_\_]. We retain the right to cease performing legal services and to terminate our legal representation for any reason consistent with ethical rules, including conflicts of interest. Our representation in this matter will cease on completion of our work set forth above unless you ask us to perform additional work that we agree to undertake. If you wish to have us return material from your files after the conclusion of our representation, we will provide you such material at your request. We will have no obligation to retain your files for more than one year after the conclusion of our representation.

We provide only legal services to you in connection with this agreement. You are not relying on us for any services other than legal services, and we are specifically not providing any business, investment, insurance or accounting advice or any investigation of the character or credit of persons with whom you may be dealing. Under rules in certain jurisdictions where we practice, we must advise you that, at any time before or during our representation of you, you may consult

independent counsel (at your sole expense) regarding this engagement letter or related documents governing our relationship.

[\_\_\_\_\_] represents many other companies, individuals and government agencies (“clients”). During the time we are representing you, we may be asked to represent:

- (1) other present or future clients in transactions, litigation or other disputes directly adverse to you that are not substantially related to our representation of you; and/or
(2) parties who are considered directly adverse parties in matters we handle for you. Our work for these directly adverse parties would be in matters that are not substantially related to our work for you.

We request your consent to allow [\_\_\_\_\_] to undertake such future representations without the need to obtain any further or separate approval from you, as long as those representations described in (1) and (2) above are not substantially related to work [\_\_\_\_\_] has done, or is doing, for you. Your signature below constitutes your consent to such representations. We agree not to use any proprietary or other confidential nonpublic information concerning you acquired by us as a result of our representation of you in connection with any litigation or other matter in which we represent a party directly adverse to you.

[\_\_\_\_\_] may need to consult with or secure consent from its other current or prospective clients who are or may become adverse to you in order to clear or address actual or potential conflicts of interest. You agree and consent that to the extent it is reasonably necessary in such communications, [\_\_\_\_\_] may disclose to each such current or prospective client the fact that [\_\_\_\_\_] has or has had an attorney-client relationship with you.

During our representation of you, there may from time to time be issues that raise questions as to our duties under the rules of professional conduct that apply to lawyers. These might include, e.g., conflict of interest issues, and could even include issues raised because of a dispute between us and a client over the handling of a matter. Under normal circumstances when such issues arise we would seek the advice of our Professional Standards Counsel, Loss Prevention partners or Professional Standards Conflicts Attorneys who are experts in such matters. Historically, we have considered such consultations to be attorney-client privileged conversations between firm personnel and the counsel for the firm. In recent years, however, there have been judicial decisions indicating that under some circumstances such conversations involve a conflict of interest between the client and [\_\_\_\_\_] and that our consultation with [\_\_\_\_\_]’s counsel may not be privileged, unless we either withdraw from the representation of the client or obtain the client’s consent to consult with [\_\_\_\_\_]’s counsel.



[\_\_\_\_\_]
[\_\_\_\_\_] 2020
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We believe that it is in our clients' interests, as well as [\_\_\_\_\_]’s interest, that in the event legal ethics or related issues arise during a representation, we receive expert analysis of our obligations. Accordingly, as part of our agreement concerning our representation of you, you agree that if we determine in our own discretion during the course of the representation that it is either necessary or appropriate to consult with our firm counsel (either [\_\_\_\_\_]’s internal counsel or, if we choose, outside counsel) we have your consent to do so and that our representation of you shall not, thereby, waive any attorney-client privilege that [\_\_\_\_\_] may have to protect the confidentiality of our communications with counsel. The costs associated with such legal counsel will be paid by [\_\_\_\_\_].

This letter confirms the terms and conditions under which [\_\_\_\_\_] will provide legal services to you. If this letter correctly sets forth our understanding, please sign and date a copy of this letter and promptly return it to me. If you have any questions about this letter or generally about our services or bills, please call me at any time. We look forward to working with you and thank you for placing your confidence in [\_\_\_\_\_].

Sincerely,

[\_\_\_\_\_]

ACCEPTED AND AGREED:

[\_\_\_\_\_]

By: \_\_\_\_\_

Print Name: \_\_\_\_\_

Date: \_\_\_\_\_

## **ACKNOWLEDGEMENTS:**

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