

Let the Machine Work

Protecting communications to instill confidence
in sexual assault reporting and response

by Maj Jess Martz & Marie Brodie

Marines take care of Marines—it's a concept as old as the Corps. Gen John A. Lejeune reminded us of this in the 1921 edition of the *Marine Corps Manual* when he discussed the "Teacher and scholar" relationship that should exist between officers and enlisted and

especially commanding officers, [who] are responsible for the physical, mental, and moral welfare, as well as the discipline and military training of the young men [and women] under their command.¹

When a Marine reports a sexual assault, it is for leaders to do everything possible to take care of that Marine. In taking care of a Marine who has been victimized, commanders may want to speak to uniformed victim advocates (UVAs) or victims' legal counsel (VLCs) to get more information. However, when leaders ask UVAs for information relating to or provided by a victim, unintended damage can be done to the victim and to the sexual assault investigation. Because of this damage that can occur, a UVA is prohibited from disclosing what the victim shares with that UVA in the course of providing the victim services.² When UVAs disclose these confidential communications, they can bring harm to the victim they are providing services to and deter future victims within the unit from coming forward. The best approach is to let the Sexual Assault Prevention and Response (SAPR) Program and military or civilian justice system run their course. UVAs are essential members of this "machine" and of the "services"

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available to a Marine victim of sexual assault. However, UVAs are particularly at risk to bring harm to a victim or to the integrity of an investigation because they are first responders and because they are typically appointed in writing by the commander. This tends to put them in a loyalty dilemma—choose between answering the unit's questions versus protecting a victim's confidentiality. A best practice for commanders and leaders is to approach reports of sexual assault with the "let the machine work"

mindset in order to protect the victim, protect the UVAs who serve the commander and the victim, and protect the military justice process that may follow the report of the sexual assault.

Understanding Confidential Communications

To accomplish this, it is essential to understand the ethical obligations of UVAs, as well as the roles of those involved in the sexual assault process. The UVA is not the person who should be



Being aware of the program also means knowing with whom information about sexual assault can be shared. (Photo by Cpl Joseph Scanlon.)

providing updates to the commander on the victim. This role is filled by at least one of the other following individuals: the sexual assault response coordinator (SARC) (if not acting as a victim advocate), the staff judge advocate, Naval Criminal Investigative Service (NCIS), and/or the trial counsel. Remember, the UVA was selected by his commander to provide someone within the unit that victims of sexual assault can report to under the umbrella of confidentiality.³ From the time that a UVA talks to a victim of sexual assault until eternity, that UVA must comply with certain rules pertaining to confidentiality and privilege, depending on whether or not the report is restricted or unrestricted. There are very few exceptions to the general rules of confidentiality and privileged communications between UVAs and victims when providing victims UVA services.

The most recent authority states that information regarding restricted reports should only be shared with “persons authorized to accept Restricted Reports or as authorized by law or DoD regulation.”⁴ Persons “authorized” are typically the UVA, SARC, VLC, medical, and mental health professionals. Every Marine leader should become familiar with what information can not be disclosed under restricted and unrestricted reporting as well as the policy behind it so that the UVA is not placed in the dilemma of paying respect to his leadership while also maintaining confidentiality.

A communication is “confidential” if made in the course of the advocate-victim relationship—it is not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of advice or assistance to the alleged victim or those reasonably necessary for such transmission of the communication.⁵ It is presumed that such communications will be kept private so that reporting and seeking help is encouraged. There are greater limitations on what a UVA can share about the victim if the report is restricted.

Restricted Reporting

In restricted reporting, very little is shared outside the umbrella of UVA-



Throughout the process—training, reporting, confidence—the integrity of the UVA must never be called into question. (Photo by LCpl Jacqueline Perez Rivera.)

victim confidentiality. Keep in mind that this reporting option exists so that victims of sexual assault may privately divulge the assault to the SARC, UVA, or medical personnel in order to get medical treatment alongside SARC and UVA support.⁶ Any personally-identifiable information related to the victim and the incident provided by the victim to the SARC, UVA, or healthcare personnel is confidential.⁷ That means that the victim’s name and any other “information about the person or the facts and circumstances involved that could reasonably be understood to identify the person,” as well as the victim’s Sexual Assault Forensic Examination

Unrestricted Reporting

In terms of what is shared inside UVA-victim communications once an unrestricted report is made, a victim has a privilege to refuse to disclose and to prevent any other person from disclosing a confidential communication between a victim and a SARC and SAPR VA, in a case arising under the UCMJ, if such communication is made for the purpose of facilitating advice or supportive assistance to the victim in accordance with Military Rule of Evidence (MRE) 514.⁹ MRE 514 is a statutory privilege that protects victim communications with their victim advocate and was just recently extended to those communications made with the Department of Defense Safe Helpline staff.¹⁰

There are very few exceptions to the general rule of privilege. Some examples include when a victim advocate believes that a victim’s mental or emotional condition makes them a danger to themselves or others; the communication clearly contemplated the future commission of a fraud or crime, or if the services of the victim advocate are sought or obtained to enable or aid anyone to commit or plan to commit what the victim knew or reasonably should have known to be a crime or fraud; to ensure the safety and security of military personnel, dependents, military

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(SAFE) Kit and its information must remain confidential.⁸ As an example, if the victim is the only female sergeant in the unit, it is advisable for the SARC to not share the victim’s rank, or if the victim is the only female in the unit, do not share the victim’s gender when reporting the crime to the installation commander.

property, classified information, or the accomplishment of a military mission; or when the victim is dead.¹¹

The victim advocate-victim privilege was created to help victims. It has the additional benefit of improving the military's approach to addressing sexual assaults and responding to congressional concern. Like the psychotherapist-patient privilege, this rule establishes a UVA-victim privilege that applies to misconduct situations constituting a case that could result in UCMJ proceedings. This privilege also allows victims who otherwise might not report because of collateral misconduct, such as drug use, underage drinking, attending off-limits locations, and breaking restriction, to report the crime committed against them and seek services to recover from their assault.

To illustrate the importance of the privilege shared between victims of sexual assault and their UVAs, here are a few examples of breaches of confidentiality. These are all avoidable if those involved are educated on what UVAs should not discuss, to include the UVAs, not just their leadership.

Example 1. A victim, who was already a victim-witness in a pending general court-martial for a sexual assault that occurred several months before, calls her UVA to report a subsequent sexual assault. The victim tells her UVA in the course of using the UVA's services that the person who sexual assaulted her was the "same person as last time I was assaulted." The victim tells the UVA that the victim already contacted law enforcement and that NCIS was on the way to interview her. A few hours later, and after the victim completes interviews with NCIS, the UVA seeks clarification from the victim that she meant it was "the same Marine" who assaulted her several months prior. The victim denies that she ever told the UVA it was the "same person as last time." The UVA tells NCIS about the victim's differing statements.

This is a breach of confidentiality because the UVA should not be disclosing what the victim told them in the course of providing UVA services unless

it meets one of the exceptions of MRE 514.

Example 2. A third party reports a sexual assault to NCIS. Both the offender and the victim are Marines but belong to different commands. The commander of the victim is notified and sends a UVA to go care for the victim. The UVA returns and tells the commander what the victim told the UVA when the UVA met with the victim.

This is a breach because the UVA is not permitted to disclose communications made by the victim while the UVA was providing UVA services. Now,

Example 3. A UVA for her unit and her unit is deployed in a remote location. On Saturday night, the UVA stood duty as the unit's Assistant Officer of the Day. A victim contacted the UVA on her personal cell phone number that the victim obtained from a member of the command and asked for advice about restricted reporting. The UVA is not the only UVA in the unit but still helps the victim anyway. The victim decides to elect restricted reporting. The next day, the UVA tells the executive officer during duty turnover that she had to put her "UVA hat on last night." The

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the UVA is a potential witness in any military justice proceedings that could stem from the NCIS investigation. To preserve the integrity of the process, the commander should have contacted the SARC and the only information provided from then on, should come from the SARC, not the UVA. The SARC would only provide information on services provided to the victim if the victim elected to use SAPR services. This protects the victim, the UVA, and also any future military justice proceedings in the event that the victim participated with the military justice process.

executive officer asks the UVA what happened. The UVA tells him that a Marine made a restricted report, and the UVA tells the executive officer that the victim is a female corporal from the S-6 (communications) section. There is only one female in the S-6 section.

This is a breach of confidentiality because in restricted reporting, PII may not be disclosed. The female corporal is the only female in the entire section. Disclosing her gender makes it obvious who the victim is and violates confidentiality within restricted reporting. The UVA cannot and should not dis-



Banners are held up before the start of a SAPR walk at MCAS Miramar. (Photo by Sgt Michael Thorn.)



Some units combine physical training with PME sessions to raise awareness about the SAPP Program. (Photo by Sgt Carson Gramley)

close anything. It is up to the SARC to give non-PII information regarding the restricted report to the installation commander. The victim's commander would not be notified so long as the report remains restricted. The potential impact on this particular victim is that she may not want to participate in the process if what she tells the UVA is then disclosed to members of the chain of command. This may also have a chilling effect on future victims coming forward.

Leaders within the Marine Corps can preserve the integrity of the reporting process in the hopes of seeking justice—whatever that may be in a particular case and to protect the rights of the victim. By safeguarding the communications the victim shares with their UVA, leaders can proactively prevent those involved with sexual assault cases from getting into trouble for seeking or divulging too much information. The UVA is the protector of communications with victims of sexual assault, and as example, if the UVA is asked for their opinion and they give it regarding a case, that is improper. Improper disclosures under either reporting option “are prohibited and may result in disciplinary action pursuant to the UCMJ or other adverse personnel or administrative actions.”¹²

The purpose of a UVA sometimes gets lost in the stress of a report of sexual assault. If the purpose is kept in mind, the integrity of the services provided by the UVA will be preserved which instills confidence in the unit, encouraging future victims to come forward because they know the information they share with their UVA will be kept confidential and/or privileged. If we keep in mind what Gen Lejeune said in 1921, it makes it easier to let the machine work because it is in the best interests of justice and the victim:

The realization of this responsibility on the part of officers is vital to the well-being of the Marine Corps. It is especially so, for the reason that so large a proportion of the men enlisting are under twenty-one years of age. These men are in the formative period of their lives, and officers owe it to them, to their parents, and to the nation, that when discharged from the services they should be far better men physically, mentally, and morally than they were when they enlisted.¹³

Notes

1. Headquarters Marine Corps, *Marine Corps Manual*, (Washington, DC: 1980).

2. Department of Defense, *DOD Instruction 6495.02, Sexual Assault Prevention and Response (SAPR) Program Procedures*, (Washington, DC: 7 July 2015).

3. Ibid.

4. Ibid.

5. Military Rule of Evidence (Mil. R. Evid.) 514, 2016 edition, is the victim advocate-victim and Department of Defense Safe Helpline staff-victim privilege. This rule states that “a victim has a privilege to refuse to disclose and to prevent any other person from disclosing a confidential communication made between the alleged victim and a victim advocate ... in a case arising under the UCMJ, if such communication was made for the purpose of facilitating advice or assistance to the alleged victim.” The rule also discusses the definition of “confidentiality,” by explaining that a communication is confidential “if made in the course of the victim advocate-victim relationship ... and not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of advice or assistance to the alleged victim or those reasonably necessary for such transmission of the communication.” The full text of Mil. R. Evid. 514 is available starting on page 40 of the electronic document available at <http://jsc.defense.gov>.

6. *DOD Instruction 6495.02*, 35.

7. Ibid.

8. Department of Defense, *DOD Instruction 6495.01, Sexual Assault Prevention and Response (SAPR) Program*, (Washington, DC: 20 January 2015).

9. *DOD Instruction 6495.02*, 36.

10. Mil. R. Evid. 514.

11. Ibid.

12. *DOD Instruction 6495.02*, 41.

13. *Marine Corps Manual*.

