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Article 6b Representative

BY CAPTAIN HEATHER HOUSEAL



Article 6b representatives ensure victims have a voice and that they are not overlooked, particularly if the victim is not already represented by an SVC.

WHO IS IT AND WHY DO I CARE?

The conversation about victims and victims' rights is constantly changing and unless you are immersed in victims' issues daily, it can be challenging to stay apprised of these changes, much less why they matter. This article seeks to explain one aspect of victims' rights that was very confusing to me as a civilian Guardian ad Litem (GAL) attorney, trial counsel, and as a Special Victims' Counsel (SVC) — the Article 6b representative. In this article, I will discuss the statutory guidance for Article 6b representatives, the role of such representatives, practical considerations for appointing designees, and whether the representatives add value.

STATUTORY GUIDANCE

The appointment of a victim's representative originates in The Crime Victims' Rights Act of 2004. The right to a representative is not designated as an enumerated right; rather, it falls under the definition of "crime victim."^[1]

A qualifying victim includes a victim of an offense under the UCMJ who is *under 18 years of age and not a member of the armed forces, or who is incompetent, incapacitated, or deceased.*

Congress then created Article 6b in the National Defense Authorization Act for Fiscal Year 2014, codifying crime victims' rights under the Uniform Code of Military Justice (UCMJ). Prior to 1 January 2019, Rule for Court Martial (RCM) 801(a)(6) mandated military judges designate, in writing, a suitable individual to assume a victim's rights under the UCMJ.^[2] A qualifying victim includes a victim of an offense under the UCMJ who is *under 18 years of age and not a member of the armed forces, or who is incompetent,*

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incapacitated, or deceased. The military judge would designate an Article 6b representative once an offense was properly brought before the court and upon notice by trial counsel that the victim qualified for a representative. Under this rule, the Article 6b representative is not appointed until after referral, when the military judge is detailed to the case and the case is brought before the court.

With the Military Justice Act of 2016, this mandate became a permissive appointment. The appointment remains under RCM 801(a)(6) but allows the appointment “at the military judge’s discretion.”^[3] The primary change recognizes that a qualifying victim may already have a legal representative who could assume his or her rights. However, the mere presence of a victim’s attorney does not preclude the appointment of an Article 6b representative.^[4]

Although the 6b responsibility overlaps the SVC’s responsibilities, the 6b representative does not have confidentiality with the victim and does not necessarily represent the victim’s expressed interest.

THE ROLE OF THE ARTICLE 6B REPRESENTATIVE

The Article 6b representative, hereinafter 6b representative, is to *assume* the victim’s Article 6b, UCMJ, rights by ensuring the victim is aware of those rights and impress upon the court the need to acknowledge and enforce those rights.^[5] In fulfilling this role, the representative attends all court hearing in which the victim is entitled to attend. If the victim does not have an SVC, the RCM allow the 6b representative to also receive service of process on the victim’s behalf, ^[6] act on the victim’s right to be reasonably heard during presentencing hearings,^[7] receive notices and motions,^[8] and submit matters to the Convening Authority after the sentence is announced.^[9]

In order to dispel some myths about the role of the 6b representative, it is important to rule out other roles that are often confused with the 6b representative’s role. The 6b representative is not the SVC, who represents a victim’s expressed interest. Although the 6b representative’s responsibility overlaps the SVC’s responsibilities, the 6b representative does not have confidentiality with the victim and does not necessarily represent the victim’s **expressed** interest. Further, the 6b representative is not the same as a GAL, who represents a child’s **best** interest. While the designee could be an individual who is a GAL attorney for the child in a civilian jurisdiction, the 6b representative does not represent the victim’s best interest under the construction of the UCMJ. The 6b representative merely assumes the victim’s rights and ensures those rights are enforced by the court, even if the victim rejects such enforcement.

WHO ARE ARTICLE 6B REPRESENTATIVES?

Statutory Perspective

When considering a designee, the military judge may consider the age and maturity of the designee, the designee’s relationship to the victim, and the physical proximity of the proposed designee to the victim. The military judge may also consider the cost incurred in making the appointment, the willingness of the proposed designee to serve in such a role, the previous appointment of a guardian by another court of competent jurisdiction, the preference of the victim, and any potential delay in appointing the proposed designee.^[10] While these factors remain relevant, they were removed from the text in the *Manual for Courts-Martial* (2019).^[11]

Practical Perspective

From a practical perspective, the 6b representative is someone the victim knows and trusts, such as a non-offending parent, relative, friend, civilian GAL, etc. If the victim is unable to identify a designee, a Special Victims’ Paralegal (SVP) or a Victim and Witness Assistance Program (VWAP) liaison can be useful in this role. The accused is not to be the designee. While the accused’s biases may be apparent, it is prudent for trial counsel and the SVC to consider whether the non-offending parent or another relative of the accused is appropriate to fulfill this role because a non-offending parent

may not ensure enforcement of the child victim's right to be protected from an offending parent. While non-offending parents should not be immediately perceived to choose spouse over child, counsel would be prudent to consider the non-offending parent's response to the child victim's crime report, his or her interactions with the victim, and his or her ability to protect the victim.

Consider whether the non-offending parent or another relative of the accused is appropriate to fulfill the 6b representative role ... will they ensure enforcement of the child victim's right to be protected from an offending parent?

Consider an example in which an SVP was designated as the 6b representative for a 17 year-old-female. The teenage girl was the alleged victim in a general court-martial, in which she alleged sexual assault against her brother-in-law. It should not be surprising that the family dynamics were declining as a result of the allegation and pending court-martial. As a result of the declining family dynamics, she could not identify anyone she trusted to fill the 6b representative role. The victim's sister (the spouse of the alleged perpetrator) and her parents were conflicted about the allegation and attempted to protect the family unit, as opposed to supporting the victim through her abuse. As a result, the victim's non-offending parents attempted to sway the victim's level of participation, essentially overshadowing her Article 6b right to be heard and to consult with trial counsel. The victim had an SVC, but the victim's *expressed interest* in the proceedings was likely conflicted by her family's advice and involvement. So, the SVC and trial counsel needed someone who could step in and provide oversight for the victim's rights throughout the justice process. A non-conflicted SVP was able to step in as the 6b representative, build rapport with the victim, and ensure her rights were not impinged by biased family members.

Trial counsel should consider the full scope of the case before recommending a designee. Could the designee be required to testify as a witness at court-martial, independent of his or her role as the 6b representative? If so, the witness-designee would be prohibited from attending all hearings in which the victim is entitled to be present and thus fail to carry out the role. Further, would defense counsel have an objection to the designee based on the circumstances of the case? SVCs have not yet encountered a situation in which the defense objected to an appointment of a 6b representative, but this is primarily due to the parties' collaboration prior to making a recommendation to the military judge.

IS A 6B REPRESENTATIVE ADDED VALUE?

Prior to January 2019, the 6b representative was a mandatory appointment. However, now that the appointment is discretionary, the parties should collectively determine whether a 6b representative adds value for the victim. A few points for trial counsel to consider before raising the issue to the military judge include the victim's representation by an SVC, if the victim has a disinterested family member or friend whom they trust to fill the role, and whether the victim's qualifying needs require a specific representative.

SVC involvement:

Is an SVC already representing the victim? If so, the SVC will advise the client on his or her Article 6b rights and notify the court if a procedural violation arises and the client authorizes the SVC to do so. Generally, the SVC is already advising the client and advocating for the client's expressed desires.

While the SVC's duties involve advising clients of their Article 6b, UCMJ, rights the SVC is bound to advocate for the client's *expressed interests*. If the client does not authorize the SVC to address a violation before the court then the violation will likely go unnoted on the record. A 6b representative should raise the issue with the military judge so that it is fully recognized and becomes part of the trial record. For instance, consider a victim's expressed interest regarding her right to be reasonably protected from the accused. A child victim may want to contact her offending parent despite a military protective order and

the SVC discouraging her from doing so. While the SVC may try to dissuade her client from communicating with her offending parent during the court proceedings, the SVC cannot disclose the communication or stop the client. A 6b representative who knows of the communication, however, could notify trial counsel or the military judge of the communication so it can be ended. Ultimately, the 6b representative ensures the victim is protected from the accused and any possible witness tampering resulting from a parent-child, power-imbalanced relationship.

If the victim is not represented by an SVC, a 6b representative would ensure the victim understands his or her legal rights throughout the proceedings, particularly when the trial counsel is not available to discuss rights with the victim during the court proceeding.

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Victims' Connection to a Representative:

Does the situation of designating a representative result in “just another stranger” the victim does not know to whom he or she must reveal personal trauma? Does the victim even have someone he or she trusts? Some victims, particularly those whose family member perpetrated the abuse, may feel that they have no one to trust, such as the case of the 17 year-old-girl, discussed earlier, whose family members’ influence overshadowed her right to fully enjoy her Article 6b, UCMJ, rights. For other victims, the situation may prove easier, as one family member or friend may be identified who can accompany them through this legal process. Be mindful, however, that the designee is responsible for sitting through the hearings in which the victim is entitled to attend and that the victim may not want to attend all hearings. Thus, counsel should be cautious not to choose an individual who serves

as the victim’s primary support system so the victim is not left alone outside of the courtroom during the proceedings.

Having sufficient time to build rapport with the victim is a primary area of concern. SVCs and SVPs express the reality that representatives are often not appointed until the week before trial, thus placing establishing trust between victims and representatives unknown to the victim in jeopardy. Such compressed timing also denies representatives who are unfamiliar with the military justice process and victims’ rights adequate training. With these concerns at the forefront, one may question the amount of value appointing a representative adds to the equation. This situation can be remedied by appointing a VWAP liaison who the victim has already met, or a non-conflicted SVP earlier in the timeline.

Counsel should assess the victim’s relationship with prospective designees to ensure the legal process furthers a supportive and nurturing environment for the victim as opposed to creating a further strain on the victim’s relationships or experience with the justice system. This is specifically true for very young children who function primarily in relationship to others and not independently.^[12]

Complexity of the Victims’ Qualifying Needs:

The American Bar Association states that the concept of “child development” should be a framework for advocacy efforts for children.^[13] This approach takes into account the child’s developmental needs and interests when analyzing the child’s position in court.^[14] In applying this approach to any victim qualifying for a 6b representative, trial counsel should engage with victims early to build rapport with the victim, understand his or her emotional, cognitive and developmental needs, determine the victim’s competence, and understand the victim’s familial background. Trial counsel and SVCs should consult with teachers, mental health professionals, the victim’s guardians, and the victim to determine his or her unique needs and competence.

The age of the victim also factors significantly into the approach. Generally, children are presumed competent at 16 years of age in most states. However, children under 16 years old may also be competent. A young child’s ability to

understand and comprehend his or her rights as a victim may change over the course of the case; however, early and frequent interactions with a child can assist counsel in determining the child's need for a 6b representative. For cases involving young children who may be able to understand some but not all of their rights, a 6b representative may be the best option for explaining those rights in child-friendly terms.

A representative may be helpful to accompany the victim through the hearings as an objective observer and to provide an extra set of ears and eyes when the victim is emotionally distraught. It is very likely that a victim may be too emotionally distraught to be able to voice a violation of his or her rights, even if competent to understand them.

If the child is mature and otherwise competent to understand the process and his or her rights through the SVC or trial counsel, then a representative may not be necessary to fully explain the victim's rights. However, a representative may be helpful to accompany the victim through the hearings as an objective observer and to provide an extra set of ears and eyes when the victim is emotionally distraught. It is very likely that a victim may be too emotionally distraught to be able to voice a violation of his or her rights, even if competent to understand them. A 6b representative, whose sole responsibility is protecting the rights of the victim, will be less distracted and better able to identify a violation of the victim's rights than the trial counsel, particularly if they are more subtle and outside the confines of the legal process itself.

While the majority of victims will qualify for a 6b representative based on age, it is possible for a victim to qualify due to incapacitation, incompetence, or death. Counsel should understand the victim's physical, cognitive, and emotional development, independent of age, and determine whether a 6b representative is necessary. Identification and selection of the victim's primary caregiver will likely result in a good fit because the caregiver may already assume responsibility for the victim's personal interests and legal rights. Regardless of the materiality of any one particular factor, appointment of a representative should prove fruitful in designating someone to be the extra eyes and ears in the midst of the chaos that can be involved in a court-martial.

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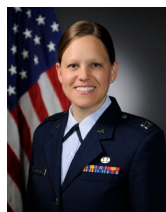
CONCLUSION

Crime victims may feel like a burden and an outsider to the legal process, resulting in further withdrawal and failure to voice concerns about rights violations. Article 6b representatives ensure victims have a voice and that they are not overlooked, particularly if the victim is not already represented by an SVC. It is not always necessary for an Article 6b representative to be appointed, however, there are certainly cases in which the representative can be a valuable bridge from the victim to the process, and trial counsel and SVCs must be familiar enough with the victim and the circumstances of the case to make that call.

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ENDNOTES

- [1] 18 U.S.C. § 3771(e)(2)(B).
- [2] R.C.M. 801(a)(6), MANUAL FOR COURTS-MARTIAL [hereinafter MCM], 2016.
- [3] R.C.M. 801(a)(6); MCM, 2019; *see also*, R.C.M. 801(a)(6)(A), which further states the military judge is not required to hold a hearing before determining whether a designation is required or before making such a designation under this rule. If the military judge determines a hearing is necessary under Article 39(a), UCMJ, the victim shall be notified.
- [4] David A. Schleuter, *Reforming Military Justice: An Analysis of the Military Justice Act of 2016*, 39 ST. MARY'S L.J. 1, 24 (2017).
- [5] Article 6b(c), UCMJ. *See also*, R.C.M. 1106A(c)(3).
- [6] R.C.M. 703(g)(3)(C)(ii), Discussion. This section applies to receiving notice of subpoenas for personal or confidential information about the victim.
- [7] R.C.M. 1001(c)(2)(A); R.C.M. 1001(c)(4); R.C.M. 1001(c)(5)(A).
- [8] M.R.E. 412(c)(1)(B). *See*, R.C.M. 405(i)(2)(B), which applies the same right for the victim's 6b representative to receive notice of motions and written responses for introduction of M.R.E. 412 evidence at preliminary hearings. *See also*, M.R.E. 513(e)(1)(B) regarding a similar application to the psychotherapist-patient privilege, and M.R.E. 514(e)(1)(B) regarding application to the victim advocate-victim privilege.
- [9] R.C.M. 1106A.
- [10] R.C.M. 801(a)(6), Discussion, MCM 2016.
- [11] R.C.M. 801(a)(6), MCM 2019, noting the omission of the factors listed in note _10.
- [12] Candice L. Maze, J.D. *Practice & Policy Brief: Advocating for Very Young Children in Dependency Proceedings: The Hallmark of Effective, Ethical Representation*, American Bar Association (October 2010), retrieved from https://www.americanbar.org/content/dam/aba/administrative/child_law/ethical_rep.pdf.
- [13] Maze, *supra* note 12, at 26.
- [14] Maze, *supra* note 13.