

1 Military Criminal Justice: Practice and Procedure § 16-6

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§ 16-6 The Victim's Right to Be Heard.

§ 16-6(A) In General.

At the beginning of the presentencing proceeding, the military judge must announce that any victim of the accused's offense, who is present at the presentencing proceeding, has the right to be reasonably heard—which includes the right to make a sworn statement or an unsworn statement, or both.¹ The victim's opportunity to be heard takes place after the prosecution has presented its evidence and before the defense presents its evidence.² The victim has that right regardless of whether the victim testified during the findings portion of the court-martial³ and regardless of whether one of the parties called the victim to testify at the presentencing proceeding.⁴

The victim's testimony, as with any other witness's testimony may be subject to the Rules of Evidence.⁵ If the victim will be making a statement, the court-martial will call the victim as a witness.⁶

¹ R.C.M. 1001(a)(3)(A).

² R.C.M. 1001(c)(1). [United States v. Cornelison, 78 M.J. 739 \(Army Ct.Crim.App. 2019\)](#) (court held that presentation of victim's unsworn statement during Government's presentencing case was nonprejudicial error; court noted that R.C.M. 1001A is part of presentencing procedure but is temporally located between the Government and defense presentations; it is distinct from the Government's ability to present victim-impact statements in aggravation, citing [United States v. Barker, 77 M.J. 377 \(C.A.A.F. 2018\)](#)).

³ R.C.M. 1001(c)(1).

⁴ R.C.M. 1001(c)(1).

⁵ [United States v. Gomez, 76 M.J. 76 \(C.A.A.F. 2017\)](#) (admitting testimony from sexual assault victims regarding impact of offenses on them was not plain error; one victim gave inadmissible opinion and hearsay testimony regarding the stress caused by the trial and the other victim's testimony was ambiguous regarding the stress of the trial).

⁶ R.C.M. 1001(c).

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In capital cases, the right to be heard means that the victim may make a *sworn statement*.⁷ For example, the victim could offer an affidavit.⁸ If the victim is under 18, incompetent, incapacitated, or deceased, the military judge may permit a designee to present the victim's statements.⁹

Before the military judge concludes the presentencing proceeding, he or she must ensure that any crime victim was given the opportunity to be reasonably heard.¹⁰

§ 16-6(B) A Victim's Unsworn Statements.

In noncapital cases the right to be heard means that the victim may make either a *sworn* or an *unsworn statement*.¹¹ A victim addressing the court-martial at sentencing through an unsworn *statement*, is not considered a witness for purposes of Article 42(b), U.C.M.J., which requires that all witnesses be administered an oath.¹² Nor are a victim's unsworn *statements* considered evidence.¹³

If the victim wishes to make an unsworn *statement*, then the victim must provide a written proffer of the contents of the unsworn *statement* to the trial counsel, the defense counsel, and the military judge,¹⁴ unless the military judge for good cause, waives that requirement.¹⁵ If the victim's unsworn *statement* includes matters that were not disclosed to the parties, the military judge will take appropriate action,¹⁶ which could include, for

⁷ R.C.M. 1001(c).

⁸ [United States v. Gonzalez, 16 MJ 58 \(C.M.A. 1983\)](#) (affidavits from sentencing witnesses other than accused admissible at courts-martial).

⁹ Art. 6b(c), U.C.M.J.; R.C.M. 801(a)(6).

¹⁰ R.C.M. 1001(a)(3)(A).

¹¹ R.C.M. 1001(c)(1).

¹² Art. 42(b), U.C.M.J.

¹³ [United States v. Tyler, 81 M.J. 108 \(C.A.A.F. 2021\)](#) (court held that either party may comment on the contents of a victim's unsworn *statement*, which is admitted under R.C.M. 1001A; thus, it was not error for the trial counsel to comment on the victim's unsworn *statement* during arguments on sentencing; court added that Military Rules of Evidence do not apply to victim's unsworn *statement*) (MIL. R. EVID. 403 does not apply to unsworn victim impact statements, which are not evidence; [United States v. Barker, 77 M.J. 377 \(C.A.A.F. 2018\)](#) (nonprejudicial error for judge to admit victim impact statements at sentencing; such statements are not considered to be either sworn or unsworn statements, as envisioned by R.C.M. 1001A).

¹⁴ R.C.M. 1001(c)(5)(B). [United States v. Cornelison, 78 M.J. 739 \(Army Ct.Crim.App. 2019\)](#) (accused failed to show that Government's failure to provide victim's unsworn *statement* to him *in* advance of her making the *statement* was prejudicial).

¹⁵ R.C.M. 1001(c)(5)(B).

¹⁶ R.C.M. 1001(c)(5)(C).

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example, an instruction to the court members that the victim did not comply with the procedural requirements for making an unsworn statement.

The military judge may permit victim's counsel to deliver all, or part, of the victim's unsworn statement, for good cause shown.¹⁷ If the victim makes an unsworn statement, neither the prosecution nor defense may cross-examine the victim.¹⁸ But they may offer rebuttal evidence of any facts contained in the statement.¹⁹ And both sides may comment on a victim's unsworn statement.^{19.1} In addressing the court-martial in an unsworn statement, the victim may present information only in the form of victim-impact evidence²⁰ or mitigation evidence.²¹ The victim may not make a recommendation as to a specific punishment.²²

§ 16-6(C) A Victim's Sworn Statement.

If the victim makes a sworn statement to the court-martial, the victim may be cross-examined by both the prosecution and the defense, and may also be questioned by the court-martial.²³ In addressing the court-martial in a sworn statement, the victim may present information only in the form of victim-impact evidence²⁴ or

¹⁷ R.C.M. 1001(c)(5)(B). [United States v. Cornelison, 78 M.J. 739 \(Army Ct.Crim.App. 2019\)](#) (military judge erred in permitting trial counsel to participate in victim's unsworn statement in question and answer form; R.C.M. 1001A contemplates that neither trial nor defense counsel will participate; only two persons other than victim may participate—victim's counsel or victim's designee).

¹⁸ R.C.M. 1001(c)(5)(A).

¹⁹ R.C.M. 1001(c)(5)(A). Because the victim is permitted to make a statement in mitigation, the prosecution may wish to respond with rebuttal evidence.

^{19.1} United States v. Tyler, 81 M.J. 108 (C.A.A.F. 2021) (court held that either party may comment on the contents of a victim's unsworn statement, which is admitted under R.C.M 1001A; thus, it was not error for the trial counsel to comment on the victim's unsworn statement during arguments on sentencing).

²⁰ R.C.M. 1001(c)(3). See [§ 16-5\(E\)\(3\)](#), *supra*. See also [In Re A.J.W., 80 M.J. 737 \(N.M.Ct.Crim.App. 2020\)](#) (petitioner not entitled to writ of mandamus to compel military judge to allow her to provide complete victim impact statement at sentencing; judge omitted portions of victim's statement alleging sexual assault but accused's plea agreement did not include guilty plea to sexual assault and accused was not found guilty of sexual assault).

²¹ R.C.M. 1001(c)(3).

²² R.C.M. 1001(c)(3).

²³ R.C.M. 1001(c)(4). The Manual for Courts-Martial does not set out any specific guidelines for court members questioning the victim. Sound practice would dictate that the military judge use the same procedures whenever court-members question other witnesses. See [§ 15-12\(C\)\(2\)](#). Thompson, "Truth or Dare: An SVC's Dilemma in Handling a Client's Potential Falsehoods," ARMY LAW., Issue 4 (2019) (author addresses application of the rules of professional responsibility set out in AR 27-6 (2018), regarding issues that arise when victim is not being truthful with counsel).

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mitigation evidence.²⁵ As with an unsworn *statement*, the *victim* may not make a recommendation as to a specific punishment.²⁶

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²⁴ R.C.M. 1001(c)(4). See [§ 16-5\(E\)\(3\)](#), *supra*.

²⁵ R.C.M. 1001(c)(4).

²⁶ R.C.M. 1001(c)(4).